Chapter 18

The Role of the International Lawyer in the Negotiation of Treaties*

Introduction

The practice of international law involves the Legal Advisers to the Foreign and Commonwealth Office (FCO) in negotiations on a regular basis. These negotiations concern all manner of issues: leading examples include claims (notably in respect of nationalised property); fisheries; air services; defence cooperation; draft Resolutions in the General Assembly and the Security Council on a wide variety of politico-legal questions; differences concerning the interpretation or application, including the non-performance, of existing treaties; and, above all, negotiations leading to the conclusion of new treaties. In many instances, these treaties have to do not only with substantive arrangements for inter-governmental cooperation or for the settlement of a difference but also with the constitution of an international organisation. The focus in this paper will be on the negotiation of new treaties, including the sometimes delicate task of making amendments or adjustments to existing treaties, drawing upon experiences as one of the Legal Advisers.

The negotiation of treaties represents a significant part of diplomacy. Thus, Article 3 of the Vienna Convention on Diplomatic Relations lists “Negotiating with the Government of the receiving State” among the functions of a diplomatic mission. In

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the era of the United Nations, international relations have been transformed by the conclusion of innumerable bilateral and multilateral treaties relating to many different matters. For those involved, whether diplomats or lawyers, in the processes of concluding such treaties, the negotiations are always challenging, often creative and rarely dull. As Satow’s Guide to Diplomatic Practice puts it,

there are few more rewarding things in diplomacy than a successful negotiation … from which both or all sides derive some satisfaction. For mutual satisfaction is the best guarantee of permanence.1

The point was put in a slightly different way by Sir Harold Nicholson, as follows:

Diplomacy is the art of negotiating documents in a ratifiable and therefore dependable form.2

Nicholson was drawing a distinction between representational or conference diplomacy (specifically, debating in an organisation such as the League of Nations) and conducting diplomatic exchanges intended to lead to a written agreement among the governments taking part. Negotiations, whether for the conclusion of a treaty or for the settlement of a difference, typically provide a stream of interesting legal issues which the negotiators have to try to solve. Clearly, international lawyers play important roles in the negotiation of treaties, both bilateral and multilateral, including treaties drawn up under the auspices of the United Nations and other international organisations.

I The Role of the International Lawyer in Applying the Law of Treaties

A The Positive Impact of the Vienna Convention of 1969

The Vienna Convention on the Law of Treaties represents a pillar of modern international law. It was largely a work of codification, a topic which lies beyond the scope of this paper.3 In the present context of the negotiation of treaties, it is relevant to note simply that the Convention gives very great assistance to the international lawyer. Surprisingly often, doctrinal differences born of constitutional factors give rise to obstacles to progress in negotiations.

In overcoming such problems, instead of having to rely solely upon the writings of publicists such as Lord McNair and Professor Reuter (excellent as their respective

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