MULTILATERAL TREATIES: THE SIGNIFICANCE OF THE NAME OF THE INSTRUMENT

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In recent years, international legal scholarship dealing with treaties has been preoccupied with the Vienna Convention on the Law of Treaties.[1] This Convention has increased the rigor, specificity, and certainty of the law of treaties. More than a decade after signature, however, the Convention has yet to enter into force.[2] Furthermore, the Vienna Convention addresses the *law* of treaties and hence de-emphasizes state practice, which is an important aspect of treatymaking. International law often views treaties as a confirmation and substantiation of law that has been developing through the customary process. In the case of the Vienna Convention and treaty law in general, it may be desirable to reverse the normal sequence by looking at the behavior of states to see whether that behavior enhances an understanding of the law of treaties as detailed in the Convention and elsewhere.

The focus here will be on all multilateral treaties entering into force between 1919 and 1971, specifically those appearing in the League of Nations Treaty Series and the United Nations Treaty Series.[3] The ability to look macroscopically at fifty years of multi-

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1. U.N. Doc. A/CONF. 39/27, May 23, 1969, *reprinted in* 63 Am. J. Int'l L. 875 (1969) [hereinafter cited as Vienna Convention].

2. As of June 12, 1979, the Convention had received 16 ratifications and been acceded to by 17 states. It requires two more parties to enter into force. The United States signed the Convention in April, 1970, but has yet to ratify it.

3. For the purpose of this article, a multilateral treaty is defined as a treaty having three or more states as parties. Treaties negotiated under the auspices of the International Labour Organization have been excluded; it was felt they represent unique kinds of treaties that, due to their large numbers, may misrepresent state positions. *See* E. Landy, The Effectiveness of International Supervision 13 (1966).

lateral treatymaking permits certain questions to be addressed that otherwise would be unanswerable. One example of this macroscopic perspective concerns the name of the instrument in the case of multilateral treaties. While the Vienna Convention and virtually all scholarly international legal literature contend that the name of the instrument has no legal effect on the treaty,[4] instruments with certain names when viewed *en masse* may possess different characteristics than instruments with other names. For example, it may be demonstrable that instruments named "convention" are more likely to have reservations than instruments named "agreement." This finding would add depth to our understanding of state practice *vis-à-vis* the instruments. This would not, of course, imply a prohibition against reservations to agreements, but merely indicate a reduced probability of such reservations.

This article will take a two-step approach. First, international legal authorities will be examined to determine if there is consensus and uniformity of opinion regarding the legal effect of the name of the instrument. Second, state practice — viewed macroscopically — will be used to seek empirical differences in differently named instruments. It is hoped the addition of this state practice dimension will clarify the significance of the name of the instrument.

I. TRADITIONAL WISDOM ABOUT THE NAME OF THE INSTRUMENT

A. Assertions of Legal Insignificance

One would be hard pressed to find an area of international law where there is more general agreement than there is with the fact that the name of the instrument has no necessary legal significance. In only one instance does it seem that a serious distinction was attempted on the basis of the name of the instrument. This related to the obligation to register treaties with the United Nations under Article 102 of the United Nations Charter.[5] It seems, however, that the obligation to register a treaty is somewhat peripheral to the is-

4. For the purpose of this article, the word "treaty," except when referring to the specific instrument, will be used generically and will be synonymous with "instrument." This is in accordance with Article 2 of the Vienna Convention, which states that "treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments in whatever its particular designation . . . ." Vienna Convention, *supra* note 1, art. 2.

5. Brandon, *Analysis of the Terms "Treaty" and "International Agreement" for Purposes of Registration Under Article 102 of the United Nations Charter*, 47 AM. J. INT'L L. 49, 49-51 (1953).

sue of whether the name of the instrument has any legal significance.

It is somewhat disconcerting that in most instances neither concern nor surprise is shown about the legal insignificance of the name of the instrument. Jessup is the exception; he contrasts the informality and imprecision of selecting the name of the instrument with other areas of international law in which precision is very important — for example, the ranking of diplomats.[6] The breadth of feeling about the legal insignificance of the name of the instrument can be seen in Schwarzenberger's statement: "Treaties, conventions, agreements, protocols, exchanges of notes or other synonyms all mean the same thing: consensual engagements under international law. All of these are governed by the same laws."[7] In a similar vein, Gamboa states that the "international juridical effect of a treaty is not dependent on the name given to the instrument."[8] Mostecky and Doyle have addressed the same issue specifically with regard to multilateral treaties and also conclude that there is no legal significance to the name of the instrument.[9] Friedmann, Lissitzyn, and Pugh seem to admit very limited significance in the name of the instrument by stating that certain names tend to be used more frequently to deal with certain subjects. On balance, however, their position is the same — that is, the name of the instrument is of no legal import.[10] Sørensen seems to lean toward ascribing some significance to the name of the instrument, but he returns to the customary posture, stating that "it is the universal opinion, however, that the fact that a treaty is not called such has no influence upon its character from the point of view of international law."[11] It is not necessary to belabor the point further except to note that a similar view is held by many others.[12]

A different tack in approaching the subject of the significance of the name of the instrument is to examine state practice. It is one thing to assert that the name of the instrument has no legal significance, but it is a vastly stronger assertion to maintain that state

6. P. JESSUP, A MODERN LAW OF NATIONS 123 (1948).

7. G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 151 (5th ed. 1967).

8. M. GAMBOA, A DICTIONARY OF INTERNATIONAL LAW AND DIPLOMACY 257 (1973).

9. INDEX TO MULTILATERAL TREATIES at v (U. Mostecky & F. Doyle eds. 1965).

10. W. FRIEDMANN, O. LISSITZYN, & R. PUGH, INTERNATIONAL LAW: CASES AND MATERIALS 299-300 (1969) [hereinafter cited as FRIEDMANN].

