Book VII Treaties and Treaty-Making, 34 Treaties and other International Instruments—IV Ratification, Accession, Acceptance and Approval, Treaty Succession

Frank Berman, David Bentley

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Introduction

34.1 A treaty becomes binding through the expression by the parties of their consent to be bound. This consent may be expressed by various means, notably signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, or by any other means if so agreed.[1] The treaty itself may provide that it is to enter into force upon signature, in which case the act of signature definitively expresses the consent of the signatory States to be bound by the treaty. In exceptional cases, the initialling of a text may also express the consent of the States concerned to be bound by it, when it is established that the negotiating States have so agreed.[2] It sometimes happens that a representative of a State is unable to receive definite instructions from his government by the time of signature; or it may be that the treaty is to enter into force on signature but the government concerned wants the opportunity to study the agreed text in greater detail before (p. 629) taking the final decision. In such circumstances, the representative may sign the treaty *ad referendum*, which, if subsequently confirmed, will constitute a valid expression of consent to be bound, effective retroactively as from the date of the signature *ad referendum*.[3] Alternatively, the formal signature of the treaty may simply be postponed until the States concerned are all in a position to commit themselves.

34.2 The very great majority of multilateral treaties, and a significant proportion of bilateral treaties are, however, nowadays concluded subject to ratification or some other process of subsequent confirmation, and it is these processes which are considered in what follows.

Ratification

34.3 Ratification is a solemn act on the part of a sovereign or other Head of State declaring that a treaty, convention, or other international instrument has been submitted to the Head of State and that after examination it has been given formal approval, with a promise of its complete and faithful observance. The instrument of ratification is signed by the Head of State, and sealed with the seal of State, though practice varies as to whether the complete text of the treaty and related instruments should be reproduced in it. Where the treaty is not in Head of State form, but in inter-State or intergovernmental form, the form of the instrument of ratification is adjusted accordingly.[4]

34.4 In the case of a bilateral treaty, instruments of ratification are exchanged, in other words each party delivers to the other its instrument of ratification and receives the corresponding one from the other party in return. The fact of exchange is recorded in a certificate of exchange, which is ordinarily drawn up in the respective languages of the two parties, and signed in duplicate, each party retaining an original in which it is given precedence. As a rule, the exchange is effected by the head of the department concerned with treaty formalities in the ministry of foreign affairs of the one country and a diplomatic

representative of the other. The issue of Full Powers for such a purpose is unnecessary, unless, as occasionally happens, one of the parties should insist on this additional formality; normally, however, the production of the instruments of ratification by the (p. 630) officials undertaking the exchange is regarded as sufficient evidence that they are authorized to proceed to the exchange.

34.5 For bilateral treaties, it is now far more common in practice for the ceremonial exchange of ratifications to be replaced by the mutual notification of the completion of the internal procedures necessary to enable the treaty to be brought into force.

34.6 When there are more than two Contracting Parties to a treaty, it is customary to have only one original text of the treaty (in all language versions), which is signed by the negotiators and deposited either in the archives of the State where it was signed, or in the archives of the international organization under whose auspices it was concluded, each of the other parties being furnished with a certified copy.[5] The instruments of ratification are then as a rule deposited with whichever government or international organ has been designated as the 'depositary'.[6] Amongst the duties of the depositary will be to deliver a formal acknowledgement of each deposit to the State concerned, and to notify the other States Parties or States entitled to become parties. The procedure to be followed in these cases is normally laid down in the treaty itself.

