

Report 45

The Treaty Making Process
Reform and the
Role of Parliament

December 1997
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Report/Law Commission, Wellington, 1997

ISSN 0113-2334 ISBN 1-877187-17-8

This report may be cited as: NZLC R45

Also published as Parliamentary Paper E 31AG

Summary of contents

	<i>Page</i>
Letter of transmittal	vii
Preface	ix
1 Introduction	1
2 What is the current treaty making process? The three stages	5
3 What is the current significance of treaty making?	19
4 Calls for a greater role for Parliament	30
5 What are the issues for the treaty negotiation and acceptance stages if Parliament's role is changed?	34
6 The treaty implementation stage: the practice and issues	51
7 Law Commission recommendations: a greater role for Parliament and others	58
Appendices	
A Overseas practice and experience of treaty making and implementation	83
B Internet websites relevant to treaties and treaty making	120
Bibliography	127
Index	137

Contents

	<i>Para</i>	<i>Page</i>
Letter of transmittal		vii
Preface		ix
1 INTRODUCTION	1	1
Recommendations	7	3
2 WHAT IS THE CURRENT TREATY MAKING PROCESS? THE THREE STAGES	8	5
The treaty making stages and the separation of powers	8	5
Treaty negotiation and acceptance	11	6
Parliament's role	25	12
Implementation	33	14
The courts	37	15
3 WHAT IS THE CURRENT SIGNIFICANCE OF TREATY MAKING?	43	19
The internationalisation of law, globalisation and sovereignty	44	19
“Democratic deficit”	57	24
Concerns expressed by Māori	59	25
4 CALLS FOR A GREATER ROLE FOR PARLIAMENT	70	30
5 WHAT ARE THE ISSUES FOR THE TREATY NEGOTIATION AND ACCEPTANCE STAGES IF PARLIAMENT'S ROLE IS CHANGED?	79	34
The treaty making doctrine	81	34
The role of the courts	87	37
The “democratic deficit” and limitation of future governments	94	40
Consultation	99	42
Timing – urgency, flexibility, confidentiality	109	45
Treaty definition/type	113	47

	<i>Para</i>	<i>Page</i>
6	THE TREATY IMPLEMENTATION STAGE: THE PRACTICE AND ISSUES	123 51
	A No legislation is required	128 52
	B The statute gives direct effect to the treaty text	129 52
	C Some treaty wording is incorporated into the body of the law	132 53
	D The substance of the treaty is incorporated into the body of the law without any obvious sign that it has happened	134 54
	E Authority is delegated to implement the treaty	136 54
7	LAW COMMISSION RECOMMENDATIONS: A GREATER ROLE FOR PARLIAMENT AND OTHERS	142 58
	Recommendation 1	144 58
	Early notification and consultation	145 59
	Recommendation 1A	150 60
	A Treaty Committee role	151 60
	Statement to the House	161 64
	Recommendation 2	162 65
	Relevant House discussion and debate	163 65
	Tabling of treaties	165 66
	Tabling of urgent treaties	176 70
	Resolution by the House	178 71
	Recommendation 2A	179 71
	Treaty impact statements	180 71
	Legislative requirements	187 74
	Addressing Māori concerns	193 75
	Recommendation 3	195 76
	Implementation	196 76
	Courts	204 79
	Conclusion	205 80

APPENDICES

A	Overseas practice and experience of treaty making and implementation	A1	83
	Australia	A2	84
	The United Kingdom	A27	96
	France	A38	101
	The Netherlands	A45	103
	The United States	A65	109
	Switzerland	A82	114
	Canada	A92	117
B	Internet websites relevant to treaties and treaty making	B1	120
	Bibliography		127
	Index		137

19 December 1997

Dear Minister

I am pleased to submit to you Report 45 of the Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*. This is the Commission's second report directly on matters pertaining to New Zealand's international obligations.

Interest in the treaty making process has grown within New Zealand with recognition that the issues are of major public importance, affecting not only our foreign relations and trade but much of our domestic law and economy. The Commission is aware of the many sectors who participate or maintain an interest in the treaty making process and has canvassed opinion across a wide range so as to include all issues in this report. The responses have been numerous and substantial, reinforcing the importance of the issues and demonstrating the depth of knowledge and experience in this sphere that New Zealand enjoys.

Treaty making is in truth a major element of our lawmaking process – of increasing importance as globalisation burgeons – with which our constitutional arrangements have not kept pace. We have attempted to identify the significant factors and suggest means of striking a new balance among them. In view of the topicality of this matter, as well as offering three main and two subsidiary recommendations for change, the Commission has sought to present much of the information received as a public resource.

We trust that this report will assist members of Parliament and public with both broad background information and focused direction for development of the treaty making process.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Preface

THE TREATY MAKING PROCESS: REFORM AND THE ROLE OF PARLIAMENT (NZLC R45 1997) continues the Law Commission's work in public law. It forms part of the International Obligations Project which aims to improve the awareness of international law in New Zealand, including New Zealand's international rights and obligations and the means by which these are created.

This report builds on the material gathered in the earlier Commission report, *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996). That document provides useful background information for this publication – in particular Part 1 covers: What is a treaty? How are treaties negotiated and agreed to? How are treaties given effect to at the international level? The character of the relationships under treaties; The implementation of treaties through national legislation; and The implementation of treaties through the courts.

In 1993 the Law Commission first circulated a draft report, *The Making, Acceptance and Implementation of Treaties: Three Issues for Consideration*, written for the Commission by its then President, Sir Kenneth Keith. The responses to the draft report's proposals were in the main supportive. In 1997 the Foreign Affairs, Defence and Trade Select Committee asked the Commission to make a submission on its Proposed Inquiry into the Role of Parliament in the Implementation of Treaties. This report builds upon and finalises the material contained in that draft report and submission. It also conforms with the Law Commission's statutory responsibility under s 5(b) and s 5(d) of the Law Commission Act 1985 to recommend development of the law of New Zealand and, importantly, to make it as understandable and accessible as is practicable.

In the preparation of this report the Commission is indebted to the following people for their valuable assistance and perceptive comments: Hon Justice Sir Kenneth Keith, Court of Appeal; Mr Don MacKay, Deputy Secretary of the Ministry of Foreign Affairs and Trade; Mr David McGee, Clerk of the House of Representatives; Sir Geoffrey Palmer, Chen & Palmer; Mr FA Small, former Director of Legal Division, Ministry of Foreign Affairs and

Trade (Retired); Mr Alan Bracegirdle, Office of the Clerk of the House of Representatives; Mr Mark Gobbi, Ministry of Justice; Ms Carolyn Coll-Bassett, lawyer (on leave), Ministry of Foreign Affairs and Trade; Associate Professor Scott Davidson, University of Canterbury; Mr John Dawson, Senior Lecturer, University of Otago; Mr Terence O'Brien, Centre for Strategic Studies, Victoria University of Wellington; Ms Janet McLean, Director, Public Law Institute, Victoria University of Wellington; Ms Melissa Poole, Senior Lecturer, Victoria University of Wellington; Professor Mike Taggart, University of Auckland; Mr Paul Rishworth, Lecturer, University of Auckland. The Commission also acknowledges the work of Diana Pickard, a legal researcher who completed much of the research and drafting of the report.