11. M. SØRENSEN, A MANUAL OF PUBLIC INTERNATIONAL LAW 177 (1968).

12. *See, e.g.*, E. COLLINS, INTERNATIONAL LAW IN A CHANGING WORLD 286 (1970); H. JACOBANI, INTERNATIONAL LAW 117 (1968); R. SWIFT, INTERNATIONAL LAW, CURRENT AND CLASSIC 442 (1969).

treaty practice itself does not illustrate any definite patterns or trends in the use of the name of the instrument. For example, an international law textbook prepared by the Institute of State and Law of the Soviet Academy of Sciences maintains not only that the name of the instrument is of no legal significance but also that "international treaty practice" provides little or no consistency.[13] Holloway illustrates the dilemma faced by many scholars when she states:

> [A]gain the view that the decisive factor in any distinction is essentially the absence of ratification in treaties in simplified form is held by a number of writers who consider that treaties are concluded by the formal intervention of the Head of State in three stages and in a single instrument, and the latter in a plurality of instruments . . . . Neither of these views seems to be borne out by the practice of States.[14]

In parallel fashion, Tobin states that he will use treaty, agreement, and convention interchangeably, because "there appears to be no established distinction between these terms in the practice of states."[15]

Before discussing attempts at discerning some method in the selection of the name of the instrument, a few comments are in order. It is clear to anyone who has looked at a large number of treaties that one can find examples to rebut any generalization asserted about the name of the instrument. One can find, for example, a supposedly solemn label — treaty — applied to an insignificant international agreement. Therefore, broad generalizations about state practice in an area as far-reaching as treaty behavior should be approached very cautiously. It is always important to distinguish between deterministic and probabilistic assertions about international behavior. Unfortunately, statements that assert *no* consistency in state practice fall in the deterministic category and must be supported by an exhaustive examination of treaty practice.

B. Attempts at Describing the Use of the Names of Instruments

Some literature on the subject takes a middle-of-the-road approach, stating in absolute terms that the name of the instrument has no necessary legal effect, yet attempting to ascribe some order and regularity to the use of differently named instruments. The

13. INTERNATIONAL LAW: A TEXTBOOK FOR USE IN LAW SCHOOLS 250 (D. Ogden trans. 1960).

14. K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 67 (1967).

15. H. TOBIN, THE TERMINATION OF MULTIPARTITE TREATIES 5 (1967).

success of the type of analysis employed below depends upon having a fairly large number of instruments with the same name. Therefore, to assure that the resulting conclusions here are valid, discussion is limited to those instrument names that are used frequently in multilateral treaties. It should be acknowledged that at least the following names of instruments are used in multilateral treatymaking: treaty, convention, agreement, exchange of notes, protocol, act, declaration, arrangement, accord, code, instrument, mandate, measures, agreed minutes, optional clause, plan, *procès-verbal*, provisions, recommendation, resolution, regulations, statute, and undertaking.[16] The job undertaken here is simplified somewhat by the fact that certain names are chosen overwhelmingly more frequently than others. It is these five — treaty, convention, agreement, protocol, and exchange of notes — that will be examined in more detail.

1. *Treaty*. Use of the word treaty as a specific name of an instrument creates an additional problem, because treaty is also a generic name for any international pact. There is an apparent general feeling, however, that treaty is the most formal instrument.[17] O'Connell goes further in stipulating the uses of the instrument:

> The treaty proper is a formal document of traditional character. It consists of preamble, body and final clauses, concluding with a testimonium, and the signatures are sealed. Due to the increasing volume of ordinary governmental transactions which can be informally negotiated the treaty is now reserved for matters of some gravity. Ratification is ordinarily required.[18]

McNair notes that "treaty is . . . usually reserved for the more solemn agreements," but he is careful to acknowledge that this usage is not consistently applied.[19] Furthermore, McNair finds that the use of treaty as the name of an instrument is declining, as a function of time, because other names are being used more often.[20] This assertion is tested below.[21]

2. *Convention*. There is some feeling that the convention is a formal, proper document more frequently used for multilateral than for bilateral treaties.[22] Convention is the most frequently cho-

16. *See generally* Myers, *The Name and Scope of Treaties*, 51 AM. J. INT'L L. 574, 574-605 (1957).
17. M. TOSCANO, THE HISTORY OF TREATIES AND INTERNATIONAL POLITICS 22 (1966).
18. D. O'CONNELL, INTERNATIONAL LAW 197 (1970).
19. A. MCNAIR, THE LAW OF TREATIES 22 (1961).
20. *Id.*
21. McNair's statement is discussed *infra* notes 53-55, and accompanying text.
22. J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 340 (1967).

sen instrument name when international organizations are directly involved in the treatymaking process.[23] O'Connell, while repeating the "tendency of international organizations to use the convention instrument,"[24] sees a clearer trend in the use of this name:

> A convention is a record of agreement on matters of importance but not of high policy. For example, it is usual to designate a treaty an agreement to confer "most favoured nation" privilege, but as a convention one to set up a reciprocal consular regime. However, usage in this respect is not uniform.[25]

3. *Agreement.* Castel gives a specific description of an agreement:

> This is an instrument less formal than a Treaty or Convention proper, and generally not in Heads of State form. It is usually applied to agreements of more limited scope and with fewer parties than the ordinary Convention. It is also employed for agreements of a technical or administrative nature only, signed by the representatives of Government Departments, but not subject to ratification.[26]

O'Connell seems to agree, stating that agreements are "used for that type of intergovernmental contract, which, because of the relatively unimportant or impermanent nature of the subject-matter, may be informal."[27]

4. *Protocol.* There seems to be consensus that the protocol is less formal than either treaties or conventions.[28] It is often a subsidiary document to a convention,[29] there being many examples of optional protocols to international conventions.[30] A good example is the Optional Protocol on Dispute Settlement signed along with the four 1958 Geneva Conventions on the Law of the Sea.[31] A glance at the many treaties that have protocol as their name quickly convinces one, however, that not all protocols are merely addenda

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23. J. CASTEL, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 816 (1965).

24. O'CONNELL, *supra* note 18, at 197.

25. *Id.*

26. CASTEL, *supra* note 23, at 816.

27. O'CONNELL, *supra* note 18, at 201.

28. CASTEL, *supra* note 23, at 816; Myers, *supra* note 16, at 587; I L. OPPENHEIM, INTERNATIONAL LAW 878 (8th ed. H. Lauterpacht 1955).

29. CASTEL, *supra* note 23, at 816.

30. Among many examples are: Protocol on Lake Inari Regulations, Feb. 24, 1956, 243 U.N.T.S. 160; Protocol to the Northwest Atlantic Fisheries Convention: Harp and Hood Seals, Apr. 29, 1966, 17 U.S.T. 635, T.I.A.S. No. 6011; Protocol to the Northwest Atlantic Fisheries Convention: Measures of Control, Feb. 8, 1949, 21 U.S.T. 576, T.I.A.S. No. 6841.

31. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, *opened for signature* April 29, 1958, 450 U.N.T.S. 170.

to conventions. McNair has noted, however, that in most instances the protocol is in some way dependent upon, or linked to, another treaty.[32]

5. *Exchange of Notes*. In the realm of bilateral treaties, the exchange of notes is today extremely prevalent. Higgins puts it this way:

> Exchange of notes, embodying, *per definitionem*, the use of more than one instrument, is a very flexible form of treatymaking, and in recent years it has become a very popular method of recording all kinds of transactions. The exchange involves an offer and acceptance, though that is no reason why these elements should be contained in only two documents. There is no doubt that these have the status of a treaty under international law.[33]

There is a further terminological problem, because many exchanges of notes are technically entitled "exchange of notes constituting an agreement."[34] For the purposes of this discussion, an instrument so designated will be counted as an exchange of notes and not as an agreement. Since the simple transmittal and acknowledgement of a correspondence constitutes a binding treaty, there is a temptation to assume that exchanges of notes always deal with fairly trivial matters and almost always on the bilateral level. Neither assumption is true. For example, the treaty of June 18, 1935, between the United Kingdom and Germany for the limitations of armaments was in fact an exchange of notes.[35]

It is confusing and frustrating to try to draw sharp distinctions between the ways the different names of instruments are used. The complications seem to stem from several things. First, states have different interpretations of the implications of certain named instruments. Specifically, the picture painted by Toscano, reflective of Italian practice, is different than that given by Castel in his interpretation of Canadian practice.[36] In the United States, there may be a tendency to select the name of the instrument in order to conform with the constitutional requirements of advice and consent by two-thirds of the Senate.[37] Unfortunately, there is greatest agreement on formality as a distinguishing factor in the choice of the

32. MCNAIR, *supra* note 19, at 23.

33. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 257 (1963).

34. *Id.*

35. MCNAIR, *supra* note 19, at 24.

36. CASTEL, *supra* note 23, at 816; TOSCANO, *supra* note 17, at 22.

37. *Research in International Law under the Auspices of the Faculty of the Harvard Law School* (pt. I), 29 AM. J. INT'L L. 666, 667 (Supp. 1935).

name of an instrument.[38] As a legal concept, the idea of formality is of questionable utility.

C. *The Position of the Vienna Convention on the Law of Treaties*

The 1969 Vienna Convention, although not yet in force, is the definitive authority on many aspects of treaty law. Article 2 of the Convention[39] makes the only reference to the significance of the name of the instrument.

> Use of Terms.
>
> 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . . .[40]

Shabtai Rosenne's authoritative work on the developmental process producing the Vienna Convention indicates no significant discussion of the importance of the name of the instrument except to reiterate its legal irrelevance.[41] Another important study on the work of the Vienna Conference implies that the drafters of the Convention realized the difficulties that would be involved if they tried to ascribe any specific meaning to the name of the instrument, although some attention was given to the differences in formality of various instruments.[42]

II. A MACROSCOPIC ANALYSIS OF STATE PRACTICE

A. *Differences Examined*

The tables offered below are employed to reveal empirical differences in the characteristics of multilateral treaties, differences in the names for the instruments, and the correlation, if any, between the two sets of differences. Certain attributes of treaties are difficult to ossify — formality is one example. For purposes of this macroscopic analysis, the discussion will be limited to the following specific treaty attributes:

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38. There is nearly universal agreement about formality. *See, e.g.*, Myers, *supra* note 16, at 579-90; STARK, *supra* note 22, at 340-43; O. SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 261 (1955). The five instrument names discussed here, ranked according to degree of formality, are: treaty, convention, protocol, agreement, and exchange of notes.