34.7 In the United Kingdom, the treaty-making power is vested in the Sovereign and the ratification of a treaty concluded in Heads of State form is effected by means of an instrument of ratification signed by the Sovereign and sealed with the Great Seal.[7] Constitutionally the Sovereign acts on the advice of the responsible ministers and, in certain circumstances, notably where the execution of a treaty involves financial commitments or a cession of territory, the approval of Parliament will first be sought. Furthermore, if legislation is required to carry out the provisions of the treaty, it is a firm rule that the United Kingdom instrument of ratification will not be exchanged or deposited until Parliament has enacted the necessary implementing legislation. Even where specific implementing legislation is not required, however, the standing practice is to lay before Parliament the texts of all treaty instruments requiring ratification, accompanied in recent years by an (p. 631) explanatory memorandum, and not to proceed to ratification until a period of 21 sitting days has elapsed.[8]

34.8 Most, if not all, States will have corresponding constitutional procedures of their own. If, for a given State, the constitutional position is that treaties duly concluded by the State become part of national law, or in some cases rank higher than ordinary legislation, the procedures for treaty approval are likely to reflect that fact. But the procedures are too varied from one country to another, as are their legal effects, to make it possible to offer any kind of summary.[9]

34.9 It should be noted that there is often confusion over what the term 'ratification' precisely connotes. In common parlance it can be used, variously, to refer to:

(a) the act of the appropriate organ of the State (sovereign, president, federal council, etc) which signifies the consent of the State to be bound by the treaty;

(b) the internationally agreed procedure whereby a treaty formally enters into force, that is to say, the formal exchange or deposit of instruments of ratification;

(c) the actual document or instrument whereby a State expresses its consent to be bound by the treaty; and

(d) more loosely, the approval of the legislature or other state organ whose approval may be constitutionally necessary as a condition precedent to ratification in the sense of (a) above.

As ratification is a technical term of international law, the usage under (d) above, which is sometimes popularly translated into 'parliamentary ratification' is inaccurate. In the United Kingdom, for example, it is the Crown which ratifies, not Parliament, though Parliament may, as a condition precedent to ratification, be invited to approve and, if necessary, to legislate. Thus, (a) is the correct technical sense of the term, and corresponds to the definition of ratification in the Vienna Convention on the Law of Treaties as 'the *international* act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.[10] Where (b) is intended, reference should be made to the exchange or deposit of instruments of ratification; and, strictly speaking, where (c) is (p. 632) intended, reference should be made to the instrument of ratification rather than to ratification *tout court*.

34.10 A further point relates to the purpose which ratification (or indeed any other form of subsequent confirmation) is designed to serve. McNair explains the position succinctly:

> Ratification is not (or, at any rate, since the days of absolute monarchs it has not been) a mere formality, like the use of a seal, or parchment, or tape. Ratification has a value which should not be minimized. The interval between the signature and the ratification of a treaty gives the appropriate departments of the Governments that have negotiated the treaty an opportunity of studying the advantages and disadvantages involved in the proposed treaty as a whole, and of doing so in a manner more detached, more leisurely, and more comprehensive than is usually open to their representatives while negotiating the treaty. However careful may have been the preparation of their instructions, it rarely happens that the representatives of both parties can succeed in producing a draft which embodies the whole of their respective instructions; some concession on one side and some element of compromise are present in practically every negotiation. It is therefore useful that in the case of important treaties Governments should have the opportunity of reflection afforded by the requirement of ratification. Moreover, the more careful the preparation of the treaty and the more deliberate the decision to accept it, the more likely is the treaty to be founded upon the interests of the parties and to be observed by them.[11]

34.11 It should also be noted that ratification must, on principle, be unconditional. Unless the treaty itself specifically so provides, the operative effect of ratifying cannot be made conditional on ratifications by other States. The need for a degree of reciprocity will be met in the treaty itself, either by providing for a minimum number of ratifications before its entry into force,[12] or by providing that the ratification of all the signatories is required for entry into force.[13]

34.12 A final point is that ratification, being in part a confirmation of a signature already given, must relate to what the signature relates to, i.e. to the treaty as a whole, and not merely to a part of it, unless the treaty itself provides that States may elect to become bound by a certain part or parts only.[14]

34.13 Older controversies over which treaties required ratification and which did not, or over whether or not there is any duty to ratify, are now a thing of the past, to a large extent as a result of the Vienna Convention on the Law of Treaties.