1

Introduction

1 **I**N THE LIFETIME OF ADULT NEW ZEALANDERS the world has shrunk. Our oceans no longer insulate us from other states. Our traders have instant electronic communication with business partners across the world.¹ Our economy and way of life are dependent on decisions and events remote from our shores concerning international bio-safety, international crime, multilateral trade negotiations, conflict resolution and much else. We are citizens of the world community of nations, playing our part in achieving a secure future for New Zealand and the other inhabitants of this planet. This is the United Nations Decade of International Law.²

2 As a small player in a global game we are acutely affected by events elsewhere.³ Prominent among these is the great number of international treaties by which nations regulate their affairs and which increasingly pre-empt the opportunity for inconsistent conduct by states.⁴ Such treaties are created as a matter of international law, but have effect as part of our domestic law through domestic legislation.⁵ It is unlawful at international law for a state to legislate

¹ See Heath, "A Legal Infrastructure for Electronic Commerce?", Paper for the Asia Pacific Economic Law Forum, Christchurch, 6 December 1997. As that paper indicates the Law Commission has in 1997 started a project on electronic commerce and international trade.

² 1990–1999.

³ See Ministry of Foreign Affairs and Trade, *Report of the Ministry of Foreign Affairs and Trade for the year ended 30 June 1997*, 1997 AJHR A.1, 10–13.

⁴ The outstanding example is New Zealand's founding document, the Treaty of Waitangi. See also the Ministry of Foreign Affairs and Trade recent publications, as part of the New Zealand Treaty Series: *New Zealand Consolidated Treaty List as at 31 December 1996: Part One (Multilateral Treaties)* 1997 AJHR A.263, and *New Zealand Consolidated Treaty List as at 31 December 1996: Part Two (Bilateral Treaties)* 1997 AJHR A.265.

⁵ The focus of the report upon the treaty making process requires discussion of both international and domestic law. It is therefore useful to distinguish the two. International law is created outside New Zealand and governs the relations between international persons such as states and international organisations. Domestic law on the other hand (which may also be referred to as national or municipal law) is created within a state and regulates the relations of its citizens with each other and with the executive. It may apply to foreign

domestically in a manner inconsistent with the international obligations it has assumed under treaties.

- 3 As yet our institutions have failed to adapt to these changes. We maintain the practice stated definitively by the Privy Council 6 decades ago:

Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.⁶

By such practice we leave foreign affairs to the executive, and maintain the theory that our Parliament is supreme and if necessary can through legislation override any executive decision. In fact if the executive binds New Zealand by treaty there is little that Parliament can do – the consequences of infringing international obligations are unthinkable.

- 4 We also adhere, for the most part, to the view that creation of public policy is properly the function of Parliament rather than the courts. But while the courts must give effect to the statute law enacted by Parliament there are wide tracts in which Parliament has not spoken, and in which the courts in order to decide the case must make a decision as to what principles should guide them. To do so without reference to international law and New Zealand's obligations would be unwise.⁷ Yet the result may be the creation of

states acting in a non-governmental capacity. Many domestic statutes give effect to treaty provisions or empower the government to give effect to them. This might be through the adoption of standard setting instruments such as United Nations resolutions or declarations, or through the adoption of legally binding instruments. Treaties are the primary medium for the creation of rights and the assumption of obligations by states: Brownlie, *Principles of Public International Law* (4th ed, Clarendon Press, Oxford, 1990), 33. (See the Law Commission's *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996), appendix C, "Statutes with possible implications for New Zealand treaty obligations".) This expression of two legal systems, international and domestic, is the dualist theory of law. The monist theory of law, that contends there is just one system of law containing international and domestic elements and in which the international law is supreme even within the domestic sphere, is not recognised by New Zealand courts. See also Higgins, *Problems & Process: International Law and How We Use it* (Clarendon Press, Oxford, 1994), chapter 12.

⁶ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347–348 (a Canadian case often referred to as the *Labour Conventions* case).

⁷ See Perry, "At the intersection – Australian and International Law" (November 1997) 71 ALJ 841. See also the International Law Commission's "Draft Articles on State Responsibility with Commentaries Attached" (1997).

law in an important sphere which Parliament, representing the people, has not properly considered.

- 5 It is therefore unsurprising that there is currently much debate as to the role that Parliament and others in New Zealand should play in the treaty making process, and that in New Zealand, Australia and elsewhere there have been calls for a review of existing law and practice. The debate encompasses elements of globalisation, sovereignty, the separation of powers (among the executive, Parliament and the judiciary) and, in New Zealand, the importance of the Treaty of Waitangi. The nub of the debate is:

Given the increasing amount of treaty making, and the interests of the democratic process, should New Zealand adapt its practices to allow Parliament and others more involvement in the treaty making process?

- 6 This report first outlines the three stages of the current treaty making process. It then looks at the current significance of treaty making given the forces of globalisation. The report then mentions some of the current calls for change in the treaty making process and considers the issues involved. The final chapter contains the Law Commission's recommendations. In addition, appendices detail overseas treaty making practice and relevant internet websites.

RECOMMENDATIONS

- 7 The Hon Justice Sir Kenneth Keith, in his 1993 draft of this report *The Making, Acceptance and Implementation of Treaties: Three Issues for Consideration*, made three major proposals which are the three main recommendations in this report. In addition to endorsing and reasserting those proposals the Commission expands upon these main recommendations with further subsidiary recommendations as follow:

- RECOMMENDATION 1 – That the value of notification and consultation with Parliament and interested or affected groups at the negotiating stage of the treaty making process be recognised, with the purpose of developing and formalising such practices.
- RECOMMENDATION 1A – That consideration be given to the establishment of a Treaty Committee of Parliament.
- RECOMMENDATION 2 – That consideration be given to the introduction of a practice of the timely tabling of treaties so that the members of the House of Representatives can determine whether they wish to consider the government's proposed action.

