TREATIES AND MEMORANDA OF UNDERSTANDING (MOUs)

GUIDANCE ON PRACTICE AND PROCEDURES

TREATY SECTION
LEGAL DIRECTORATE
FOREIGN AND COMMONWEALTH OFFICE

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CONTENTS

1 **TREATIES AND MOUs**

Responsibility for concluding treaties
What is a treaty?
What is an MoU?
How do you distinguish an MoU from a treaty?
Documents required by FCO Treaty Section

2 **MORE ABOUT TREATIES**

Treaty drafts
Signature of treaties
Checklist for signature ceremonies
Ratification of treaties
Reservations, interpretive declarations and objections
Laying before Parliament and publication

3 **EXPLANATORY MEMORANDA (EMs)**

Guidelines on EMs for treaties
Example of an EM

4 **MOUs**

Terminology
Specimen paragraphs
Form of words to be used for an exchange of notes
Recording an MoU

5 **DEVOLVED ADMINISTRATIONS**

Introduction
Extract from the International Relations Concordat

6 **APPLICATION OF TREATIES TO THE CHANNEL ISLANDS, THE ISLE OF MAN AND OVERSEAS TERRITORIES**

7 **GLOSSARY**

8 **FCO TREATY SECTION CONTACT NUMBERS**

1. TREATIES AND MOUs

RESPONSIBILITY FOR CONCLUDING TREATIES

The responsibility for concluding treaties involving the UK lies with the Secretary of State for Foreign and Commonwealth Affairs. The FCO is responsible for Foreign and Commonwealth policy aspects of all treaties, as well as for dealing with questions of form and procedure. It must also consider points of international law. This remains the case even when the negotiation of the treaty is led by other government departments (OGDs) i.e. the department which will carry out the treaty's provisions. FCO Legal Advisers and FCO Treaty Section must be given the opportunity to comment on the drafts of all treaties under negotiation to ensure that they are drafted in accordance with correct international practice. The same applies to MoUs (see below).

WHAT IS A TREATY?

The term treaty describes an international agreement concluded in writing between states which creates rights and obligations in international law. Treaties are known by a variety of names, for example agreement, convention, protocol, treaty etc. They may be in the form of a single instrument with numbered articles or in the form of an exchange of notes. There can also be treaties between a state and an international organisation.

WHAT IS AN MoU?

An MoU records international "commitments", but in a form and with wording which expresses an intention that it is not to be binding as a matter of international law. An MoU is used where it is considered preferable to avoid the formalities of a treaty - for example, where there are detailed provisions which change frequently or the matters dealt with are essentially of a technical or administrative character; in matters of defence or technology where there is a need for such documents to be classified; or where a treaty requires subsidiary documents to fill out the details. Like a treaty, an MoU can have a variety of names and can also be either in the form of an exchange of notes or a single document. However, the formalities which surround treaty-making do not apply to it and it is not usually published. Confusingly some treaties are called memoranda of understanding.

HOW DO YOU DISTINGUISH AN MOU FROM A TREATY?

The predetermined method of distinguishing an MoU from a treaty is by the terms in which they are written. The key difference between MoUs and treaties is whether or not there is an intention to create legally binding obligations. It is the international practice to show clearly by the form of the document and its terminology the intention either to create legally binding obligations, or not, i.e. either a treaty or an MoU. Thus, in order to ensure that MoUs are not worded in such a way as to amount to treaties care should be taken to avoid the use of "treaty language". Guidance on the terminology to be used (and to be avoided) as well as on the form is given on pages 15-18.

Although an MoU is not legally binding it should be no less carefully drafted than if it were a treaty, given that it is always the intention to perform all HMG's commitments, whether legally binding or not. As with treaties, **all** draft MoUs should be sent to the relevant FCO department for clearance by their legal adviser, and foreign language versions should be checked. Moreover, there should be the same level of inter-departmental consultation as for treaties (see page 3).

DOCUMENTS REQUIRED BY FCO TREATY SECTION

Original treaty documents should always be sent to Treaty Section, which arranges for their publication as command papers and laying before Parliament. It also arranges for their transfer to the National Archives for permanent preservation upon entry into force for the UK and for their registration with the United Nations in accordance with Article 102 of the UN Charter.

In addition, all notifications about treaties (i.e. notifications about the signature or ratification of treaties by the UK and by other states, about declarations, reservations and objections made by other states, and about the entry into force of treaties), which are received by OGDs directly from a depositary should be forwarded to FCO Treaty Section. States may act as a legal depositary for multilateral treaties and are responsible for ensuring the proper execution of all treaty actions relating to that treaty. The depositary's duties are international in character, and the depositary is under obligation to act impartially in the performance of those duties.

MoUs, as opposed to treaties, are entered on departmental files. However, a photocopy of the final (and preferably signed) text of an MoU should be sent to FCO Treaty Section.

2. MORE ABOUT TREATIES

TREATY DRAFTS

OGDs should normally deal with the appropriate FCO geographical or functional department, who should seek advice from their departmental legal adviser and Treaty Section on text and format of treaty drafts. Particular points to note are:

(a) It is for the department responsible for the subject of the treaty to prepare the initial draft and to maintain an up to date version as amendments are made during the course of negotiations. All drafts and subsequent amended versions should be dated. Drafts which undergo significant amendment should be cleared again as necessary. It is helpful to have amendments highlighted in some way.

(b) Consistent wording and layout should be used, especially when making amendments and additions. Cross-references should always be checked.

(c) Any foreign language version must be submitted to the FCO Translation Branch, by the FCO lead department, for comparison and verification against the English text at the earliest opportunity. (A linguistic check is also necessary for an MoU.)