(p. 633) **34.14** The traditional view had been that, in principle, all treaties required ratification in order to become valid and binding. The International Law Commission explained the reasons for this view:

> The modern institution of ratification in international law developed in the course of the nineteenth century. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself, but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the sovereign to ratify his representative's full powers, if these had been in order. Ratification came, however, to be used in the majority of cases as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change.
>
> It was established that the treaty itself was subject to subsequent ratification by the State before it became binding. Furthermore, this development took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding.[15]

34.15 As late as 1929, the Permanent Court of International Justice referred, in the *Territorial Jurisdiction of the International Commission of the River Oder* case, to the rule that 'conventions, save in certain exceptional cases, are binding only by virtue of their ratification'.[16] But the generally accepted view is now the one expressed in Article 14 of the Vienna Convention on the Law of Treaties that whether a treaty requires ratification or not depends essentially on the intention of the parties to the particular treaty.

34.16 Fortunately, the dispute as to the nature of the underlying rule is more theoretical than real; for it is now the invariable practice for the treaty itself to contain either an express clause or some other clear indication as to whether ratification is required. Where the parties do not regard ratification as necessary, the treaty usually states that it will come into force upon signature, or on a certain date, or upon the happening of a certain event.

34.17 At the Vienna Conference on the Law of Treaties, there was extended, but inconclusive, discussion on whether there should be incorporated in the Law of Treaties Convention a residual presumption in favour of signature or of ratification when a treaty was silent as to how consent to be bound should be expressed. The Convention as adopted makes no attempt to resolve the argument, and simply (p. 634) enumerates the circumstances in which consent to be bound is expressed by signature, and the circumstances in which consent to be bound is expressed by ratification, acceptance, approval, or accession.[17]

34.18 Although ratification is a matter of discretion, it is not generally the practice of a democratic government to sign a treaty unless it means to make an effort in good faith to ratify it in due course. Successive British governments have held to that principle as a rule of policy. But, as is well known, governments may meet with insuperable political difficulties which prevent ratification.[18] No time limit is normally set for ratification and, subject to the terms of the treaty, there is no rule of law as to the date within which, if at all, it must take place. Frequently several years elapse between signature and ratification.[19] Article 18 of the Vienna Convention on the Law of Treaties lays down a rule that, pending ratification, a signatory State is under an obligation 'to refrain from acts which would defeat the object and purpose of a treaty', until it had made clear its intention not to become party to the

treaty; but it has been doubted whether this represents a rule of customary international law.[20]

Accession

34.19 Accession is the process under which a State may become a party to a treaty of which it is not a signatory.[21]

34.20 Accession is normally a secondary process, but it can exceptionally constitute the primary (or even the exclusive) process for a State to express its consent to be (p. 635) bound by a treaty. The 1928 General Act for the Pacific Settlement of International Disputes was drafted by a Commission set up by the Assembly of the League of Nations, subsequently discussed and modified, and eventually adopted by the Assembly itself, and then left open for accession. There was no provision for signature and ratification, so that accession was the only means of becoming a party to it.[22] The Revised General Act adopted by the United Nations General Assembly in 1949 follows the same pattern.[23]

34.21 A similar process is laid down in the Convention on the Privileges and Immunities of the United Nations.[24] The relevant provisions are:

> *Section 31*—This Convention is submitted to every Member of the United Nations for accession.
>
> *Section 32*—Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations and the Convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Similar, but slightly more complex, provisions are contained in the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies of the United Nations.[25]

34.22 It should be stressed, however, that these cases are exceptional. Multilateral treaties will normally make provision for the treaty to be open for signature until a stipulated date and thereafter to be open for accession, often indefinitely, an example being the Vienna Convention on the Law of Treaties itself.[26]

34.23 It used to be thought that it was legally impossible to accede to a treaty which was not yet formally in force. The rationale of the view was that accession amounted in essence to acceptance of a contract already entered into, thereby implying an operative instrument to accede to. Modern practice is however in the contrary sense, as the International Law Commission pointed out in 1966.[27] It is therefore open to the States negotiating a treaty to provide that it should be open to accession at once (or after the expiry of a set period), even before the (p. 636) treaty has formally entered into force; and likewise to provide that accessions rank equally with ratifications in making up the number of consents to be bound required to bring the treaty into force.[28]

34.24 Accession as a secondary process can take place as of right (where the treaty expressly provides that certain States or categories of States may accede to it) or by invitation (where the treaty expressly provides that non-signatory States may accede only upon the invitation of the Contracting Parties or of some representative body). There are many examples of treaties, accession to which is by invitation only. Thus, Article 10 of the North Atlantic Treaty of 1949[29] provides that:

> [t]he Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a

party to the Treaty by depositing its instrument of accession with the Government of the United States of America.