- RECOMMENDATION 2A – That consideration be given to the preparation of a treaty impact statement for all treaties to which New Zealand proposes to become a party.
 - RECOMMENDATION 3 – That, so far as practicable, legislation implementing treaties or other international instruments give direct effect to the texts (that is, use the original wording of the treaties), and that when that is not possible, the legislation indicate in some convenient way its treaty or other international origins.⁸
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⁸ See detail in [chapter 7](#). See also *A New Zealand Guide to International Law and its Sources*, and the Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (Report 6, Wellington, 1991) appendix E, “Treaties: what are they, what do they do, how are they made and how are they given effect?”.

2

What is the current treaty making process? The three stages

THE TREATY MAKING STAGES AND THE SEPARATION OF POWERS

- 8 **T**HE TREATY MAKING PROCESS involves three stages: negotiation; acceptance; and implementation. The way these three stages function is connected to the constitutional separation of powers in New Zealand.⁹ Treaty making stages one and two, negotiation and acceptance, have been and at present remain the task of the Executive, the organ of government which “embraces the administrative powers and functions of central government and includes all the government departments under ministerial control”.¹⁰
- 9 Under the separation of powers Parliament is the second organ of government, exercising its dual “functions of law-making and holding to account the political Executive”.¹¹ Under the first function – lawmaking – Parliament is involved in the final stage of the treaty making process, that of implementation.¹² When the

⁹ The formalisation of the role of the Sovereign and of the separation of powers in New Zealand can be seen in the provisions of the Constitution Act 1986 ss 6–24.

¹⁰ Joseph, *Constitutional and Administrative Law in New Zealand* (Law Book Company Limited, Sydney, 1993), 5. See [para 11](#) of this report for detail of who may have treaty making powers.

¹¹ Joseph, 5. The debate over how far these functions of Parliament should extend can be seen in [paras 79–98](#). The Constitution Act 1986 reaffirms constitutional principles about parliamentary control of public finance, in that the Crown may not levy taxes, raise loans, or spend public money except by or under an Act of Parliament.

¹² Parliament is very rarely involved in the second, acceptance, stage of treaty making – see [paras 25–32](#).

implementation of treaty obligations involves the passage of domestic legislation, Parliament's role is readily apparent.

- 10 The third organ of government, the judiciary, which “exercises powers for adjudicating disputes according to the law including disputes between individuals and the state”,¹³ is increasingly involved in the construction of statutes which fulfil or may fulfil New Zealand's international obligations and in developing the common law, and in that capacity is involved in the third stage of treaty making – treaty implementation.

TREATY NEGOTIATION AND ACCEPTANCE¹⁴

- 11 Various representatives of the state (such as the Head of State, Head of Government, Minister of Foreign Affairs and Trade, heads of diplomatic missions, and representatives accredited to international conferences or organisations) have an authority at international law (recognised by article 7 of the Vienna Convention on the Law of Treaties 1969)¹⁵ to negotiate and adopt or authenticate the text of a treaty. Other officials may also be given specific authority to undertake a negotiation or to agree to a treaty text.¹⁶ Such conduct, and the resulting treaty, does not have effect in the domain of domestic law until incorporated into it by Parliament.

¹³ Joseph, 5; the role of the courts is considered further in [paras 37–42](#) of this report.

¹⁴ For an historical perspective on New Zealand's treaty making ability and process see appendix 2 “Treaties, Conventions and Trade Agreements” in Ringer, *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991), 320. Much of the material in this and the following paragraphs has already been published in the Law Commission's *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996), paras 27–33, and in the Legislation Advisory Committee's *Legislative Change: Guidelines on Process and Content*, Report 6, Wellington, 1991, appendix E, “Treaties: What are they, What do they do, How are they made, and How are they Given Effect?” (Law Commission 1991).

¹⁵ The Vienna Convention on the Law of Treaties 1969 is reproduced in appendix A in *A New Zealand Guide to International Law and its Sources*. It is also available on several Internet websites – see [appendix B](#) of this report. New Zealand is a party to the Vienna Convention and is therefore bound by the rules it established.

¹⁶ This latter authority is usually conferred under a formal written authority called an instrument of “full powers” – which may also be issued on occasion to persons who have the intrinsic authority mentioned above: Small,

- 12 The established doctrine is stated by the Privy Council in the 1937 case *Attorney-General for Canada v Attorney-General for Ontario* as:

It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. . . .

Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the Executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its Executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.¹⁷

correspondence, 20 October 1997. Article 2(1)(c) of the Vienna Convention defines full powers as “a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of a State to be bound by a treaty, or for accomplishing any other act with respect to a treaty”. Further, article 7(1) (Full powers) states that a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if he produces appropriate full powers, or it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes. Article 7(2) lists those considered as representing their State without having to produce such full powers. It should be noted that “in international practice these days full powers really refers only to the instrument that states issue authorising a named representative to sign a treaty. It does not have anything to do with the negotiation or authentication of treaty texts”: Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

¹⁷ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347–348. The case concerned the limitation of the federal power to implement international obligations in areas of provincial jurisdiction without provincial co-operation. It is considered further in [paras 81–86](#).

13 The House of Lords has recently reaffirmed this proposition, that:

The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.¹⁸

14 As the Privy Council made clear, the making of a treaty is an executive act. One model of treaty negotiation and conclusion can be seen in Lord McNair's *The Law of Treaties*.¹⁹ The reports of the Ministry of Foreign Affairs and Trade for the period 1990–1995 now show the New Zealand Government as engaging in an average of 13 multilateral and 17 bilateral treaty actions per year, encompassing a great diversity of subjects.²⁰ The Ministry's report for the year 1996–1997 shows 20 bilateral and 15 multilateral treaty actions.²¹

15 In practice in New Zealand the basic model of treaty making involves a mixture of Ministry of Foreign Affairs and Trade (MFAT) standard practice and convention as follows:²²

- negotiation of treaty texts by the Minister of Foreign Affairs or officials from MFAT;
- Cabinet approval of the terms negotiated; and
- signature by New Zealand's representative.

¹⁸ *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476. See also *Maclaine Watson & Co Ltd v International Tin Council* [1988] 1 Ch 1; *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] 1 Ch 72, 253, 286; *Re International Tin Council* [1989] 1 Ch 309; Keith, "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37, 44.

¹⁹ McNair, *The Law of Treaties* (Clarendon Press, Oxford, 1961), see in particular part 1, "The Conclusion of Treaties".

²⁰ *New Zealand Consolidated Treaty List as at 31 December 1996: Part Two (Bilateral Treaties)* 1997 AJHR A.265, 10.

²¹ Report of the Ministry of Foreign Affairs and Trade for the year ended 30 June 1997, 1997 AJHR A.1, 36–41.