(d) At all stages of preparation of a treaty, time should be allowed for indispensable standard checks, e.g. legal, linguistic etc.

(e) Clean versions of the final agreed draft, in English and foreign languages as appropriate, should be produced in good time by the lead department, since a minimum of three weeks is normally required for preparing signature copies of a treaty.

(f) It is essential that the Devolved Administrations are consulted about negotiations that touch on devolved areas (see page 19).

(g) The Channel Islands, the Isle of Man, and the overseas territories should be consulted at the earliest possible time when a treaty is being negotiated, or consideration is being given to the signature of a treaty already adopted, which could apply to them (see page 23-24).

The lead department should never make any commitments to the other party or parties about the preparation of documents or about dates for signature without first consulting all other departments concerned (and in particular Treaty Section).

SIGNATURE OF TREATIES

Unless the treaty provides that it enters into force on signature, by signing a treaty a State shows that it is in agreement with the text, but it is not bound by it until the treaty has been ratified and has entered into force. The state is not obliged to ratify it. The UK, however, does not sign a treaty unless it has a reasonably firm intention of ratifying.

In international law a head of state, head of government or foreign minister may sign a treaty in his or her own right. Anyone else needs to produce "Full Powers" from one of those three. Full Powers are the grant to another person of authority to sign a treaty on behalf of the State. In UK practice, the Queen does not sign treaties, but the Prime Minister sometimes does. Full Powers are normally signed by the Foreign and Commonwealth Secretary except for certain EU treaties which are drawn up between heads of state and therefore require a Queen's Full Power. FCO ministers and certain UK Representatives hold general Full Powers giving them authority to sign any treaty (subject to the approval of the Foreign and Commonwealth Secretary in each case). Anyone else signing a treaty on behalf of the UK requires a special Full Power enabling them to sign the specific treaty.

The Full Powers document is drawn up by Treaty Section and (unless it is for signature by the Queen) submitted by the lead FCO department to the Foreign and Commonwealth Secretary for signature. OGDs should therefore approach the appropriate FCO department in the first instance at director level requesting Full Powers. They should give the name, title, position and any decorations of the person to be named in the Full Power and also attach a copy of the treaty. If FCO or other departments are aware that a treaty signing is due, e.g. attendance at a conference and a signing of a treaty is likely; they should consult Treaty Section at the earliest possibility.

Full Powers are not required for a treaty in the form of an exchange of notes. It is not UK practice to issue Full Powers for agreements constituted by exchanges of notes because HM representatives abroad and ministers/heads of FCO departments in London conduct diplomatic correspondence in the name of the Secretary of State. But a non-FCO minister or official should not sign without the specific authorisation of the Foreign and Commonwealth Secretary or an FCO minister.

CHECKLIST FOR THE SIGNATURE OF BILATERAL TREATIES IN LONDON BY NON-FCO MINISTERS

When non-FCO ministers are authorised by the Foreign and Commonwealth Secretary to sign treaties it is the OGD's responsibility to arrange the signing ceremony. But Treaty Section now aim to attend and officiate at such ceremonies. When that is not possible, they are available to give advice.

In any case, Treaty Section prepare the texts, and ribbon and seal them into binders for the ceremony. The latter task is done in Treaty Section's premises, usually in the presence of the FCO and/or OGD desk officer and an official from the other country's embassy or high commission, on the last working day before the signing.

The signature ceremony itself is divided into three parts:

a) BEFORE THE CEREMONY

(i) A table should be provided which is sufficiently long and wide to allow for the simultaneous signing of both copies of the agreement and display of the Full Powers. Normally only the two signatories sit at the signing table, which should be put in a suitable position to allow photographs to be taken. Where possible the table, chairs, blotters, pens, treaties and Full Powers should be in place in advance of the ceremony. A "recce" a day or two before the signing could prove useful. (The rest of this assumes that Treaty Section are not present).

(ii) Immediately before signature takes place (if Treaty Section are not present), the FCO/OGD desk officer should insert the date on the English language texts and ask someone from the other side to do the same on the foreign language texts in their own language.

b) DURING THE CEREMONY

(i) At the signing table the other country's representative should sit to the **right** of the UK minister.
(ii) Each signatory signs first his own country's copy of the agreement, **below** his government's signature block. The United Kingdom original will mention the UK government first in the title and the signature blocks will be to the left, but to the right in the other state's original.

(iii) The agreements are exchanged behind the seated signatories by those attending them. They then each sign the other country's copy of the agreement.

(iv) The signatories then stand, shake hands and exchange binders. This ensures that each signatory ends up with their country's copy of the agreement. It also allows a good opportunity, if relevant, for photographs and filming.

c) AFTER THE CEREMONY

(Again, if Treaty Section are not present), the FCO/OGD desk officer should ensure that he/she:

(i) retrieves the UK original;

(ii) retains the other side's Full Powers; and

(iii) records (in block capitals) the **exact** form of signature of the signatories **in pencil** under their respective signatures. **This is essential for publication purposes.**

All these items **must** be sent to Treaty Section for retention and publication as soon as possible after the ceremony.

RATIFICATION OF TREATIES

Treaties are frequently subject to ratification, acceptance, approval, or the mutual notification of the completion of procedures. In addition, multilateral treaties may be acceded to, which does not involve signature. The date of entry into force is determined by the provisions of each treaty. It is important to note that from the date a treaty enters into force for the UK, it places international obligations on the UK vis-a-vis the other party or parties. It is essential therefore that the UK is in a position to fulfil its obligations as from that date, and does not become legally bound until it has the necessary domestic powers to give effect to the provisions of the treaty; otherwise it will be in breach of its international obligations. Pleading insufficiency of domestic law is not, in international law, an acceptable excuse for failure to implement the provisions of a treaty.