Later members have all joined the alliance pursuant to Protocols to the North Atlantic Treaty by which the parties give their unanimous consent to the issue of an invitation to accede to the Treaty.

34.25 The nature of a treaty may be such that the Contracting Parties may wish to make an invitation to accede subject to conditions to be agreed between them and the State so invited. The best-known example of this kind is the European Union, the admission of a new member to which will of necessity require enormously detailed negotiation between the existing Member States and the applicant State. Article 49 of the Treaty on European Union (Consolidated Version)[30] provides that:

> [a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement (p. 637) between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

34.26 Where a treaty is the constitutive instrument of an international organization, the admission of a new Member State (on such terms and conditions as the constitutive instrument may lay down) may be regarded as equivalent to accession. The Charter of the United Nations stipulates (Article 4) that:

> 1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations.
>
> 2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

The applicant State is required to embody in its formal written application a declaration that it accepts the obligations contained in the Charter; and, if the application is approved, membership becomes effective on the date on which the General Assembly takes its decision on the application.[31]

34.27 In cases such as these, where the constitutive treaties have their own inbuilt dynamic, accession (or admission) may be rendered possible on terms which put the new Member State in a different position from the other Contracting Parties, at least for a transitional period. Normally speaking, however, any State exercising the right of accession given to it in a treaty enjoys the same rights and becomes subject to the same obligations as the other Contracting Parties, without regard to whether they are original signatories or have subsequently acceded.

34.28 The question was discussed in the Assembly of the League of Nations in 1927 whether a State might properly express a purported instrument of accession as 'subject to ratification'. Present-day practice discourages this. In his role as depositary of multilateral treaties, the Secretary-General of the United Nations has long considered an instrument of accession declared to be subject to ratification 'simply as a notification of the government's intention to become a party'; he has drawn the attention of the government concerned to the fact that the instrument does not entitle it to become a party and underlines that 'it is only when an instrument containing no reference to subsequent ratification is deposited that the State (p. 638) will be included among the parties to the agreement and the other governments concerned notified to that effect'.

34.29 Which States may accede to a treaty? It would seem beyond dispute that no State, uninvited, has a right to make itself a party to a treaty by accession; accession can accordingly only take place when the original parties to the treaty consent, either generally by means of a provision in the treaty, or ad hoc, and only upon whatever conditions they may have laid down for accession. It was at one time suggested that a principle of universality required that all States should be entitled to participate in general multilateral treaties, defined for this purpose as treaties which concern general norms of international law or which deal with matters of general interest to States as a whole. A proposal to that effect advanced at the Vienna Conference on the Law of Treaties was, however, rejected by the Conference mainly on the ground that it ran contrary to the principle that States are, and should be, free to choose their treaty partners.[32]

34.30 International law prescribes no particular form for an instrument of accession, though the treaty itself may do so. An instrument of accession is a formal instrument, and it seems inconceivable that an oral communication would suffice. Accession is carried out in accordance with the procedure prescribed by the particular treaty, either by the deposit of a formal instrument of accession with, or by a written notification addressed to, the depositary.[33] The instrument or notification emanates from the executive authority of the State. It will enter into force on the date of deposit or notification, unless the treaty otherwise provides. Where the deposit or notification takes place before the date of entry into force of the treaty, the accession will not take effect unless and until the treaty itself enters into force.