²² Comment from meeting between the Law Commission and the Deputy Secretary, Ministry of Foreign Affairs and Trade, Don MacKay. The Ministry of Foreign Affairs and Trade does not have a formal manual on treaty making processes (eg, negotiation processes). The Legal Division has, however, set out various 'general instructions' on treaty making for staff. (The Law Commission was not able to obtain copies of these general instructions as MFAT advised that the instructions were in the process of being rewritten, September 1997).

Some treaties, however, are negotiated by Ministers or officials from Ministries other than Foreign Affairs, for example, the Ministry for the Environment concerning global environmental standards or the Ministry of Justice concerning criminal justice matters.

- 16 The convention of Cabinet approval of terms negotiated is detailed in the *Cabinet Office Manual* which notes:

Cabinet is the central decision-making body of Executive government. Its role is to take decisions in a wide range of areas including . . . ratification of international treaties and agreements . . . (para 3.1)

and

Any action to sign, ratify or accede to a treaty also must be submitted to Cabinet for approval. The text of the treaty must be attached to the Cabinet paper. (para 3.11)²³

- 17 In practice a treaty may be negotiated in a number of ways:
- between the representatives of the two states immediately concerned;
 - at a conference of the interested states for the purposes of negotiating that particular text (as in the aftermath of a war); or
 - within an established international framework which may be regional (such as the South Pacific Forum), or universal (as with the United Nations and its agencies).

- 18 In some circumstances the representatives may be those not only of governments but of international organisations – NGOs (non-governmental organisations) – or of countries which are not yet fully independent.²⁴ The International Labour Organisation is unique in providing for tripartite representation at its conferences, involving representatives of employers and unions as well as governments.

- 19 As a matter of international law treaties come into force and take effect according to their own terms. There is a distinction between two types of treaties. First, there are treaties which become binding as a result of signature affixed at the completion of the negotiation.

²³ Attaching the text of the treaty to the Cabinet paper is a recent requirement of the Cabinet Office rather than a practice of long standing, and is apparently not, for practical reasons, followed in the case of large treaties: Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

²⁴ See further Chinkin, "Global Summits: Democratising International Law-Making?" (1996) 7(4) Public LR 208.

These take effect simply on *signature*, and are commonly more simple bilateral agreements. The effective date is sometimes postponed to enable appropriate administrative or legislative steps (especially by way of subordinate instrument) to be taken. Secondly, there are treaties which require a further step to be taken after the text has been established (by signature in the case of a bilateral treaty or by adoption by a conference of a multilateral text) and before the treaty will take effect. These treaties are in general more important: they often require legislative implementation; and many are multilateral.

- 20 It is only rarely the case in New Zealand that a treaty is signed upon the conclusion of the negotiations since this step requires some detached consideration of the text and Cabinet approval. Bilateral treaties may be initialled²⁵ upon conclusion of negotiations and prior to Cabinet approval being obtained for signature. In the case of multilateral treaty negotiations, it is common for a Final Act to be prepared which records the results of the treaty negotiations and will generally be signed by delegations. Signature of the treaty itself (usually subject to subsequent ratification) will follow later.²⁶
- 21 Because the final acceptance of more important or complex treaties may require substantial changes in governmental policy or in national law, they may be signed as a means of ensuring the treaty's authenticity and demonstrating New Zealand's intention to be bound by the treaty. The treaty does not become binding until the state in question takes the further step, most commonly referred to as *ratification*. In other words, in some cases signature may represent no more than a concrete expression of an intention to *ratify* the treaty in the future. Signing does, however, imply the obligation to refrain from acts which would defeat the object and the purpose of the treaty.²⁷ Ratification is one name given to action that states may take to bind themselves legally to a treaty text, other actions are named *acceptance* or *approval*. For example, multilateral treaties fairly routinely offer ratification for those who

²⁵ "Signature has as one of its functions that of text authentication, but a text may be authenticated in other ways, for example . . . by initialling": Brownlie, *Principles of Public International Law* (4th ed, Clarendon Press, Oxford, 1990), 606.

²⁶ Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

²⁷ See article 18 of the Vienna Convention on the Law of Treaties detailed in [para 24](#).

have signed the treaty and accession or acceptance for those who have not. The term ratification should not be used for implementation in national law.²⁸

Ratification, acceptance, approval and accession are accomplished by passing to the other party (or to the depositary of a multilateral treaty) a formal instrument to that effect, generally under seal, and executed, in New Zealand's case, by the Minister of Foreign Affairs who is also responsible for the execution of formal Instruments of Full Powers authorising the signature of treaties on behalf of the Government of New Zealand. All such actions (including signature whether or not subject to ratification, etc) require prior Cabinet approval.²⁹

- 22 In general, treaties create binding obligations only between or among states which become parties to them.³⁰ Article 34 of the Vienna Convention on the Law of Treaties, for example, makes it clear that “[a] treaty does not create either obligations or rights for a third State without its consent”. Those states which have not become parties to a treaty by original signature followed by ratification or acceptance, but which wish to become party to it, may have the right accorded under the treaty to *accede* or *adhere* to the text and thereby become bound by it.³¹ A state becoming a party to a multilateral convention may be able to formulate *reservations*, indicating that it will not be bound by one or other of

²⁸ *Legislative Change: Guidelines on Process and Content*, appendix E; MFAT, *New Zealand Consolidated Treaty List as at 31 December 1996: Part One (Multilateral Treaties)* 1997 AJHR A.263, 17.

²⁹ *New Zealand Consolidated Treaty List: Part One (Multilateral Treaties)*.

³⁰ One exception is customary international law derived from a treaty which is binding on all nations: *North Sea Continental Shelf Cases (Denmark and The Netherlands v Germany)* [1969] ICJ Rep.1; *Paramilitary Activities Case (Nicaragua v USA)* [1986] ICJ Rep.14. International practice may have initially developed under the auspices of a (multilateral) treaty but as the custom develops the obligation eventually applies to non-signatory parties as well. Article 38 (1)(a) and (b) of the Statute of the International Court of Justice states that the court shall, in determining disputes in accordance with international law, apply international conventions, and international custom as evidence of a general practice accepted as law. A further exception is that a state may have an actual right arising from a treaty to which it is not a party – see Articles 36–38 of the Vienna Convention; for example, New Zealand was not a party to but enjoyed third party benefits under the 1972 ‘Protocol 18’ (EEC and butter imports to the UK). Brownlie, *Principles of Public International Law* (4th ed, Clarendon Press, Oxford, 1990), 3; Higgins, *Problems & Process: International Law and How We Use it* (Clarendon Press, Oxford 1994), 210; Davidson, correspondence, 16 October 1997; Small, correspondence, 20 October 1997.