Accordingly, if domestic legislation is required to enable the UK to give effect to its obligations under a treaty, the legislation should be in place **before** the treaty comes into force, so that the two can come into operation at the same time. It is FCO practice, therefore, to insist that any necessary UK legislation, i.e. an Act or Order-in-Council, must be in place before a treaty is ratified or acceded to. A written assurance at director level is consequently required in the case of OGDs responsible for implementing the terms of the treaty that all legislative steps will have been completed before the deposit of the UK instrument of ratification or accession takes place. This applies equally to treaties which are subject to the mutual notification of completion of procedures. For example EU Agreements, double taxation agreements, privilege and immunities agreements.

RESERVATIONS, INTERPRETIVE DECLARATIONS AND OBJECTIONS

A reservation is a formal statement by which a state seeks to exclude or modify a provision in a multilateral treaty in its application to that state. Treaties sometimes provide that no reservations or only specified reservations may be made. An interpretive declaration indicates a state's interpretation of a provision. It does not seek to exclude or modify the treaty provisions. When possible it is usually preferable to make an interpretive declaration rather than a reservation. But the dividing line between them is not easy to draw. A reservation which is 'disguised' as an interpretive declaration is still a reservation. What matters is it substantive effect. A reservation must be made in, or if made on signature, confirmed by, the instrument

of ratification, acceptance or approval. The full text can accompany the instrument in a separate note. An objection is a notification by a state, almost always to the depositary, that it objects to a reservation made by another state. It is also possible, although less common, to notify disagreement with an interpretative declaration.

The effect of a reservation is a difficult legal matter. As with all matters concerning reservations or interpretative declarations, FCO Legal Advisers must be consulted. The responsibility for drafting a reservation, interpretive declaration or objection falls to the lead FCO department, in consultation with their legal adviser, and such OGDS as are involved. At what point are they made? A reservation or interpretive declaration may be made either at signature or not until ratification. But if a reservation is made at signature, it must be repeated at ratification. This is not necessary for an interpretive declaration, but repetition is desirable. An objection is made at or after ratification (or its equivalent). When the UK is considering ratifying a treaty it is necessary to examine the reservations made by other states in order to decide whether to object to any of them. After the UK has ratified a treaty, it should continue to examine new reservations made by other states, in case it wishes to respond to them. The nature of the response raises difficult political and legal issues in which legal advice must always be sought. Legal Advisers must be consulted immediately when notifications of reservations, interpretive declarations, or objections are received by the lead FCO department. There is a deadline of twelve months by which objections should be made.

LAYING BEFORE PARLIAMENT AND PUBLICATION

As soon as possible after signature, a copy of the treaty is sent to The Stationery Office to be published as a command paper for presentation to Parliament. Publication is arranged by Treaty Section. Printing, proof-checking and laying can take several months. If it is necessary to ratify a treaty within a certain period FCO Treaty Section should be alerted so that the necessary arrangements can be made for laying and publishing quickly.

Under the Constitutional Reform and Governance Act (CRaG) 2010 all treaties (except those listed below) that are subject to ratification, acceptance, approval, the mutual notification of completion of procedures, or to which the UK intends to accede, cannot be ratified unless they have been laid by a minister of the Crown before Parliament for 21 sitting days without either House having resolved that it should not be ratified. Treaties are laid before Parliament in one of the following series:

Country Series (for bilateral treaties);

Miscellaneous Series (for multilateral treaties);

European Union Series (this series is reserved for the text of EU treaties requiring ratification approval or acceptance by the member state that are not yet in force)

The European Community Series ceased to exist following the entry into force of the Treaty of Lisbon, and the term European Union should apply to most treaties concluded under its auspices. The exception is Euratom, which is the last remaining European Community with a separate legal personality to the EU. As such, the texts

of treaties concluded between Euratom (and/or Member States) and Third Parties that are not yet in force will henceforth where necessary be laid in a separate "**Euratom Series**")

Treaty Series (when a treaty has entered into force for the UK (whether on signature or following ratification, accession, etc.) it is published in the Treaty Series).

The CRaG Act does not apply to the following treaties:

- A treaty covered by section 12 of the European Parliament Election Act 2002 or section 5 of the European Union (Amendment) Act 2008.

- A treaty for which an Order in Council may be made under section 158 of the Inheritance Tax Act 1984, section 2 of the Taxation (International and Other Provisions) Act 2010 or section 173 of the Finance Act 2006 (International Tax Enforcement Arrangements).

- A treaty concluded (under authority by the Government of the United Kingdom) by the government of a British overseas territory, or any of the Channel Islands or of the Isle of Man.

Note The effect of the EU Act 2011 (Section 14) is to disapply the application of section 20 of CRaG to any matter covered by Part 1 of the EU Act thus in effect removing the need to comply with CRaG for future EU treaties unless either under the ordinary or simplified revision procedure

3. EXPLANATORY MEMORANDA (EMs)

Since 2010, any treaty laid before Parliament under the CRaG Act must be accompanied by an EM. Examples can be found on the FCO website: http://webarchive.nationalarchives.gov.uk/20130104161243/http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/

GUIDELINES ON EMs FOR TREATIES

Introduction

An EM brings to the attention of Parliament the main features of the treaty with which it is laid. The aim of an EM is to improve the information about treaty matters which is provided to Parliament by the Executive.