Acceptance and Approval

34.31 Acceptance and approval are alternative methods of participation in a multilateral treaty, which have relatively recently become established in international practice as a new procedure for becoming party to treaties. They are, as the International Law Commission pointed out, 'an innovation which is more one of terminology than of method'.[34]

(p. 639) **34.32** Where a treaty is made open to 'acceptance' without prior signature, the process is akin to accession. Thus, Article 14 of the Statute of the Hague Conference on Private International Law of 1951 provides that it 'shall be submitted for the acceptance of the Governments of the States which participated in one or more sessions of the Conference. It shall enter into force from the date that it is accepted by the majority of the States represented at the Seventh Session.'[35]

34.33 Reference to 'acceptance' as a method of participation in a treaty may also be found in the so-called 'triple option' clause to be found in many international conventions. An example is the Convention on the Intergovernmental Maritime Consultative Organization of 1948,[36] Article 57 of which provides that:

the present Convention shall remain open for signature or acceptance and States may become parties to the Convention by:

(a) Signature without reservation as to acceptance;

(b) Signature subject to acceptance followed by acceptance; or

(c) Acceptance.

Acceptance shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.[37]

34.34 The advantage of a provision for acceptance in a treaty is that it may enable the treaty to enter into force earlier than if the treaty had provided for 'ratification' as such. The constitutional procedures of some States require the assent of the legislature before a treaty can be formally ratified, and it may be possible to accomplish the process of 'acceptance' by executive action alone.[38]

34.35 What has just been said about 'acceptance' applies *mutatis mutandis* to 'approval'. 'Approval' appears more often in the form of 'signature subject to approval', where, according to Liang,[39] approval is apparently used 'to indicate the approbation, by the process of municipal law, of the terms of a treaty, as distinguished from "acceptance" which is used to indicate the formal act evidencing the actual acceptance of the treaty by the State'. The opening of a treaty to 'approval' without signature is rare.[40]

(p. 640) Treaty Succession

34.36 Finally, a word needs to be said about treaty succession, a subject which has gained in importance in recent decades. Whenever a change takes place in the international status of a particular territory (or, to put the matter more precisely, when one State is replaced by another in the responsibility for the international relations of a particular territory), questions are bound to arise in regard to the effect of this change on the status of treaties that formerly applied to the territory, or at least its effect in regard to legal relations under such treaties. The subject is known as treaty succession, and is merely one aspect of the more general question of State succession.[41] The situations that may give rise to succession are classified in a United Nations Convention of 1978 on Succession of States in respect of Treaties, as: the transfer of territory from one State to another, the case where two or more States unite into one successor State, and the case when 'a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist'.[42] The Convention (which did not enter into force until 1996; see further below) also devotes considerable attention to what it refers to as 'newly independent States', i.e. territories that had previously been colonial dependencies, a situation that attracted much international attention at the time, but is now of far less practical interest.

34.37 Unlike the Vienna Convention on the Law of Treaties itself, the 1978 Succession Convention cannot be regarded as an expression of the generally accepted law and practice in this area. It has only twenty-two parties, of whom eight are accounted for by the six States emerging from the break-up of the former Yugoslavia, together with the Czech Republic and Slovakia, and none of the leading States has shown interest in becoming party to it. Whereas the Convention sought to diminish the role either of agreements reached between predecessor and successor States for the assumption of treaty obligations in anticipation of the succession, or of general declarations made by the successor State to the same effect after the event, international practice has shown itself to be characterized by a far greater degree of pragmatic flexibility. The Convention favoured, in essence a 'clean slate' for newly independent States (see paragraph **34**.36), by contrast with substantial continuity in the cases of the uniting and separating of (p. 641) States.[43] The particular case of decolonization aside, the needs of international life have shown the great desirability of

mechanisms by which successor States can express a position in respect of their treaty relations, to which other treaty parties can then react, whether by way of express acceptance, tacit acquiescence, or (where the case demands) formal refusal, and the treaty depositary may have an important administrative role to play in this process, especially when the depositary function is carried out by an international organization.[44] In some practical respects, the attainment of clarity may be as important as establishing whether treaty relations do continue to subsist. In summary, rather than a rigid reliance on abstract rules, practice has favoured empirically derived outcomes case by case, in which subsequent consent or acquiescence by the States concerned has played a substantial role. This is as one would have expected, given that agreement represents the fundamental basis for treaty relations in general.