39. Vienna Convention, *supra* note 1.

40. *Id.* art. 2.

41. S. ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 110 (1970).

42. T. ELIAS, THE MODERN LAW OF TREATIES 13-14 (1974).

(1) the date of entry into force of the treaty;
(2) whether the treaty entered into force upon signature or required ratification;
(3) the number of parties to the treaty (laterality);
(4) the number of states expressing a reservation to the terms of the treaty;
(5) the number of states signing the treaty but failing to follow through with required ratifications;
(6) a rough indicator of the importance level of the treaty; and
(7) an indication of whether the treaty creates a continuing or a short-term obligation.

Clearly these seven attributes do not represent the totality of the content of multilateral treaties. It is hypothesized, however, that these seven characteristics are indicative of the dimensions by which differences in the names of instruments emerge. If, for example, one finds that the average instrument named treaty has three times as many reservations as the average instrument named convention, one has acquired an understanding of the empirical differences between these two names of instruments.

An important point that has been revealed by this research is the necessity of drawing a distinction between two principal kinds of multilateral treaties based upon laterality. Unfortunately, even the Vienna Convention on the Law of Treaties does not acknowledge a difference between multilateral treaties according to the number of parties. In fact, the Convention addresses multilateral treaties principally in a reactive way.[43] During the Vienna Conference, however, an attempt was made to distinguish between general and restricted multilateral treaties, although a formal proposal to incorporate such a provision in the Convention was ultimately rejected.[44]

There remains substantial sentiment, nevertheless, that multilateral treaties should be subdivided according to laterality. Triska and Slusser categorize Soviet treaties as either multilateral or plurilateral.[45] It has been noted that multilateral treaties involving an exclusive group of states are fundamentally different than international agreements open to all states.[46] Fortunately, there is some

43. Vienna Convention, *supra* note 1.

44. U.N. Doc. A/CONF. 39/L.36 (1969). Proposals were put forth by Syria and France, but both were withdrawn when it became clear they would not receive widespread political support. *See* ELIAS, *supra* note 42, at 15.

45. J. TRISKA & R. SLUSSER, THE THEORY, LAW AND POLICY OF SOVIET TREATIES 415 (1962).

46. SØRENSEN, *supra* note 11, at 125.

agreement that "plurilateral treaty" is a good designation for multilateral treaties having applicability to an exclusive group of states, whereas "general multilateral treaty" is a more appropriate label for multilateral treaties open to all states.[47] The procedures in the following section are used under the assumption that this general/plurilateral dichotomy is important and should be employed when looking at the implications of the name of the instrument.

B. Methodology Employed

There are numerous statistical techniques available for analyzing, interpreting, and presenting the results of this macroscopic view of 1,100 multilateral treaties.[48] The procedure followed here is elementary; all results will be presented in the form of contingency tables. This approach was adopted for two principal reasons. First, it is assumed that because statistical techniques are employed so seldom in international law, the readership of this article is generally unfamiliar with the more complex procedures. Using more complicated techniques might make the research results incomprehensible to those who would be most interested in them. Second, it is more desirable to focus on multilateral treaties than to offer an exposition on the propriety of various quantitative techniques.

A contingency table is nothing more than a way of presenting information so that every case (multilateral treaty) can be categorized according to two attributes. The attributes themselves must be divided into mutually exclusive categories. Consider the following simple example:

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47. *See, e.g.*, ELIAS, *supra* note 42, at 14-15; SØRENSEN, *supra* note 11, at 125; B. BOT, NONRECOGNITION AND TREATY RELATIONS 105 (1968).

48. For example, factor analysis might be used to look for overall patterns in the selection of certain instrument names. *See* Rummel, *Understanding Factor Analysis*, 11 J. CONFLICT RESOLUTION 446 (1967). Additionally, a regression model might be used to predict choice in instrument name based on other data. *See generally* H. BLALOCK, SOCIAL STATISTICS 273-85 (1960).

		LOCATION OF THE TREATY		
		League of Nations Treaty Series	United Nations Treaty Series	TOTALS
TYPE OF TREATY	Bilateral	4,100 27 90	11,000 73 90	15,100 100 90
	Multilateral	426 26 10	1,200 74 10	1,626 100 10
	TOTALS	4,526 27 100	12,200 73 100	16,726 100 100

Interpreting the table is simple. The large numerals indicate the number of treaties, which are defined by the column and row in which the numeral is located. For example, there are 4,100 bilateral treaties contained in the League of Nations Treaty Series. The small numerals need more explanation. The numeral to the right of the large numeral is the row percentage, that is, the percentage of all cases in that row as they are defined by each column heading. For example, there are 4,100 bilateral treaties in the League of Nations Treaty Series, which represent 27% of all bilateral treaties. In similar fashion, the small numerals below the large numerals are the column percentages. The 90 under 4,100 means that bilateral treaties represent 90% of all treaties contained in the League of Nations Treaty Series.

There are advantages and some disadvantages to using contingency tables.[49] On the positive side, the tables are simple, straightforward, and unambiguous. In the example above, there is little room for disagreement about the fact that the United Nations Treaty Series contains 11,000 bilateral treaties. Some of the drawbacks of contingency tables relate to the fact that they compare only two variables at a time. Additionally, one has to make absolutely certain that the categories selected are mutually exclusive. It must also be acknowledged that there may be some subjectivity involved in defining the categories. On balance, nevertheless, contingency tables seem to be an appropriate way to isolate the differences in empirical characteristics possessed by instruments having different names.[50]

49. For a discussion in general terms of the use of contingency tables, *see generally* J. GUILFORD, FUNDAMENTAL STATISTICS IN PSYCHOLOGY AND EDUCATION (1965); BLALOCK, *supra* note 48.