When an EM should be produced

An EM should be produced for all treaties, which are subject to ratification, accession, acceptance, approval, or the mutual notification of completion of procedures. The EM should be laid at the same time as the Miscellaneous, Country or European Communities Series command paper.

When an EM is not required

An EM will not be required for a treaty which enters into force on signature and will be published first as a command paper in the Treaty Series. Nor is an EM required for double taxation conventions, which are not published as command papers until they enter into force, being subject to scrutiny by Parliament when the Order-in-Council incorporating their provisions into UK law is debated.

Lead responsibility

The FCO Department or OGD which has the main policy interest in a particular treaty will take responsibility for the preparation of the EM. Even. When the EM has been drafted it should be cleared by the relevant department's FCO/OGD legal adviser. Treaty Section will check that the format is correct and lay the EM at the same time as the command paper to which it refers. Treaty Section needs both the original signed copy of the EM and preferably in PDF form (because it is subsequently published on the FCO website).

Form of an EM

An EM should bear the full title of the treaty to which it refers. It should also include the command paper number which is allocated by The Stationery Office at the time the publication date is fixed. (It can be obtained by telephoning FCO Treaty Section). The amount of detail provided may vary from case to case depending on the length and complexity of the treaty.

Content of a standard EM

General principles

An EM should be drafted following the general government conventions in providing information to Parliament. These commit government to being as open as possible and not knowingly to mislead Parliament. Information should only be withheld when disclosure would not be in the public interest.

Subject matter

The description of the subject matter should be sufficient to enable Members of Parliament to understand broadly the substance of the treaty without reference to its text. Departments should indicate in particular if the treaty has been negotiated within the EU or if EURTOM is also to become a party to it.

If the treaty raises significant human rights issues, it must be copied to the Joint Committee on Human Rights (JCHR). Departments should indicate if they consider the treaty concerned falls within this requirement.

Ministerial responsibility

The EM should state which minister is primarily responsible for the treaty and should indicate any other minister who may have an interest. In cases where there is otherwise no mention of the FCO's interest, something on the lines of the following formulae should be included:

"The Secretary of State for Foreign and Commonwealth Affairs:

- has overall responsibility for the conclusion and implementation of treaty obligations and responsibility for their application in Overseas Territories." (for multilateral treaties)

- also has a policy interest." (for multilateral EU treaties)

- has overall responsibility for UK policy relating to the UK's relations with [State]." (for bilateral treaties)

- has overall responsibility for UK policy relating to the EU's relations with [State]." (for EU bilateral treaties)

The EM must be signed by a minister, preferably the one with responsibility for the subject matter of the treaty.

Policy Considerations

(i) *General*

This section should contain an account of the reasons why it is proposed that the UK should become a party to the treaty. It should highlight the benefits for the UK from participation as well as any burdens on the UK which would result.

(ii) *Financial*

This section should cover the anticipated financial implications for the UK in becoming a party.

(iii) *Reservations and Declarations*

The content of any reservation or declaration made at the time of signature of the treaty should be set out. The EM should also indicate which reservations or declarations are to be made or re-confirmed on ratification. If, after the EM has been laid, it is decided to make any changes to the content of a reservation or declaration, or to make any additional reservations or declarations, Parliament should be informed by laying a supplementary EM before ratification with a command paper to which it refers.

Implementation

The EM should describe the means of implementing the treaty in the UK including details of any legislation required to be enacted before the treaty can be ratified. This section should also include a reference to the One-in, One-out (OIOO) rule. In many cases this may be a single sentence to confirm that the rule has been considered as part of the process of concluding the treaty but is not applicable.

<u>Overview - OIOO rule</u>:
The One-In, One-Out (OIOO) rule is a government policy aimed at reducing the cost and volume of regulation in the UK's economy. The rule encourages departments to implement regulation only as a last resort, having first considered the use of non-regulatory alternatives. New legislation which imposes a direct annual net cost on business or civil society organisations (IN) should be compensated for by the removal of existing legislation or regulations with an equivalent value (OUT). Departments are asked to identify compensatory OUTs at the same time that INs are cleared with the Cabinet Office (Reducing Regulation sub-Committee).

<u>International agreements and obligations and OIOO</u>:
International agreements (treaties) and obligations should be treated in the same manner as EU measures when calculating INs and OUTs. In practice this means that treaties need not be considered <u>except</u> in the following cases;

a) "gold-plating": where a department implements a treaty obligation(or EU Directive) that goes beyond minimum requirements and results in increased costs to business; or
b) Fails to derogate: where a department fails to take advantage of derogations (opt-outs) that are permissible under the treaty and which would reduce costs to business; or uses a derogation which imposes increased costs on business.

<u>The role of policy departments</u>:
Policy departments who are tasked with the negotiation of new treaties and MoUs are best-placed to assess the impact of their work with reference to the rule. This should be done with the assistance of departmental lawyers. Treaty Section cannot advise at what stage in the process of negotiation and conclusion of a treaty that the rule should be specifically addressed. However, if it is likely that domestic legislation is required in order to implement a new treaty obligation, we recommend that OIOO is considered at this point. We also recommend that submissions for ministerial policy clearance for treaty negotiations make reference to OIOO if applicable. Further, departments should include a reference to OIOO when EMs are submitted to Ministers for their signature before a treaty may be ratified –in many cases this may be a single sentence to confirm that the rule has been considered as part of the process of concluding the treaty, but is not applicable.