³¹ *Legislative Change: Guidelines on Process and Content*, 79–80.

the provisions.³² (A complex regime regarding and controlling the lodging of reservations is set out in Articles 19–23 of the Vienna Convention.)

- 23 All the actions just mentioned are actions at the international level. Whether they also make any change to domestic law is a matter for the national constitutional system. In some countries they do. In others, including New Zealand, they do not – as the Privy Council in *Attorney-General for Canada v Attorney-General for Ontario* made clear.
- 24 The post-negotiation stage, acceptance, is also controlled by the Vienna Convention on the Law of Treaties. For example, Article 18 of the Convention details that

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

PARLIAMENT'S ROLE

- 25 The decision in *Attorney-General for Canada v Attorney-General for Ontario* outlines the conventional doctrine that it is the Executive's role to govern and to enter into treaty negotiations/creation, and Parliament's role to monitor the executive with appropriate checking, reporting and approval processes. In addition the performance of treaty obligations, if they involve changes to the existing domestic law, will require action by the legislature.
- 26 A senior MFAT official has described this latter action in New Zealand as follows:

It is suggested that Parliament has no choice but to pass the necessary legislation or it will leave New Zealand in default of its treaty obligations. This is not so. The executive does not take binding treaty action until the necessary legislation has been passed. The legislation comes first, not the treaty action. Indeed, competing pressure on the legislative programme can prevent the Executive becoming party to

³² See article 19 of the Vienna Convention on the Law of Treaties.

treaties within the time frame it might prefer. In practice, therefore, Parliament can constrain the Executive's power by refusing to pass any necessary legislation. If it refuses to pass the legislation, then the Executive cannot take action to bind New Zealand to the treaty.³³

- 27 There is a further consideration in respect of the treaties subject to additional steps such as ratification. They are more likely to require legislative implementation than those which become binding as a result of signature. One reason for such legislation may be that the treaty's substantive provisions would affect the rights and duties of individuals or entities under the law of New Zealand in a way not currently provided for with compliance unachievable by other than legislative means (such as by instructing a Government Department to act in a way conforming with the undertakings given in the treaty).
- 28 If the implementing legislation is to be considered by Parliament (which is not always the case, as appears from the bilateral examples – some of which can be implemented by Order in Council), the House thereby receives an opportunity to scrutinise the proposed executive action of accepting the treaty.³⁴ The *Cabinet Office Manual* (1996) requires Ministers when proposing new legislation to Cabinet and its committees to report on the proposal's compliance with New Zealand's international treaty obligations. The process of checking draft legislation against the provisions of the New Zealand Bill of Rights Act 1990 (with the s 7 reports to the House) also often raises treaty compliance issues since that Act closely follows the International Covenant on Civil and Political Rights.
- 29 But for some very significant treaties the opportunity for the House to scrutinise the proposed executive action will not arise. Often the assessment is made that the domestic law already complies with the treaty or that the government can enter certain reservations to the acceptance. Such reservations can cover any

³³ MacKay (Deputy Secretary, MFAT), "Treaties – A Greater Role For Parliament?" (1997) 20(1) Public Sector 6. The Ministry of Justice has noted in relation to this practice, however, that Parliament rarely takes legislative action contrary to Cabinet's expectations and that the practice is not always followed: Gobbi and Barsi, "New Zealand's Treaty-Making Process: Understanding the Pressures and Proposals for Reform (Draft No 3)", (Strategic Assessment Group, Ministry of Justice, Wellington, 1997), 25; see also [paras 94–98](#) on related issues.

³⁴ This presumes that it is clear that the legislation implements a treaty and the precise nature of the treaty obligations involved.

situations of domestic non-compliance with the treaty obligations.³⁵

30 That lack of opportunity for the House to scrutinise proposed action occurred with the two human rights covenants (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights).³⁶ It was also the case with the two Optional Protocols to the latter Covenant, and also to the Convention on the Rights of the Child (where rather than no legislation being assessed as necessary to implement the Convention, reservations were used to meet the legislative deficiencies).

31 As stated by a senior MFAT official:

Not all treaties, however, require legislation for their implementation. Many treaties can be implemented without any change to existing law, because domestic law is already consistent with obligations in the treaty. Quite often, too, treaties can be implemented through regulations or by administrative action. In such instances the treaties concerned do not go to Parliament before the treaty action is taken, although Parliament is subsequently informed of the action.³⁷

32 Treaties are also tabled in the House of Representatives. As the Ministry of Justice has noted:

Currently, the executive, approximately twice a year, tables in the House the treaties that it has executed. They are tabled in bulk without any explanatory material. The government of the day rarely sets aside time to discuss any of these treaties.³⁸

IMPLEMENTATION

33 The role of Parliament is clear in relation to the third stage of the treaty making process – implementation through domestic legislation. It is to be noted that Article 27 of the Vienna Convention stipulates that states cannot excuse non-compliance by reference to inadequate national law.

³⁵ In effect, such treaties may be described as self-executing, although not in the strict legal sense. See further [paras 130–131](#) and material in [appendix A](#).

³⁶ Except that is for legislative amendments focused on two specific issues.

³⁷ MacKay, 6.

³⁸ Gobbi and Barsi, 30–31.

- 34 Implementation begins with the conventional proposition that a treaty, when accepted by the Executive, does not by that fact alone become part of the domestic law of New Zealand. It is assumed that legislation is required if the treaty is to become part of that law and, in particular, if it is to directly affect the rights and duties of individuals.³⁹
- 35 Legislative change is performed in the constitutionally appropriate ways, by Parliament or one of its delegates, and not by the prerogative or other executive action. The matter then becomes one of choice of legislative method and techniques; for example, how is the legislation to be drafted – by giving direct effect to the treaty text or using another form of drafting?
- 36 Legislative practice and the relevant commentary indicate four broad approaches to legislation in the context of treaty implementation: no legislation is required; the statute gives direct effect to the treaty text using the “force of law” formula;⁴⁰ the statute uses some of the wording of the treaty; or the substance of the treaty is incorporated into the body of the law. A further option is for primary legislation to authorise the making of subordinate legislation (regulations or rules) which is to give effect to identified treaties.⁴¹

THE COURTS

- 37 While the courts are not involved directly in the treaty making process, they are increasingly involved in the results, for example, in the construction of and decisions concerning statutes which fulfil or may fulfil New Zealand’s treaty obligations. In that sense the courts can become part of the general process of treaty implementation.

The extent to which treaty obligations may be examined or analysed in domestic courts, or give rise to claims in domestic courts, is a matter for domestic law. The existence of the treaty obligations as a commitment between the state parties thereto is a matter for international law.⁴²

³⁹ But the assumption is increasingly challenged – see discussion of issues concerned with the role of the courts in [paras 87–93](#).