50. For a more detailed discussion of the strengths and weaknesses of contingency tables, *see generally* H. LANCASTER, THE CHI-SQUARED DISTRIBUTION (1969); Cochran, *Some Methods for Strengthening the Common X^2 Tests*, 10 BIOMETRICS 417, 418-19 (1954).

C. *Contingency Table Results*

TABLE 1

DATE OF ENTRY INTO FORCE

	1919-1923	1924-1928	1929-1933	1934-1938	1939-1946	1947-1951	1952-1956	1957-1961	1962-1966	1967-1971	TOTALS
Treaty	7 13	8 14	3 5	5 9	2 4	9 16	7 13	10 18	1 1	4 7	56 100
	13	7	2	5	4	8	5	8	1	4	5
Convention	15 5	32 10	53 16	47 14	8 3	27 7	43 13	36 11	41 13	26 8	328 100
	28	26	43	45	16	25	29	27	30	24	30
Agreement	9 2	44 11	47 12	23 6	14 3	37 9	59 15	60 15	66 16	43 11	402 100
	16	36	38	21	28	34	39	45	48	41	37
Protocol	8 8	18 17	5 5	7 7	5 5	20 19	11 11	9 9	10 10	9 9	102 100
	15	15	4	7	10	18	7	7	7	8	9
Exchange of Notes	2 4	2 4	5 11	9 19	5 11	4 9	4 9	3 6	9 19	4 8	47 100
	4	2	4	8	10	3	3	2	7	4	4
Other	13 8	17 11	11 7	15 10	16 10	13 9	26 17	14 9	10 6	20 13	155 100
	24	14	9	14	32	12	17	11	7	19	15
TOTALS	54 5	121 11	124 11	106 10	50 5	110 10	150 14	132 12	137 12	106 10	1,090 100
	100	100	100	100	100	100	100	100	100	100	100

Table 1 looks at the six categories of instrument names for each of ten time intervals. This provides a convenient way to look for trends in the use of names of instruments. Examining the overall numbers of multilateral treaties for each time interval, there has been little increase during the fifty-year period. There was a precipitous drop during World War II, but, in general, overall magnitudes are fairly constant. This refutes the assertions that there are vastly more multilateral treaties today than in the past.[51] In fact, in proportion to the number of independent states in the world, there is slightly less activity today than there was forty years ago.

Beginning with instruments named treaty, one sees expected period-to-period fluctuations, but no strong trends. The percentage of instruments named treaty averaged only one point greater for the prewar period than for the postwar period. This does not represent a significant shift away from instruments named treaty. This finding is at variance with much of the literature. McNair states that "the term 'treaty' is now declining in frequency in proportion to its numerous rivals."[52] This is simply not true for multilateral treaties, particularly for the period upon which McNair focuses — 1945-1960. O'Connell goes even further, offering this explanation for the decline in the use of instruments named treaties: "Due to the increasing volume of ordinary governmental transactions which can be informally negotiated, the treaty is now reserved for matters of some gravity."[53] In the realm of multilateral treaties, however, it would seem that the volume of matters that *cannot* be resolved informally is increasing just as rapidly. The opinion that the treaty is declining as the preferred name of instrument is echoed by Sørensen[54] and Myers,[55] but it must be reemphasized that in the case of multilateral treaties these generalizations are inaccurate.

Exchange of notes is the other instrument name for which there has been considerable time-related hypothesizing. Starke

51. Assumptions about vastly increased magnitudes of treaties can be overt or subtle. *See* ROSENNE, *supra* note 41, at 47; ELIAS, *supra* note 42, at 13.

52. MCNAIR, *supra* note 19, at 22.

53. O'CONNELL, *supra* note 18, at 197.

54. SØRENSEN, *supra* note 11, at 177.

55. Myers, *supra* note 16, at 579.

states that the exchange of notes has been "very frequently adopted in recent years";[56] O'Connell makes an analogous statement.[57] Again, the data simply do not support these positions. There are some year-to-year fluctuations, but in general, exchanges of notes are used no more frequently today than they were during the 1920s. When discussing this instrument, one needs to remember that it is relatively uncommon in multilateral treaties.

Several other trends are evident from Table 1. Agreements form a larger share of multilateral treaties today than they did before World War II. For the four prewar intervals, agreements averaged 28% of all treaties, whereas for the five postwar intervals, they averaged 41% of the total, clearly indicating an increased use of agreements. There has been a corresponding decrease in the use of the instrument named convention during the same period. From 1919 through 1938, conventions accounted for an average of 36% of all multilateral treaties. Since 1945, they have accounted for only 27%. There are few other notable trends in the table.