<u>Contacts for further guidance</u>:
Overall responsibility for enforcing the rule across government is held by the Reducing Regulation sub-Committee (RRC) within the Cabinet Office. However, specific guidance and advice is available from the Department for Business, Innovation and Skills (BIS). The contact with BIS is Michael Ridley: michael.ridley@bis.gsi.gov.uk . There is also a general Better Regulation contact e-mail through which queries can be submitted – betterregulation@bis.gsi.gov.uk

Consultations

The outcome of any discussions which have taken place with interested parties who may have an opinion on the subject matter of the treaty or be affected by its provisions should be summarised, e.g. the overseas territories, the business community, special interest groups.

EXAMPLE OF AN EXPLANATORY MEMORANDUM

EXPLANATORY MEMORANDUM ON THE EUROPEAN UNION CONVENTION ON DRIVING DISQUALIFICATIONS

Title of the Convention

Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Driving Disqualifications

Command Paper Number: CM 4327

Subject Matter

This Convention was drawn up by the Council of the European Union and signed by the Member States on 17 June 1998, during the UK's Presidency of the European Union. Its purpose is to provide a mechanism by which a driving disqualification imposed by an EU Member State on a resident of another Member State will be enforced by the latter State when the driver returns to that State. Enforcement by the driver's own State will normally have the effect of removing his right to drive anywhere in the EU (and in consequence, elsewhere) during the currency of the ban.

The Convention covers driving disqualifications arising from the following conduct: reckless or dangerous driving; wilful failure to carry out the obligations placed on drivers after being involved in road accidents; driving a vehicle while under the influence of alcohol or other substances affecting or diminishing the mental and physical abilities of a driver; and refusal to submit to alcohol and drug tests.

Ministerial Responsibility

The Home Secretary has responsibility for policy matters relating to the criminal law (except in Scotland) and takes the lead on judicial co-operation with other EU Member States within the framework of Title VI of the Treaty on European Union, in consultation, as necessary, with the Secretaries of State for Scotland and Northern Ireland. The Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Environment, Transport and the Regions also have a policy interest.

Policy Considerations

(i) General

With increasing travel across borders, driving disqualifications are frequently imposed on drivers who are normally resident in another Member State. But disqualifications imposed in this way do not apply in the driver's home country. The Convention will give Union-wide effect to these driving disqualifications and thus improve road safety within the EU.

(ii) Financial

Some additional costs would be involved in implementing the Convention. No estimate of the likely case load is available at present, and costs would also depend on what arrangements had to be made for handling any appeals or challenges (for example if an appeal system were needed to resolve disputes about the application of the provisions, or claims of mistaken identity). Although there is at present no identified source of domestic funding, the Government intends to review this in the near future.

(iii) Reservations and Declarations

On ratification of the Convention, each Member State will need to declare how it will implement a disqualification imposed on a resident of that State by another Member State. Three options are available in Article 4(1) of the Convention: (a) direct execution of the decision of the State of the offence by enforcing the remainder of the disqualification period imposed by the State of the offence; (b) execution by virtue of a judicial or administrative decision by the State of residence; or (c) conversion of the decision of the State of the offence into a judicial or administrative decision. The Government intends to consult interested parties on which of the procedures described in Article 4(1) it intends to apply, and will provide a supplementary EM in due course.

Implementation

Primary legislation will be needed to give effect to the Convention.

Consultations

None of the organisations consulted disagreed in principle with what the Convention is trying to achieve and some, such as the Royal Automobile Club (RAC), the Royal Society for the Prevention of Accidents (ROSPA) and the British Institute of Traffic Education Research (BITER) expressed their support. Others such as the Road Haulage Association (RHA), the Automobile Association (AA) and the Transport and General Workers Union (T&G), would prefer that steps are taken first to secure greater consistency in offences and penalties across the EU. Although the Government has no objection in principle to the harmonisation of road traffic offences and penalties, this would have been a time-consuming and difficult exercise which would have seriously delayed the adoption of the Convention.

Kate Hoey
Parliamentary Under Secretary of State
Home Office

4. MEMORANDA OF UNDERSTANDING (MoUs)

TERMINOLOGY TO BE USED IN THE DRAFTING OF MOUs AND OTHER ARRANGEMENTS TO INDICATE THAT THEY ARE NOT TREATIES

The document should not be titled or referred to as an Agreement. The word agree and its derivatives should be avoided. Say instead the "Participants enter into arrangements" or "have reached the following understandings".

The provisions should be cast as expressions of intent rather than as obligations in order to avoid it being a treaty. Certain words should never be used. Some alternatives are suggested below.

Further advice is available from Treaty Section.

DO NOT USE	**DO USE**
article	paragraph
agree	accept/ approve/ decide
agreement/ undertaking	arrangement/ understanding
authoritative/ authentic	equally valid
clause	paragraph
conditions	provisions
continue in force	continue to have effect
Done	signed
enter into force	come into operation/ come into effect
mutually agreed	jointly decided
obligations	commitments

DO NOT USE	DO USE
Parties	Governments/ Participants
Preamble	Introduction
rights'	benefits
have the right	be permitted to
shall/ undertake to/ agree to/ undertake	will/ decide
terms	provisions
undertake	carry out

MOU SPECIMEN PARAGRAPHS

The following are specimen paragraphs covering entry into operation/effect:

"This Memorandum will come into operation on signature and will continue in operation until terminated by either participant giving six months' written notice to the other."

"This Memorandum of Understanding will come into effect on the date of the later Government notification and will continue in effect until terminated by either Government on six months' written notice."

The following is a specimen form of a signature paragraph:

"The foregoing record represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of……………………………….. upon the matters referred to therein.

Signed in duplicate at ……………………. on ……………….. in the English and ………………… languages, both texts having equal validity.