⁴⁰ See description of this term in [paras 129–131](#).

⁴¹ See detail on implementation in [chapter 6](#).

⁴² Higgins, 210.

38 It is established in New Zealand that treaties do not, as in the United States of America, have direct effect upon our domestic law⁴³ – recall the House of Lords statement:

International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation.⁴⁴

39 Nor have New Zealand courts followed the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273⁴⁵ and held that the execution of a treaty gives rise to a legitimate expectation that administrative decisions will take into account the international treaty obligations.

40 It is well settled that to the extent that New Zealand domestic law may be uncertain, that uncertainty should be resolved in a way that avoids contravention of New Zealand's international obligations.⁴⁶ In *Tavita v Minister of Immigration* [1994] 2 NZLR

⁴³ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308; [1941] NZLR 590. See also Keith, "The Treaty of Waitangi in the Courts" (1990) 14 NZULR, 37, 44–45, which notes that the New Zealand courts have adopted this position specifically in respect of the Treaty of Waitangi with Myers CJ in the Court of Appeal in *Tukino* ([1939] NZLR 107, 120) stating "[a] treaty only becomes enforceable as part of the municipal law if and when it is made so by Legislative authority". The article further notes that on appeal in that case the Privy Council (AC 308, 324; NZLR 590, 596–597) was persuaded by Mr AT Denning KC that "[i]t is well settled that any rights purporting to be conferred by such a treaty of session cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law". This statement is cited in later cases, notably *New Zealand Māori Council v A-G* [1987] 1 NZLR 641, 655, 667–668, 691, 715.

⁴⁴ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.

⁴⁵ See Perry, "At the intersection – Australian and International Law" (1997) 71 ALJ 841. *Teoh* has been cited in the following New Zealand cases: *Attorney-General v Transport Accident Investigation Commission* (unreported, HC, Wellington, 18 December 1996 CP 164/96 CP 180/96); *Lawson v Housing NZ* [1997] 2 NZLR 474; *Patel v Chief Executive of Department of Labour* [1997] 1 NZLR 102 (see also unreported, 5 March 1997, CA 220/96); *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538; *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140; and *Elika v Minister of Immigration* [1996] 1 NZLR 741.

⁴⁶ See *Mortensen v Peters* 1906 SLT 227. See also Bennion, *Statutory Interpretation* (2nd ed, Butterworths, London, 1992), 564. It should be noted that liability for failure to comply with or give effect to New Zealand's international obligations is at the international level in relation to the other parties to the treaties: Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

257, which related to a binding provision in the Convention on the Rights of the Child unincorporated in domestic law, Cooke P (as he then was) observed that

[t]he law as to the bearing on domestic law of international human rights, and instruments declaring them, is undergoing evolution. For the appellant Mr Fliegner drew our attention to the Balliol Statement of 1992⁴⁷ . . . with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. . . . A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.⁴⁸ [footnote added]

The court was critical of any suggestion which might imply that New Zealand's adherence to international instruments was at least partly "window dressing".

41 More recently the Court of Appeal in *New Zealand Airline Pilots' Association Inc v Attorney-General*⁴⁹ considered a relevant provision in the Chicago Convention on civil aviation. Although the particular convention provision was not binding (expressed in "may" rather than "shall" terms) and did not form part of domestic law, the court held that so far as the wording of legislation allows,

⁴⁷ The full text of which appears in 67 ALJ 67. It has since been reaffirmed in the Bloemfontein Statement of 1993 (in turn followed and reaffirmed by the Georgetown Statement).

⁴⁸ *Tavita* considered the import of the UN Convention on the Rights of the Child. This Convention was also considered in the United Kingdom case *R v Sec of State, ex p Venables* [1997] 3 All ER 97 where Lord Browne-Wilkinson stated that

the United Kingdom (together with 186 other countries) is a party to the UN Convention on the Rights of the Child. . . . The Convention has not been incorporated into English law. . . . But it is legitimate in considering the nature of detention during Her Majesty's pleasure . . . to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country. Article 3.1 requires that in the exercise of administrative as well as court powers the best interests of the child are a "primary consideration".

See also *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538; *Rajan v Minister of Immigration* [1996] 3 NZLR 543, 551; *Wellington District Legal Services Committee v Tangiora* (unreported, 10 September 1997, CA 33/97).

⁴⁹ Unreported, 16 June 1997, CA 300/96; 301/96; see also *Butler v Attorney-General & Refugee Status Appeals Authority* (unreported, 13 October 1997, CA 181/97).

the legislation should be read in a way consistent with New Zealand's obligations. Further, such an interpretation applies whether or not the legislation was enacted with the purpose of implementing the relevant text.

- 42 In summary, when considering the treaty making process, it should not be thought that a treaty which has not been the subject of legislation is irrelevant to the New Zealand legal system.⁵⁰
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⁵⁰ See *A New Zealand Guide to International Law and its Sources*, paras 65–73. See further Bennion, 564–569. Issues related to the role of the courts are discussed in [paras 87–93](#).

3

What is the current significance of treaty making?

- 43 **T**HE BROADER CONTEXT for the treaty making process, and therefore for this report, is the internationalisation of the law, the forces of globalisation, and matters of sovereignty and democratic deficit. These provide compelling reasons for re-examining the treaty making process at the end of the 20th century.

THE INTERNATIONALISATION OF LAW, GLOBALISATION AND SOVEREIGNTY

- 44 The world is being affected in massive ways by major developments in science and technology, on the environmental front, in ecology, trade and financial arrangements, communications, agriculture, food and health, population growth and movement, methods of warfare, ideology and political arrangements – to mention some matters at this extraordinary time. These changes have been occurring incrementally for a very long time, gradually at first:

After a very long period of gradual globalisation, the era post World War II was characterised by an enormous surge of new issues or technologies and their potential for increasing co-operation or antagonism, and by a dramatic increase in the number of independent sovereign states which again must either co-operate or antagonise.⁵¹

- 45 Witness the expansion of the international community from the 50 founder member states of the United Nations, to the membership as at 31 May 1997 of 185 states. Another indication is that in 1950 New Zealanders, in the course of the whole year, made 5,793 overseas telephone calls, or just under 16 a day (figures from the Post Office records). When the information was last

⁵¹ Small, correspondence, 20 October 1997. Note, however, that in one day of 1938 the Government ratified 22 conventions of the International Labour Organisation which was “an intervention on the co-operative treaty front which we have never subsequently equaled”.

publicly available the *daily* figure had reached 100,000 (not including faxes and emails).⁵²

46 Those changes have a legal reflection in a vast range of treaties among other sources of international law. The United Nations treaty lists show that two treaties (at least) are signed every day. In accordance with the principle, stated by President of the United States, Woodrow Wilson, at the end of World War I, that covenants are to be “open”,⁵³ well over 30,000 treaties have been registered with the United Nations.⁵⁴ Those treaties limit the powers of states in multifarious ways.⁵⁵

47 As noted in the *Cabinet Office Manual*⁵⁶

[m]ajor changes in . . . trade patterns, . . . financial systems, . . . the environment and many other matters of international concern mean that more and more law is made through international processes. The powers of national governmental institutions are correspondingly reduced. This has important consequences for national and international constitutional processes.