TABLE 2

NAME OF THE INSTRUMENT	TOPICS: Political	Economic	Cultural	Human.	TOTALS
Treaty	38 68 13	15 27 2	1 2 2	2 3 2	56 100 5
Convention	66 20 22	199 61 31	14 4 35	49 15 45	328 100 30
Agreement	76 19 25	288 71 45	11 3 28	27 7 25	402 100 37
Protocol	44 43 15	44 43 7	1 1 2	13 13 12	102 100 4
Exchange of Notes	13 28 4	32 68 5	2 4 5	0 0 0	47 100 4
Other	61 39 21	66 43 10	11 7 28	17 11 16	155 100 15
TOTALS	298 27 100	644 59 100	40 4 100	108 10 100	1,090 100 100

56. STARKE, *supra* note 22, at 343.
57. O'CONNELL, *supra* note 18, at 201.

Table 2 divides the multilateral treaties according to topic categories. A simple four-category system has been adopted. Some subjectivity exists, because most treaties contain elements of several of the categories. Most treaties, however, could be clearly placed in one of the categories. It should be noted that "political" here is defined broadly to include military and diplomatic matters. There is a margin for error in macroscopic analyses, because it is general patterns that are important. The overall results will not be affected by, for example, a disagreement about whether several treaties should be classified as political or economic.

Most conspicuous is the fact that the overwhelming majority of multilateral treaties, about 59% of the total, are economic in nature. Political treaties account for the next largest portion, approximately 27% of the total. The preponderance of these two categories is so great that most of the instrument names need only be viewed according to their distributions between the political and economic categories. There are very distinct patterns here. Instruments named treaty are the most clearly political in nature — more than two-thirds being classified as political. Protocols are split about equally between the political and economic categories. Both conventions and agreements, which account for 67% of all multilateral treaties, are overwhelmingly economic in nature. These results seem to be generally consistent with legal literature. Friedmann, Lissitzyn, and Pugh state that certain instrument names appear to be used more often in certain topic areas, although they seem uncertain as to which and to what degree.[58] Hudson is very accurate when he states, "[T]he usual formal agreement dealing with political relations is called a treaty."[59]

Table 3 is based upon the assumption that there is a basic difference between multilateral treaties open to all states and those which are in some way restricted. Several things are confirmed by the table. First, plurilateral treatymaking is by far the most frequent multilateral activity, accounting for nearly three-quarters of the total. Most general treatymaking occurs in instruments named convention. Protocols also have a disproportionately large amount of general activity, perhaps reflective of their linkages with conventions. The instrument named treaty is more often plurilateral than

58. FRIEDMANN, *supra* note 10, at 298.

59. CASES AND OTHER MATERIALS ON INTERNATIONAL LAW 843 (2d ed. M. Hudson ed. 1936).

TABLE 3

NAME OF THE INSTRUMENT	LATERALITY			
		Plurilateral	General	TOTALS
	Treaty	47 84 6	9 16 3	56 100 5
	Convention	199 61 25	129 39 45	328 100 30
	Agreement	327 81 41	75 19 26	402 100 37
	Protocol	66 65 8	36 35 13	102 100 9
	Exchange Of Notes	42 89 5	5 11 2	47 100 4
	Other	124 80 15	31 20 11	155 100 15
	TOTALS	805 74 100	285 26 100	1,090 100 100

all the others, indicating a reluctance on the part of states to adopt this instrument when large numbers of parties are involved. These results seem to be generally consistent with legal literature. Starke notes that it is British policy to insist upon the name convention for all important multilateral treaties.[60] Castel observes that agreements usually have "fewer parties than the ordinary convention."[61]

Table 4 illustrates the duration of the obligation created by the treaties. Obviously, there are many degrees of duration ranging from a few minutes to decades. The approach taken here uses only two categories—"short-term" and "continuing." Short-term treaties are those creating a one-time commitment that can be dispensed of within a year or less. As with most categories, there can be disagreement about individual cases, but the aggregate trends are valid. Most multilateral treaties (83%) create continuing obligations. The obligations created by exchanges of notes are the most transient, while conventions tend to create the most durable obligations. O'Connell's contention that agreements tend to be less permanent than treaties or conventions is thus confirmed, although by

60. STARKE, *supra* note 22, at 244.
61. CASTEL, *supra* note 23, at 816.

a narrow margin.[62] Jessup's statement that exchanges of notes have "informal or temporary character" is also accurate.[63]

TABLE 4

NAME OF THE INSTRUMENT	DURATION		
	Short-term	Continuing	TOTALS
Treaty	10 18 5	46 82 5	56 100 5
Convention	26 8 14	302 92 33	328 100 30
Agreement	80 20 42	322 80 36	402 100 37
Protocol	23 23 12	79 77 9	102 100 9
Exchange Of Notes	14 30 9	33 70 4	47 100 4
Other	34 22 18	121 78 13	155 100 15
TOTALS	187 17 100	903 83 100	1,090 100 100

TABLE 5

NAME OF THE INSTRUMENT	LEVEL OF IMPORTANCE			
	Low	Medium	High	TOTALS
Treaty	5 9 1	34 61 8	17 30 39	56 100 5
Convention	160 49 27	165 50 37	3 1 7	328 100 30
Agreement	249 62 41	141 35 32	12 3 27	402 100 37
Protocol	63 62 10	37 36 8	2 2 4	102 100 9
Exchange of Notes	35 75 6	12 25 3	0 0 0	47 100 4
Other	91 59 15	54 35 12	10 6 23	155 100 15
TOTALS	603 55 100	443 41 100	44 4 100	1,090 100 100

62. O'CONNELL, *supra* note 18, at 201.
63. JESSUP, *supra* note 6, at 123.

Table 5 attempts to classify the importance of treaties on a three-level scale: "low," "medium," and "high." Disagreement is possible on the proper classification of individual treaties, but the overall results should be valid, since the classifying was done consistently. Most treaties were easy to classify. The majority of treaties are relatively trivial and classified as low; this group represents 55% of the total. From this classification it is possible to calculate the average importance for each instrument name:

Treaty	2.21
Convention	1.52
Agreement	1.41
Protocol	1.40
Exchange of Notes	1.25

These results are striking. Treaty is by far the most important instrument; exchange of notes is the least important. It is problematic whether the differences among the other three instrument names are significant. These findings are in general harmony with the works of others.[64] Brierly states that agreements are usually "less formal or less important" than treaties or conventions.[65] Gamboa finds a protocol to be of a less "important nature than a treaty."[66] The most important point emerging here is the preeminent importance of instruments named treaty.