[NB “authoritative” or “authentic” should not be used]

For the Government of the United Kingdom of Great Britain and Northern Ireland:

For the Government of [State title]:

FORM OF WORDS TO BE USED IN AN EXCHANGE OF NOTES RECORDING AN UNDERSTANDING

The opening paragraph should be on the following lines:

"I have the honour to refer to discussions which have taken place between our two Governments concerning…………………………… As a result of these discussions it is the understanding of the Government of the United Kingdom that the following arrangements will apply: ....……….. ."

The rest of the Note should use "will", rather than "shall". The concluding paragraph should read:

"*If the arrangements set out above are acceptable to the Government of ……………………….. I have the honour to suggest that this Note and Your Excellency's reply to that effect will place on record the understanding of our two Governments in this matter, which will come into operation on the date of your reply."*

Reply Note

"*I have the honour to acknowledge receipt of your Note dated ……………… concerning ……………………….. and to confirm that the arrangements set out in your Note are acceptable to the Government of …………………..... and that your Note and this reply will place on record the understanding of our two Governments in this matter, which will come into operation on today's date.* "

If the exchange of notes is in two languages, the translations should be matched and the reply note should repeat the text of the initiating note in translation (see below):

"*I have the honour to acknowledge receipt of your Note dated ………………….. concerning ………………….., which reads as follows:*

[Insert text of initiating note in translation]

I have the honour to confirm that the arrangements set out in your Note are acceptable to the Government of …………………..… and that your Note and this reply will place on record the understanding of our two Governments in this matter, which will come into operation on today's date."

5. DEVOLVED ADMINISTRATIONS

Under the devolution legislation, the UK Government remains responsible for international relations, including relations with the EU, and the FCO continues to be responsible for the foreign policy of the UK and its constituent parts. As a consequence the UK Government alone has the power to enter into treaties or other international agreements binding on the UK in international law.

But the UK Government recognises that the devolved administrations will have an interest in international policy making in relation to devolved powers. Furthermore, under the devolution legislation the devolved administrations are responsible for observing and implementing international obligations which relate to devolved matters.

To ensure effective co-operation in international matters, the UK Government and the devolved administrations have agreed the international relations and EU concordants which cover, amongst other areas: the exchange of information, formulation of UK policy and the conduct of international negotiations, implementation of international and EU obligations and co-operation over legal proceedings.

Under the terms of these concordats UK government departments must consult the devolved administrations over the formulation of the UK position in international negotiations on devolved matters, must involve the devolved administrations in negotiations of international commitments relating to devolved matters and formally notify the devolved administrations once they are agreed. Such notification should take place as soon as an agreement has been concluded, to allow sufficient time for the devolved legislatures to make any necessary legislation prior to ratification. The concordats provide for apportioning quantitative obligations and there is a provision for the UK Government to pass financial penalties to the devolved administrations where they default on an agreed liability.

EXTRACT FROM THE CONCORDAT ON INTERNATIONAL RELATIONS

Formulation of UK policy and conduct of international negotiations

i) The FCO, or as appropriate another lead UK Department, will consult the devolved administrations about the formulation of the UK's position for international negotiations, to the extent that the negotiations touch on devolved matters (including non-devolved matters which impact upon devolved areas). The devolved administrations will be sent copies of papers, including relevant interdepartmental correspondence, and be invited to meetings on subjects in which they have a devolved policy interest. Where necessary, the FCO will facilitate contacts and ensure that timely consultation takes place. The UK Government alone has the power to enter into treaties or other international agreements binding on the UK in international law and will undertake the negotiation of all binding international agreements and multilateral international arrangements (e.g. the Rio Declaration), following the consultation arrangements referred to above.

ii) The devolved administrations may hold working-level discussions on devolved matters with foreign national or sub-national governments or appropriate counterparts in international organisations. The devolved administrations may, in co-operation with the FCO, make arrangements or agreements with foreign national or sub-national governments or appropriate counterparts in international organisations, to facilitate co-operation between them on devolved matters, provided that such arrangements or agreements do not purport to bind the UK in international law, affect the conduct of international relations or prejudice UK interests. (It is an inherent part of the Belfast Agreement (Command Paper 3883) that, on matters within their competence, the devolved administrations may hold discussions and make arrangements with the Irish Government in the context of the British-Irish Council[5]).

The devolved administrations will consult the FCO in advance about any contact, correspondence, or proposal that is novel or contentious, might create a contingent international liability or may have implications for international relations.

[5] Paragraph 10 of the British-Irish Council section of Strand 3 of the Agreement states that "it will be open to two or more members [of the British-Irish Council] to develop bilateral or multilateral arrangements between them. Such arrangement could include, subject to the agreement of the members concerned, mechanisms to enable consultation, co-operation and joint decision making on matters of mutual interest; and mechanisms to implement any joint decisions they may reach."

iii) Where international negotiations bear directly on devolved matters, it may be appropriate for Ministers or officials from the devolved administrations to form part of a UK negotiating team. The role of Ministers or officials from the devolved administrations will be as part of a UK team to support and advance the single UK negotiating line which they will have played a part in developing. The UK lead Minister will retain responsibility for the negotiations and will determine how each member of the team can best contribute to securing the agreed position. In appropriate cases, and by agreement with the FCO (or where appropriate another lead UK department) Ministers or officials from the devolved administrations could speak for the UK in international meetings.