48 The idea of a national Parliament with full power to make whatever law it likes without any constraint from outside, from the rest of the world, was never an accurate one. With the massive changes just mentioned, that idea has become more and more a distraction and an impediment to careful thought about arrangements for lawmaking. Consider, for example, the cautious formulation by the United Nations Secretary-General in his major report to the Security Council in 1992, *An Agenda for Peace*:

⁵² Keith, “Governance, Sovereignty and Globalisation” paper presented at the 1997 5th Biennial Conference of the New Zealand Council of Trade Unions, 3.

⁵³ “Open covenants of peace openly arrived at”, Address to Congress, 8 January 1918. First of *Fourteen Points*.

⁵⁴ Palmer and Palmer, *Bridled Power: New Zealand Government Under MMP*, (3rd ed, Oxford University Press, Auckland, 1997), 301. The obligation to register treaties with the United Nations is contained in article 102 of the United Nation’s Charter and article 80 of the Vienna Convention on the Law of Treaties; Davidson, correspondence, 16 October 1997. The Parliamentary Library in Wellington, as an official repository of international documents, holds copies of all treaties registered with the UN; see further detail on finding treaties in the Law Commission’s *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996), paras 74–107.

⁵⁵ The emphasis in this report on formal treaty making should not obscure the other ways in which international rules and practices get established.

⁵⁶ *Cabinet Office Manual*, (Cabinet Office, Wellington, 1996), 7.

Respect for [the] fundamental sovereignty and integrity [of States] are essential to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. . . . Globalism and nationalism need not be viewed as opposing trends, doomed to spur each other on to extremes of reaction. . . . Respect for democratic principles at all levels of social existence is critical, within States and within the community of States.⁵⁷

49 Further, this statement by a New Zealand Prime Minister:

We live in a globalised world economy. . . . Individual countries, no matter how large or powerful, cannot themselves deal with such transnational issues as climate change, capital flows, resource conservation and drug trafficking. . . . The role of Government in international relations is increasingly one of identifying and aligning self interest with the values most of its electorate hold to be important, and then protecting and projecting those values into its dealings with other Governments and international organisations. . . . In an interdependent world, pure sovereignty – the complete control of one’s own affairs – is not possible.⁵⁸

50 New Zealand, because of its size and position, cannot hope to create all “rules” within its own boundaries and be unaffected by others. New Zealand, for instance, accounts for a mere 0.2–0.3% of the world’s trade.

51 “Globalisation also implies an intensification in the levels of interaction, interconnectedness, or interdependence between the states and societies that constitute the modern world community.”⁵⁹ Consider, for example, the worldwide communication and data trading achieved through the internet.⁶⁰ The United Nations Development Programme’s latest *Human Development Report* (entitled *The Shrinking World*) notes that the use of the internet is

⁵⁷ Boutros-Ghali, *An Agenda for Peace* (United Nations, 1992), paras 17, 19 – a report of the Secretary-General pursuant to the statement adopted by the summit meeting of the Security Council on 31 January 1992. There is a 1995 2nd edition.

⁵⁸ Bolger, address to the Institute of International Affairs Annual Dinner, Wellington, 6 June 1997, 3 and 7.

⁵⁹ Held and McGrew, “Globalisation and the Liberal Democratic State” in Sakamoto (ed), *Global Transformation: Challenges to the State System* (United Nations University Press, Tokyo, 1994), 58–59; Alston, “Reform of Treaty-Making Processes: Form Over Substance”, Alston and Chiam (eds), *Treaty-Making and Australia*, (Federation Press, Sydney, 1995), 3.

⁶⁰ See [appendix B](#) for a list of some of the internet websites relevant to treaties and treaty making.

doubling every year and telecommunications are increasing at 20% per year.⁶¹ The realities of an increasingly globalised world require a shift in the objects and aims of international law itself. The focus of international law was traditionally primarily concerned with the boundaries between countries and the protection of citizens and territory from other states; while the object of modern international law must be co-operation rather than protection.⁶² Correspondingly, treaty making practice has become increasingly important both in the international sphere and in its effect at the domestic level. The means by which New Zealand's own foreign relations are conducted must be considered in that light.

52 The increasing internationalisation of law has had a ripple effect throughout domestic law, both legislation and the common law. The Commission considers accordingly that it is insufficient to continue discussion of treaty making issues solely in terms of the traditional separation of powers – that in New Zealand Parliament makes the law, the executive governs the country within the law, and the judiciary declare and enforce the law. Within that power split, it has traditionally been the executive which negotiates treaties and is politically responsible through checking and reporting processes to Parliament – the law making body. To respond to the surge in the internationalisation of law, such checking, reporting and approval functions and mechanisms need to be updated, and involve a greater role for Parliament. As the Ministry of Justice observed:

Because the growing body of international law is having an increasing impact on domestic law, involving Parliament in the treaty-making process may be an historical inevitability. The old law and practices

⁶¹ Cited in Keith, "Governance, Sovereignty and Globalisation", 3.

⁶² Burmester, "National Sovereignty, Independence and the Impact of Treaties and International Standards" (1995) 17 Sydney LR, 127, 132. "Traditional" in this context would refer to a period only up to mid 19th-century: Small, correspondence, 20 October 1997. It should also be realised that this statement reflects Western preoccupations, as developing states are still very much concerned with territory and state building: Davidson, correspondence, 16 October 1997. See also Sunday Star Times "Trade puts Nigeria in the background" 26 October 1997 which reports the Malaysian Prime Minister at CHOGM, Edinburgh, October 1997, accepting globalisation but calling for a properly legislated code of behaviour to protect the weak from the strong. In relation to freeing up world trade he stated "[m]any of us have struggled hard and even shed blood in order to be independent. When borders are down and the world becomes a single entity, independence can become meaningless".

may have been adequate for a time when international law was relatively young and unimportant. However, in the world of internationalisation, especially in the areas of economics and human rights, New Zealand's treaty-making process may well be overdue for re-evaluation and change.⁶³

53 Issues of sovereignty commonly arise in relation to the topic of international law and treaty making. It is interesting to note that

the first real examples of true, useful co-operative functional treaty making arose from the desire of states to extend their sovereignty by securing rights which their existing sovereignty did not accord them, for example, to pass messages through cables or wires in adjacent European countries.⁶⁴

More recently sovereignty issues are expressed as a concern that growing internationalisation of law, with more law being made offshore, will result in loss of independence. The effect of treaty making upon national sovereignty is expressed by former Australian Governor General, Sir Ninian Stephen as follows:

[I]t has been estimated that no less than fifty thousand international instruments have come into existence in the past fifty post-war years and that a whole horde of intergovernmental agencies, some two thousand of them, now exist, most of them busy rule-making for the world.