Tables 6, 7, and 8 are similar. Each refers to the number of states in relation to differently named instruments. Table 6 deals with the number of reservations and other forms of conditional acceptance in the terms of treaties. It shows unequivocally that most multilateral treaties (90%) have no reservations whatsoever. The table also reveals that most reservations are found in instruments named convention. During this fifty-year period there have been about 400 reservations to multilateral treaties. Over 60% of these have occurred in instruments named convention, while another 25% have occurred in agreements. There have been very few reservations to instruments with any other name. Exchanges of notes have virtually no reservations.

64. *See, e.g.*, MCNAIR, *supra* note 19, at 22.

65. J. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 317 (6th ed. 1963).

66. GAMBOA, *supra* note 8, at 225.

TABLE 6

NAME OF THE INSTRUMENT	NUMBER OF RESERVATIONS -0-	-1-	2-3	4 or more	TOTALS
Treaty	50 89 5	4 7 9	1 2 3	1 2 3	56 100 5
Convention	265 81 27	20 6 44	21 6 68	22 7 65	328 100 30
Agreement	376 94 38	11 3 24	6 1 19	9 2 26	402 100 37
Protocol	92 90 10	6 6 14	2 2 7	2 2 6	102 100 9
Exchange of Notes	47 100 5	0 0 0	0 0 0	0 0 0	47 100 4
Other	150 97 15	4 2 9	1 1 3	0 0 0	155 100 15
TOTALS	980 90 100	45 4 100	31 3 100	34 3 100	1,090 100 100

TABLE 7

NAME OF THE INSTRUMENT	NUMBER OF SIGNATURES LACKING RATIFICATIONS -0-	1-2	3-10	11 or more	TOTALS
Treaty	39 70 5	5 9 6	8 14 5	4 7 5	56 100 5
Convention	170 52 22	36 11 41	77 23 50	45 14 51	328 100 30
Agreement	318 80 42	29 7 33	30 7 20	25 6 28	402 100 37
Protocol	67 66 9	9 9 10	14 12 9	12 12 13	102 100 9
Exchange of Notes	45 96 6	1 2 1	0 0 0	1 2 1	47 100 4
Other	121 78 16	8 5 9	24 16 16	2 1 2	155 100 15
TOTALS	760 70 100	88 8 100	153 14 100	89 8 100	1,090 100 100

Table 7 tends to cast light on a perennial problem of multilateral treaties — a substantial number of multilateral treaties enter into force when signed and do not require ratification.[67] Thus, Ta-

67. Instruments enter into force upon signature in the following percentage breakdown: treaty — 4%; convention — 4%; agreement — 27%; protocol — 29%; exchange of notes — 55%.

TABLE 8

NAME OF THE INSTRUMENT	NUMBER OF FULL OBLIGATIONS -3-	4-10	11-20	21 or more	TOTALS
Treaty	14 25 7	23 41 5	11 20 7	8 14 4	56 100 5
Convention	35 11 17	136 41 28	59 18 35	98 30 44	328 100 30
Agreement	99 25 48	188 47 38	56 14 33	59 14 26	402 100 37
Protocol	20 20 9	37 36 8	18 18 11	27 26 12	102 100 9
Exchange of Notes	19 40 9	25 53 5	1 2 0	2 5 1	47 100 4
Other	21 14 10	80 52 16	24 15 14	30 19 13	155 100 15
TOTALS	208 19 100	489 45 100	169 16 100	224 20 100	1,090 100 100

ble 7 is relevant only to those treaties for which ratification is required. One can see that for 70% of treaties the failure of ratification provides no problem. Only 4% of exchanges of notes have signatures not followed by required ratifications. This is hardly surprising, since 55% of exchanges of notes entered into force when signed.

One finds these unsubstantiated signatures to be much more prominent in instruments named convention. Fully half of conventions have at least one signature left "hanging" without the required ratification. Instruments named treaty also have a fairly good record, with 70% of them having no unsubstantiated signatures. Although 80% of agreements have no signatures lacking ratification, the remaining 20% represents a large number of individual cases where agreements are signed and not ratified. Overall, there are more than 2,000 instances where a signature has been affixed to an instrument requiring ratification without the ratification materializing. About three-quarters of these occurrences are with instruments named convention or agreement.