Implementation of international commitments

iv) Under the devolution legislation, the devolved administrations are responsible for observing and implementing international obligations which relate to devolved matters[6] . They are similarly responsible in areas where they or the UK Government have made commitments under informal instruments[7]. In common with other parts of the UK, the devolved administrations expect to observe the terms of these informal instruments which have been entered into in good faith. The FCO or other lead UK Department will formally notify the devolved administration of any new international commitment concerning devolved matters which it will be the responsibility of the devolved administration to implement (although the arrangements described in paragraphs 2-4 should ensure that the devolved administrations are already aware of new commitments). Such notification should take place as soon as the instrument has been concluded in order to allow sufficient time for the devolved legislatures to make any necessary legislation prior to ratification.

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[6] It is essential that the UK Government is in a position to implement international obligations it has undertaken in good faith. The UK Government therefore has power to ensure that the devolved administrations take action to give effect to the UK's international obligations and do not take actions which would be incompatible with these obligations. Section 58 of the Scotland Act 1998, section 26 of the Northern Ireland Act 1998, and section 108 of the Government of Wales Act 1998, give the UK Government power to order that a proposed action by a devolved administration should not be taken if it would be incompatible with any international obligation of the UK or direct that action be taken to give effect to any such obligation. Under section 35 of the Scotland Act, the Secretary of State may make an order prohibiting the Presiding Officer from submitting a Bill of the Scottish Parliament for Royal Assent if he has reasonable grounds to believe that it contains provisions which would be incompatible with any international obligations of the UK Similarly, under section 14 of the Northern Ireland Act the Secretary of State may decide not to submit a Bill of the Northern Ireland Assembly for Royal Assent which contains a provision which he considers would be incompatible with any international obligations of the UK. The UK Government may also revoke any subordinate legislation made by a devolved legislature if it contains provisions which would be incompatible with any international obligations.

[7] The term "informal instruments" covers international instruments which have no binding form in international law, but which evidence a political commitment by the States accepting them. It can include instruments describing themselves as "recommendation", "Resolution", "declaration","conclusions" and "charter".

v) Under the devolution legislation, the UK Government may by subordinate legislation split a quantitative international obligation, such as a quota, and transfer part of it to the devolved administration[8]. The size of the devolved administrations' shares will be a matter for negotiation, taking into account the extent of the powers of the devolved legislatures and administrations and the range of measures relating to devolved and non-devolved matters which might be taken to fulfil an obligation. The devolved administrations must be consulted before any order is made to apportion their share of such an obligation, and the UK Government has made it clear to Parliament that it would expect to use its best efforts to reach agreement with them.

vi) It will be for the devolved administration and the FCO, or other lead OGD, to consider how to implement an international commitment which relates to devolved matters. Where the commitment is to be implemented separately by the devolved administration, they will consult and agree their implementation proposals with the FCO or other lead UK OGD to ensure that any differences of approach are compatible with the need for consistency of effect and of timing, where that is appropriate. Where the commitment is to be implemented by UK legislation, the FCO or other lead UK OGD will consult and agree their implementation proposals with the devolved administrations where these may impact on devolved matters. The devolved administrations will ensure that when necessary UK legislation making provision about devolved matters is laid before the devolved legislatures.

vii) The UK Government will, under normal circumstances, not ask the UK Parliament to legislate in any area for which legislative competence has been devolved except with the agreement of the devolved legislature. But instances may arise, for reasons such as urgency, where full consultation and agreement is impractical. The UK Government intends, for example, to continue the practice of implementing UN Security Council Resolutions by means of Orders in Council under the United Nations Act 1946[9]. The Foreign Secretary will remain the responsible authority for the preparation of such orders.

(Memorandum of Understanding and supplementary agreements on Devolution between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales, Cm 4444 of October 1999, pp. 33-35)

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[8] **Section 27 of the Northern Ireland Act 1998, section 106 of the Scotland Act 1998, and sections 106 and 108 of the Government of Wales Act 1998.**

[9] **Despite the general devolution of the functions of observing and implementing international obligations, powers under any Order in Council made under section 1 of the 1946 Act may be exercised concurrently in or as regards Scotland by UK Ministers.**

6. APPLICATION OF TREATIES TO THE CHANNEL ISLANDS, THE ISLE OF MAN AND OVERSEAS TERRITORIES

The Channel Islands (Guernsey and Jersey) and the Isle of Man (the Islands) are **not** part of the United Kingdom but are self-governing dependencies of the Crown with their own legislative assemblies and systems of law and administration. They have no representation at Westminster. The United Kingdom Government is responsible for the defence and international relations of the Islands and the Crown is ultimately responsible for their good government.

This means that the UK can sign treaties on their behalf. When the UK is involved in the negotiation of any treaty (multilateral or bilateral) which could apply to the Islands, or is considering signing a treaty already adopted, the **Crown Dependencies Division, Ministry of Justice** must be informed as early as possible so that they can consult the Islands. The Islands must then be allowed a proper length of time to consider the implications of having any treaty extended to them.

Departments and agencies should inform the Ministry of Justice of any proposals to make Orders under Section 1(3) of the European Communities Act 1972 specifying treaties as community treaties where it appears they may apply either wholly or in part to the Islands under Protocol 3.

OVERSEAS TERRITORIES

It is equally important that the overseas territories are similarly consulted where a treaty is being negotiated or consideration is being given to the signature of a multilateral treaty which could apply to them. The appropriate Department should be made aware of the situation at the earliest possible time.