34.38 It is generally accepted, however, that a succession of States has no effect on boundary regimes or other territorial regimes, and this rule is reflected in Articles 11 and 12 of the Succession Convention.[45]

34.39 Conversely, highly personal and highly political treaties are liable to expire rather than to be continued. A special rule also applies to membership of international organizations, where in principle membership cannot be inherited, even though it has as its formal origin the member State's becoming party to the treaty which forms the constitutive instrument of the organization. Therefore, where two States unite, both of whom had been members of an international organization, their membership can be merged into the membership of the new State, but the process does not operate in reverse; on a separation of States, it would normally be expected that the new State (or States) would apply for membership in its (or their) own name.

(p. 642) **34.40** There is however an important qualification to the above, which has come into focus latterly with the disintegration of composite States, notably the former Socialist Federal Republic of Yugoslavia and the former Union of Soviet Socialist Republics, but also in a more limited way the former Republic of Czechoslovakia. In such cases, it may be possible to discern (though this is not always so) that there is a single central sovereignty that has been maintained, initially through the accretion of additional units of territory, and later through their loss. In a case of this kind, it is possible to speak of a 'continuing State' (sometimes referred to as 'continuator State') which will have a different status for succession purposes than the other territorial entities, whose treaty relations will be determined as 'successor States'.[46] The distinction can be of fundamental importance. It explains, for example, why the Russian Federation was able, by simple notification, not merely to continue the membership of the Soviet Union in the United Nations, but to assume the special prerogatives of a permanent member of the Security Council. It explains also how the Russian Federation retained the special status of nuclear-weapon State under the Treaty on the Non-Proliferation of Nuclear Weapons, while the other component parts of the former Soviet Union either succeeded or acceded to the Treaty as non-nuclear-weapon States. Contrast the outcome of the dissolution of the former Yugoslavia, where in a series of cases, the International Court of Justice has noted (without pronouncing definitively on them) the doubts remaining over membership in the United Nations of the rump State entitled 'Federal Republic of Yugoslavia (FRY)' until the eventual admission of the State of Serbia and Montenegro as a new member on 1 November 2000. The Court nevertheless decided, on the one hand, that it could proceed with cases brought before that date by or against the FRY; conversely that, after the separation of Montenegro, a case pending against Serbia and Montenegro should proceed against Serbia alone.[47]

34.41 Two other cases of special interest should be noted. One is the eventual reunification of Germany in 1990, after close on half a century during which the eastern part of Germany had gradually acquired recognition of separate statehood as the 'German Democratic Republic' (GDR). Although the GDR ultimately acceded to the Federal Republic of Germany under the latter's Constitution, this was (p. 643) done on the basis of a treaty

between the two States, which in turn made specific provision for treaty succession: the Federal Republic's treaties would in principle continue, and be extended to the entire territory (subject where necessary to consultations with the other treaty parties), whereas all the GDR's treaties were to be subject to discussion with the other parties 'with a view to regulating or confirming their continued application, adjustment or expiry'. It would seem that discussions took place with 135 treaty partners, and that the outcome was to discard or disapply the overwhelming proportion of the GDR's very substantial corpus of treaties.[48]

34.42 The second case of special interest is that of Hong Kong. The Sino-British Joint Declaration of 19 December 1984, which laid the ground for the return of Hong Kong to Chinese sovereignty in 1997, stipulated that Hong Kong would be enabled to conduct within limits its own external relations, including the power to conclude international agreements, using the name 'Hong Kong, China'. As spelled out more fully in Annex 1 to the Joint Declaration and in the Basic Law (enacted by China—though in agreed terms—to serve as the constitutional instrument for the Hong Kong Special Administrative Region), this international capacity was to include both the continued application to Hong Kong of international agreements concluded before the handover and also Hong Kong's continued participation, in an appropriate form, in international organizations. These arrangements were seen by both parties as an important element in the preservation of Hong Kong's own way of life, including the maintenance of the capitalist economic system. In exercise thereof, an extensive campaign of 'localizing' Hong Kong's treaty relations (for example, in the fields of trade and air services) was pursued in the period preceding the handover.[49]

Footnotes:

1 Art 11 of the Vienna Convention on the Law of Treaties.

2 See Chapter **31**, paragraph **31**.12.

3 Art 12.2(b) of the Vienna Convention on the Law of Treaties.

4 Standard forms for instruments of ratification are reproduced in the UN Treaty Handbook (see Chapter **31** n 1) and in A Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge: Cambridge University Press, 2013).

