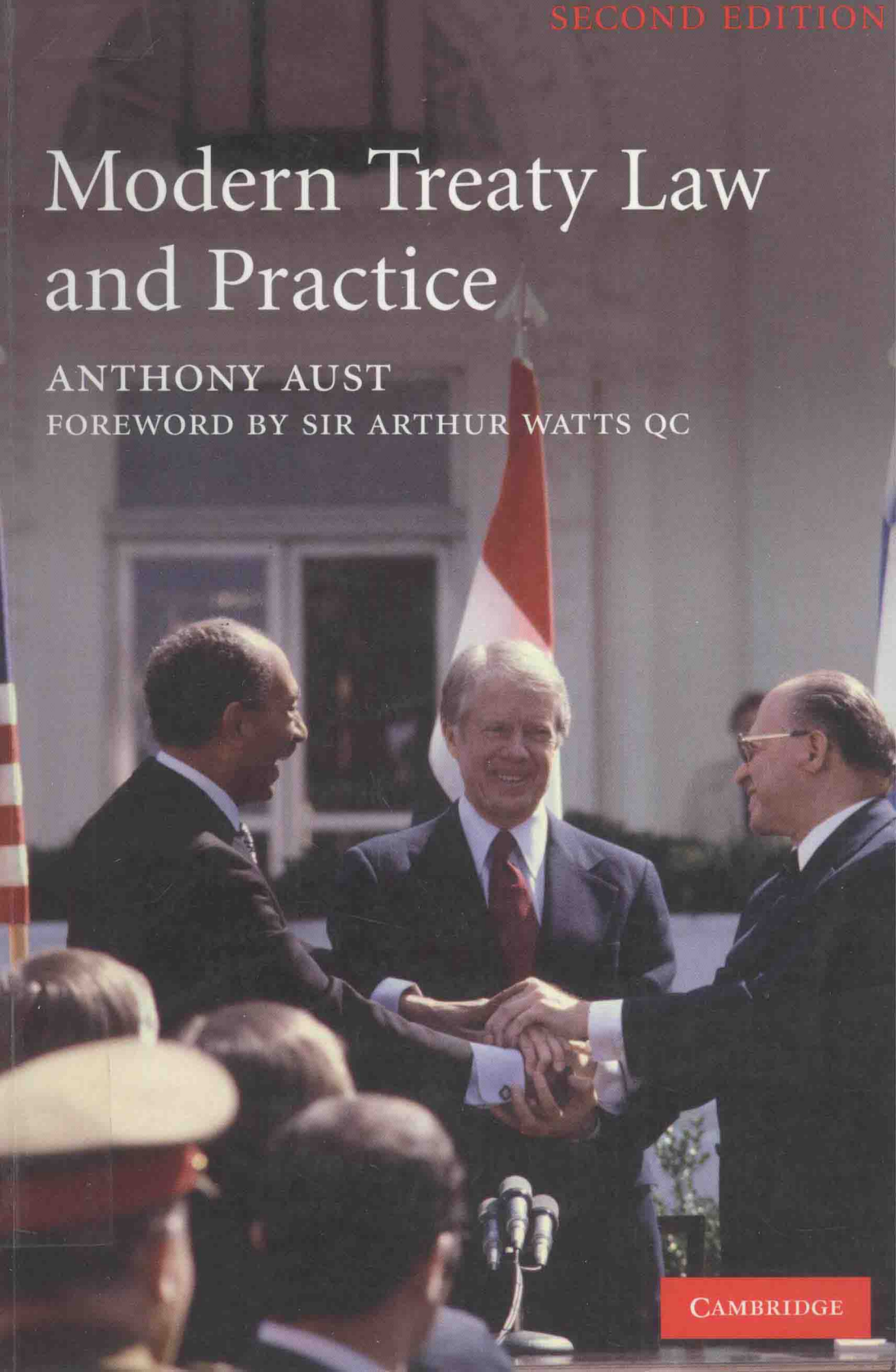


SECOND EDITION

Modern Treaty Law and Practice

ANTHONY AUST

FOREWORD BY SIR ARTHUR WATTS QC



CAMBRIDGE

MODERN TREATY LAW AND PRACTICE

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*London School of Economics; Kendall Freeman, London; formerly Deputy
Legal Adviser, Foreign and Commonwealth, London*



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accuracy of URLs for external or third-party internet websites referred to
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websites is, or will remain, accurate or appropriate.

A new edition of a book first published in 2000. Written from the viewpoint of an experienced practitioner, it provides a comprehensive account of the law of treaties. 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. The numerous precedents from treaties and other treaty-related documents are invaluable for the practitioner. The book aims to supply the reader with a full understanding of treaties. Technical language is avoided as far as possible, making the book accessible to non-lawyers. Although not primarily an academic work, there is still plenty to interest and inform students and academics, including those specialising in political science, international relations or diplomacy.

ANTHONY AUST is a former Deputy Legal Adviser of the Foreign and Commonwealth Office, London. He is now a visiting professor at the London School of Economics and other academic institutions; a consultant on international and constitutional law to governments and international organisations, and with the London solicitors, Kendall Freeman.

For Kirsten

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 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

¹ He retired as Deputy Legal Adviser in 2002.

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

PREFACE TO THE SECOND EDITION

I am, in plainer words, a bundle of prejudices – made up
of likings and dislikings.²

The 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 edition with what I say now, as on reservations made on 're-accession'.

Although this edition may look much like the first, 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, on the legal rationale for MOUs. New material has been added, for example, the use of MOUs in litigation; the treaty-making capacity of some odd 'states', such as the Cook Islands, the Vatican, Taiwan and Palestine; Article 46; the effect of hostilities on treaties; third state nationals and treaties; 'unsigned' a treaty; reviving a treaty; and so-called unequal treaties. Given their increasing importance for treaties, there is a new chapter on international organisations, including an attempt to explain the sometimes baffling role in treaty-making played by the European Community/Union. The long passage on Hong Kong and treaties has been updated and distributed among three chapters: capacity, territorial application and succession. Even some of the quotations are new. The bibliography has been omitted.

In response to popular request, the tables of treaties, MOUs and cases list the pages where the each instrument or decision is referred to. They are

² Charles Lamb, *Essays of Elia* (1823), 'Imperfect Sympathies'.

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 (accessible also online with 'Athens'); or a website.

I have again to thank my wife, Kirsten Kaarre Jensen, for her support. But, since this edition was prepared when she was away at work, not when I came home from my office, her quality time has not been so badly affected.

Unless otherwise indicated, all views expressed in this book are my own. But, for this edition, various people have provided valuable facts and material: Jill Barratt, Paul Berman, Alan Boyle, Elise Cornu, Francis Delon, Susan Dickson, James Ding, Gabrielle Dumont, Novella Galli, Joanna Harrington, Frank Hoffmeister, Jan Klabbbers, Pieter-Jan Kuiper, Don Mackay, Adeline Pillet, Jean-Claude Piris, Peter Slinn, André Surena, Andrew Townend, Luzius Wildhaber and Susan Williams. I am sorry if I have omitted anyone.

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 Finola O'Sullivan, Richard Woodham and Wendy Gates of Cambridge University Press, and Elizabeth Doyle for copyediting and Maureen MacGlashan 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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Where appropriate, a treaty is listed under either the name or acronym by which it is most commonly known, or the subject matter is mentioned first.

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

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