Table 8 provides information about the total number of parties to multilateral treaties, whether through ratification, accession, acceptance, or signature of an instrument not requiring ratification. It

is clear that instruments named convention and protocol tend to have the largest number of parties. Thirty percent of conventions have more than twenty parties; the corresponding figure for exchanges of notes is only 2%. These results can be viewed another way. The average treaty has about eleven parties, as does the average agreement. The average exchange of notes has only about six parties. Conventions tend to have by far the most parties, averaging nearly eighteen parties each. There are some general patterns, but examples to the contrary exist — there are fifty-nine agreements with more than twenty parties and thirty-five conventions with exactly three parties. There appear to be relatively few references in the literature to certain instrument names predisposing fewer parties than do others, except for the often-stated fact that exchanges of notes have few parties. Starke observes accurately that agreements usually have fewer parties than do conventions.[68]

III. CONCLUSION

The preceding pages have demonstrated ironies about the study of contemporary international law. It is surprising that in an academic discipline with a history of precise scholarship, one finds misinformation or no information at all about an important aspect of multilateral treaties. International legal scholarship should not limit itself to microscopic studies. As Professor Rohn, the Director of the Treaty Research Center at the University of Washington states, "[Our] knowledge of treaties is comparable to a science of economics which is rich in case studies of individual transactions but which has not yet developed the notion of a gross national product."[69] The working assumption here has been that international law in general and treaty law in particular can be understood best when traditional, microscopic legal studies are bolstered by a broad view of the entire phenomenon of multilateral treaties.

It is not adequate to be satisfied with semi-intuitive statements about aggregate patterns in multilateral treatymaking like the unfortunate one offered by Starke: "There have been one or two examples of multilateral exchanges of notes."[70] There have been *at least* forty-seven multilateral exchanges of notes between 1919 and 1971. Facts like this need to be known. An inescapable conclusion

68. STARKE, *supra* note 22, at 245.

69. Rohn, *The U.N. Treaty Series Project as Computerized Jurisprudence*, 2 TEXAS INT'L L.F. 167, 169 (1966).

70. STARKE, *supra* note 22, at 247.

from this work is that a broader, more thorough understanding of treaties has been hindered by reiterations about the legal insignificance of the name of the instrument. This obscures the fact that there may be important empirical differences between instruments with different names. These differences reveal much about how states exercise their latitude in naming multilateral instruments. McNair's provocative statement of forty years ago is germane:

> My submission is that the task of deciding these disputes will be made easier if we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly differing legal character of several kinds of treaties and to frame rules appropriate to the character of each kind.[71]

A few of the conclusions reached here bear reiteration. It must be borne in mind that these relate to multilateral treaties coming into force between 1919 and 1971. There is no reason to assume that these conclusions would be valid for bilateral treaties or for other time periods.

There are few significant trends evident in the use of instrument names during the last fifty years. Treaty and convention may be used slightly less than in the past, and agreement slightly more, but the trends are remarkable for their consistency, not their change.

Treaty is the only instrument name that deals largely with matters of politics. Most other instruments are preoccupied with economic matters.

Roughly three-quarters of multilateral treaties are plurilateral. Conventions are the instruments most likely to be open to all states. The great preponderance of instruments named treaty or exchange of notes (85% and 89%, respectively) are plurilateral, hence limited to relatively few parties.

Most multilateral treaties create obligations lasting beyond the immediate time surrounding the signing of the treaty (83%). Instruments named convention create the most durable obligations.

Reservations to multilateral treaties are *not* an epidemic; 90% of multilateral treaties have no reservations. Conventions are the instruments with the most reservations, both in absolute terms and relative to their numbers.

There are many instances where states sign instruments and fail to follow through with ratification where it is required. All in-

71. MCNAIR, *supra* note 19, at 754.

strument names except exchange of notes have significant numbers of these unsubstantiated signatures. Conventions have the greatest number of unsubstantiated signatures, there being 122 conventions with three or more signatures that have not been followed by required ratifications.

The patterns are clear regarding the total number of parties. Treaty and exchange of notes are usually reserved for instruments having fewer than ten parties. Agreements are widely used; ninety-nine have exactly three parties while fifty-nine have more than twenty-one parties. Convention is the choice of instrument name when more than twenty parties are involved — there are ninety-eight conventions with more than twenty parties.

An important question, and one that cannot be answered completely here, is to what degree these findings are applicable to bilateral treaties. A partial answer was provided by Lejnieks in his research project *The Nomenclature of Treaties: A Quantitative Analysis*.[72] Because Lejnieks' data are for a different time period — 1946-1963 — it is best to compare results in terms of percentages:

	Multilateral Results 1919-1971	Bilateral Results[73] 1946-1963
Treaty	5%	4%
Convention	30%	8%
Agreement	37%	52%
Protocol	9%	2%
Exchange of Notes	4%	34%
Other	15%	—

These show, not unexpectedly, that there is much less bilateral activity in instruments named convention and considerably more in instruments named exchange of notes. It is interesting to see that Lejnieks found trends in the use of certain instrument names. His results are quite consistent with those obtained for multilateral treaties — few significant variations over time.[74] This would disprove contentions about pronounced time-related shifts in the preference of states for certain instrument names.

Treaty analysis that is limited to a narrow, microscopic, legalistic approach may solve non-problems while ignoring many aspects of the treatymaking behavior of states. As Rohn puts it, scholars must learn to "repress the conditioned reflex of interna-

72. Lejnieks, *The Nomenclature of Treaties: A Quantitative Analysis*, 2 TEXAS INT'L L.F. 175, 175-88 (1966).

73. *Id.* at 187.

74. *Id.* at 185.

tional lawyers" and the concomitant tendency to "bury ourselves in fine print of exegeses of legal subtleties."[75] In a sense, the plea is an old one — by all means study the trees, but in the process, understand the woods. After all, the further development of a yet fragile law of treaties can be accomplished best by a variety of research techniques capable of elucidating everything from legal minutia to aggregate patterns of state practice.

75. P. ROHN, TREATY PROFILES 10 (1976).