5 Though there are occasional exceptions to this rule. For some multilateral agreements the 'triple depositary' technique was devised during the period of divided States as a special exception to the general rule, so as to allow each of the component parts of a divided State to sign the treaty or deposit an instrument of ratification or accession with a depositary power that recognized it as a State and thus as entitled to ratify or accede. Examples are: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including The Moon and Other Celestial Bodies 1967; the Treaty on the Non-Proliferation of Nuclear Weapons 1968; and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1972.

6 For the functions of a treaty depositary, see Art 77 of the Vienna Convention on the Law of Treaties.

7 Practice, of course, varies widely as regards the form and wording of an instrument of ratification. The UN Treaty Handbook (see Chapter **31** n 1) contains model texts in the Annexes.

8 This is popularly known as the 'Ponsonby rule'; see the FCO Guidance (see Chapter **31** n 1), in particular the descriptive note on the operation of the rule. The Ponsonby Rule is now

enacted into law with some changes by ss 20–25 of the Constitutional Reform and Governance Act 2010.

9 A wide selection of national systems is described in D Hollis, M Blakeslee, and B Ederington (eds), *National Treaty Law and Practice* (Leiden, Boston: Martinus Nijhoff, for the American Society of International Law, 2005).

10 Art 2(b) (emphasis supplied). In the analogous situation of the withdrawal of a reservation, the International Court has drawn a firm distinction between the adoption of internal legislation authorizing withdrawal and the formal notification of withdrawal on the international plane: *Case concerning Armed Activities on the Territory of the Congo* [2006] ICJ Reports 6, 23–7 (for Reservations, see Chapter **35**).

11 Arnold McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) 133–4.

12 For multilateral conventions concluded under the auspices of the UN, thirty-five is often the chosen number, but there may be further qualifications as well: the UN Charter required the ratification of all five States designated as permanent members of the Security Council, and the same rule applies to all amendments to the Charter.

13 As, for example, with all of the constitutional treaties of the European Union.

14 For the possibility of making ratification subject to reservations, see Chapter **35**.

15 [1966] ILC Reports 30; see also J Mervyn Jones, *Full Powers and Ratification* (Cambridge: Cambridge University Press, 1946) 12–20 and 74–90.

16 PCIJ, Series A, No 23, 20.

17 Arts 12, 14, and 15; see also Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984) 40–1.

18 For example, the then French government failed to obtain in 1954 the necessary parliamentary approval required to enable France to ratify the European Defence Community Treaty. More recently, the difficulties are well known that have faced the Treaty establishing a Constitution for Europe of 29 October 2004, and the subsequent Treaty of Lisbon of 13 December 2007, following their failure to be approved by referendum in certain EU Member States. US accession to the Third UN Convention on the Law of the Sea has been pending in the Senate for more than 20 years.

19 Though it is rare that the gap between signature and ratification is as long as 63 years, as for the United Kingdom ratification (in 1970) of the 1907 Hague Convention for the Pacific Settlement of International Disputes. A more modern example is the Additional Protocols to the Geneva Conventions of 1949, signed by the United Kingdom in 1977, but not ratified until 1998.

20 In 2002 the USA, which had signed on 31 December 2000 the Statute of the International Criminal Court, gave formal written notice to the Government of Italy, as depositary of the treaty, of its intention not to proceed to ratification; this has vulgarly, but not entirely accurately, been written about as an attempt to ‘un-sign’ the treaty as a result of the unhappy use in the US notification of the phrase ‘suspend’ in respect of the US signature.

21 The process is sometimes called ‘adherence’ or ‘adhesion’ (in French ‘adhésion’), but the Vienna Convention on the Law of Treaties uses the term ‘accession’.