The following departments are responsible for consulting the territories listed below:

Ministry of Defence (Air): Sovereign Base Areas, Cyprus
FCO, Europe Directorate –Mediterranean, Iberia team: Gibraltar
FCO, Overseas Territories Department: the rest

The United Kingdom overseas territories comprise:

Anguilla

Ascension

Bermuda

British Antarctic Territory

British Indian Ocean Territory

British Virgin Islands

Cayman Islands

Falkland Islands

Gibraltar

Montserrat

Pitcairn, Henderson, Ducie and Oeno Islands

St Helena

South Georgia and South Sandwich Islands

Tristan da Cunha

Turks and Caicos Islands

Entrustments

Delegation of treaty-making powers to Crown dependencies and overseas territories

Occasionally a Crown dependency or overseas territory may wish to conclude a treaty in its own name. This involves a delegation of authority known as a Deed of Entrustment to conclude a treaty called an entrustment. This document is signed off by the Foreign Secretary. If the lead directorate/department are content, a copy of the text should be sent to Legal Advisers for their clearance. Treaty Section can advise on the form of the document comprising the entrustment. The FCO lead directorate/department must afterwards send the document to the Governor, to be conveyed to the head of government, authorising the territory to conclude the treaty. The preamble to the treaty should state that it has been concluded, 'with the consent and authority of the Government of the United Kingdom of Great Britain and Northern Ireland.

If a department is considering grant of entrustment, FCO should be consulted.

7. GLOSSARY

Acceptance/Approval: have the same legal effect as ratification.

Accession: an act whereby a state expresses its consent to be bound, instead of signature followed by ratification. Accession is only used in the case of multilateral agreements.

Agreed minute: may record decisions reached between two delegations, or, may be annexed to an agreement to deal with administrative details or interpretations. In some cases may be used as the title for a treaty or an MoU.

Agreement: the usual title for a bilateral treaty. Sometimes used for a multilateral treaty.

Contracting State: means a state which has consented to be bound by a treaty *whether or not the treaty has entered into force.*

Convention: a term frequently employed for agreements to which a large number of countries are parties. In bilateral relations it is often applied to treaties of a technical or social character, e.g. conventions on social security or double taxation.

Exchange of Notes (constituting an agreement): may be used to make a new treaty, to modify, amend, terminate or extend an existing one. The Exchange of Notes consists of an exchange of diplomatic correspondence in formal terms between a Minister for Foreign Affairs, his deputy or a senior official and an Ambassador/High Commissioner or Charge d'Affaires. (Sometimes they can be in the 3rd person). Notes are drafted in consultation with FCO Legal Advisers, and it is customary for both Notes to be approved in draft by the governments before they are exchanged (see also page 18 on the use of exchanges of notes for non-binding understandings).

Final Act: a formal statement or summary of the proceedings of an international conference. Treaties drawn up as a result of the conference will be attached to the Final Act. Signing the Final Act, however, does **not** constitute consent to be bound by such treaties. (When a Final Act is mentioned in the context of a European Communities Agreement, however, it usually covers a series of declarations made by one or more parties relating to specific articles of the Agreement. It is often appended to the Agreement itself).

Full Powers: a formal document signed by the head of state or government or the Foreign Minister empowering the person (or persons) named to sign a treaty on behalf of that state.

Initialling: signifies provisional assent to the text of a treaty by delegates following negotiations.

MoU or arrangement: a form frequently used to record informal arrangements between states on matters which are inappropriate for inclusion in treaties or where the form is more convenient than a treaty (e.g. for confidentiality). They may be drawn up as a single document using non-treaty terms, signed on behalf of two or more governments, or consist of an exchange of notes or letters recording an understanding reached between two governments.

Notification of completion of procedures: bilateral treaties are sometimes signed before a government has the necessary legislation in place to enable it to implement the provisions. In such cases the text may provide for each country to notify the other when the internal procedures required to be undertaken (e.g. an Act of Parliament or Orders-in-Council) have been completed. Such treaties usually come into force on the date of the Note containing the later of the two notifications. Has the same effect as ratification. (Treaty Section must be copied into correspondence about these notifications).

Party: means a State which has consented to be bound by the treaty **and** for which a treaty is in force.

Proces-verbal: in the treaty context is most commonly used to set out agreed corrections to a treaty already signed.

Protocol: usually denotes a treaty amending or supplementing an existing treaty, but can stand alone.

Ratification: follows signature and signifies the consent of a state to be bound by the treaty.

Signatory: not a precise term. Should **not** be used when referring to a state which has ratified a treaty.

Signature: is the act whereby a state expresses its agreement in principle with a treaty, but not its consent to be bound by it, unless the treaty provides that it will come into force on signature. A state which has signed a treaty which is subject to ratification is not obliged to ratify. However, UK policy is not to sign without a reasonably firm intention to ratify.

Treaty: an agreement concluded between states (or other entities such as international organisations having international personality) in written form and binding in international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. It does not have to be signed, although it usually is.

FCO TREATY SECTION CONTACT NUMBERS

Address: Treaty Section
Legal Directorate
Room WH.MZ.23
Foreign and Commonwealth Office
King Charles Street
London SWlA 2AH

e-mail: treatypublicenquiries@fco.gov.uk

Treaty Section comprises:

Treaty Procedures, who manage the production of a treaty for signing in the United Kingdom and advise on procedures to be followed when a treaty is signed overseas. After signing they arrange the publication and laying before Parliament of treaties as command papers (with EMs as appropriate). They also advise on the form of draft treaties and related matters such as the production of Full Powers and instruments of ratification.

Tel: 020 7008 1130/1117

Treaty Information Team, who maintain the UK treaty database by adding details of all treaties to which the UK is or has been a Party and provide an enquiry service. They also coordinate the UK's responsibilities as depositary of 34 multilateral treaties and arrange the transfer of treaties to the National Archive for permanent preservation upon entry into force for the UK.

Tel: 020 7008 1109

Treaty page on FCO website https://www.gov.uk/uk-treaties