22 Art 43 simply provides that ‘the present General Act shall be open to accession by all the Heads of State or other competent authorities of the Members of the League of Nations and

the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose'; 93 LNTS 343.

23 71 UNTS 101.

24 Approved by the UN General Assembly on 13 February 1946: 1 UNTS 15 and 90 UNTS 327.

25 33 UNTS 261.

26 Under Art 81 the Convention was opened for signature until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters in New York; and under Art 83 it is to remain 'open for accession' thereafter.

27 [1966] ILC Reports 32.

28 For example, under Art 84 of the Vienna Convention on the Law of Treaties itself, the Convention 'shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession'.

29 Treaty Series No 56 (1949) Cmd 7789.

30 Text available at <http://eru-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF >.

31 Previously, once a favourable decision was taken by the General Assembly, membership became effective on the date on which the applicant State presented to the Secretary-General an instrument of adherence. The first six new members (Afghanistan, Iceland, Pakistan, Sweden, Thailand, and Yemen) were admitted to membership of the United Nations in this way.

32 Sinclair, *The Vienna Convention*, 230–1; but see S Nahlik, 'La Conférence de Vienne sur le droit des traités. Une vue d'ensemble' (1969) 15(1) *Annuaire Français de Droit International* 48–9.

33 The UN Handbook (at para 3.3.4) indicates that '[t]he Secretary-General, as depositary, has tended to treat instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned have been advised accordingly'.

34 [1966] ILC Reports 31.

35 Treaty Series No 65 (1955) Cmd 9582.

36 Now the Intergovernmental Maritime Organization (IMO); the consolidated text of the Convention as revised is available at <http://www.imo.org/>.

37 Similar provisions can be found in other IMO Conventions.

38 See Liang in (1950) 44 *AJIL* 342–9.

39 Ibid.

40 [1966] ILC Reports 31.

41 Questions of an equivalent kind arise in respect of the property of the State in all its forms, the liabilities of the State (including its debts), and the ownership of and access to historical, archival, and cultural materials.

42 1946 UNTS 3.

43 Though the continuity was qualified, for uniting States, by the proviso that the application of inherited treaties would remain limited to the territory to which they originally applied, in other words not to the entire territory of the new State, a limitation

that was found particularly difficult to accept in the case of Germany; see further at paragraph **34**.41.

44 Though this may in turn require a more active role than the purely neutral and mechanical one that many depositaries had come to accustom themselves to playing.

45 It has also been suggested, notably by monitoring bodies under these instruments, that human rights treaties have a special character, in that their purpose and effect is to guarantee fundamental rights for the benefit of individuals, and that 'once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in government of the State Party, including dismemberment in more than one State or State succession or any subsequent action of the State Party designed to divest them of the rights guaranteed by the Covenant': General Comment No 26 of 8 December 1997 by the Committee under the International Covenant on Civil and Political Rights (Document CCPR/C/21/Rev.1/Add.8/Rev. 1, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/06b6d70077 b4df2c8025655400387939?Opendocument>.

46 The same distinction is made in the Analyses published by the British government in advance of the referendum on Scottish independence in 2014; see Cm 8554 of February 2013 and Cm 8765 of January 2014, especially the legal expert opinion annexed to the latter.

47 *Legality of Use of Force (Yugoslavia v United Kingdom)* [1999] ICJ Reports 826, later *sub nom. Serbia and Montenegro v United Kingdom* [2004] ICJ Reports 1307; *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* [1996] ICJ Reports 595, [2003] ICJ Reports 7, later *sub nom. Bosnia and Herzegovina v Serbia and Montenegro* [2003] ICJ Reports 43.

48 For a full account see D Papenfuss, 'The Fate of the International Treaties of the GDR within the Framework of German Unification' (1998) 92 *AJIL* 469, who points out that the GDR had pursued a hyper-active policy of treaty making as a device for seeking recognition.

49 Now see the Treaties and International Agreements website of the Hong Kong Department of Justice: <http://www.legislation.gov.hk/choice.htm>.