What this amounts to is a partial transference by nations of their sovereignty in recognition of their interdependence one with another, or their absolute need in today's world to relate to other nations and to do so in part through the medium of international treaties and conventions giving rise to new international law and involving a diminution of sovereignty and a growth of common-form laws.⁶⁵

54 Similarly, New Zealand's corresponding freedom to choose whether to become a party to a treaty has diminished. In some cases New Zealand may not have a real choice whether it should enter an

⁶³ Gobbi and Barsi, "New Zealand's Treaty-Making Process: Understanding the Pressures and Proposals for Reform (Draft No 3)", (Strategic Assessment Group, Ministry of Justice, 1997), 3. It can be noted, however, that the old practices were superior in one respect (the Parliamentary role) than the present ones: Keith, correspondence, 14 October 1997.

⁶⁴ Small, correspondence, 20 October 1997.

⁶⁵ Stephen, "The Expansion of International Law – Sovereignty and External Affairs", Sir Earl Page Memorial Trust Lecture, 15 September 1994, 3, noted in Australian Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (AGPS, Canberra, 1995), 240.

international agreement where, for instance, the text is widely supported and failing to accede would prove detrimental to the national interest. Further, there may be instances where decisions at an international level are automatically binding without action on the government's part. For example, by virtue of its membership of the United Nations New Zealand is obliged to give effect to decisions made by the Security Council under Chapter VII of the United Nations Charter.⁶⁶

55 Conversely, the point has been made that treaties may also be a means by which New Zealand can enhance its sovereignty. By working with other countries to achieve goals and to put a brake on unilateral behaviour by larger states, New Zealand can exercise a greater influence than if acting on its own.⁶⁷ A different view expressed is that a country actually exercises its state sovereignty when it negotiates, concludes and ratifies treaties. The core issue then becomes not whether state sovereignty is restricted but whether the exercise of state sovereignty restricts parliamentary sovereignty (that is, its legislative freedom) to an unacceptable extent.⁶⁸

56 In sum, the process of globalisation means that states have not, for many years, existed in "splendid isolation".⁶⁹ Consequently, treaty making practice and the functioning of traditional doctrines of national constitutional law such as Parliamentary supremacy and sovereignty must be re-examined. This re-examination must take place in light of an increasing number of activities which are conducted on a transnational basis, and the fact that national actions increasingly have international ramifications.⁷⁰

"DEMOCRATIC DEFICIT"

57 The term "democratic deficit" describes another aspect of treaty making which is currently attracting strong international

⁶⁶ Keith, "Sovereignty? A Legal Perspective", Wood and Leland (eds), in *State and Sovereignty: Is the State in Retreat?* (University of Otago Press, Dunedin, 1997).

⁶⁷ Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

⁶⁸ Gobbi and Barsi, 14.

⁶⁹ Burmester, 131.

⁷⁰ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 178–179.

criticism.⁷¹ Treaties can have a wide range of implications for a nation's legal and administrative systems, economy, and individual citizens. Thus, there is concern that the practice whereby treaties are entered into by the executive, without significant parliamentary or public involvement, is undemocratic. The deficit is perceived at both the national and the international levels:

The question of the degree of public participation in the treaty-making process has been at issue since World War I. Arthur Ponsonby, a parliamentarian in the United Kingdom who served as Under Secretary of State for Foreign Affairs, attributed the cause of World War I to the existence of secret treaties. He published a book in 1915 entitled *Democracy and Diplomacy* (Methuen, London, 1915) in which he argued that the existing treaty making process was far less democratic than it should be.⁷²

58 Sir Ninian Stephen, noting the potential for a “democratic deficit”, stated:

When power passes from nation-states to international agencies, the international elector risks becoming increasingly unimportant, and increasingly isolated from influence over affairs that may be of direct concern to him or her.

The decline in the extent of national sovereignty may mean just that – policy affecting the citizen may be determined at levels altogether too remote, in international forums by people largely immune to the sorts of pressures that the citizen can still exert over policy-making by Australian governments if sufficiently determined and if their determination is shared by sufficient others.⁷³

CONCERNS EXPRESSED BY MĀORI

59 Concerns over globalisation and the treaty making process expressed by the Australians as the “democratic deficit” are similarly expressed by Māori in New Zealand. Such expressions often take the form of, in general, a loss of sovereignty or, more

⁷¹ The term “democratic deficit” was reportedly coined in the context of European Community institutions, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 229.

⁷² Gobbi, “Participating in the Treaty-Making Process”, paper presented to the United Nations Association of New Zealand, 29 July 1997, 1.

⁷³ Stephen, “Making rules for the world”, (1995) 30(2) *Australian Lawyer* 14. This statement highlights the connection of “democratic deficit” issues to those concerning consultation.

specifically, a need to protect tāonga, intellectual and cultural property rights and cultural values. This includes a lack of control over the use of indigenous flora and fauna, the use of te reo,⁷⁴ as well as Māori words and symbols, and a lack of consultation with iwi. For Māori, the basis of these concerns can be found in a desire to uphold the protections enshrined in the Treaty of Waitangi. Given the current treaty making process (which rarely involves Parliament) the recently increased numbers of Māori members of Parliament can have limited effect in this regard.

60 The importance of matters of intellectual and cultural property – tāonga – for Māori in any discussion of globalisation can be seen in the following excerpt:

The international context is particularly important in intellectual property. Ideas and their exploitation are not constrained by national boundaries but, in the absence of international mechanisms, intellectual property rights can only be national. The need for international co-operation and reciprocity to provide a workable system of intellectual property was recognised more than a century ago.⁷⁵

61 Further, concerning the use of intellectual property rights by indigenous peoples as a response to matters of globalisation, article 29 of the United Nations draft Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literature, designs and visual and performing arts.

62 The draft Declaration when finalised will not be binding upon states, and it should be noted that the text of the Declaration is not as yet settled. The draft Declaration has been the subject of much debate and continues to hold potential for further discussion.

⁷⁴ In *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 the Privy Council notes the Crown's obligation under the Treaty of Waitangi to protect tāonga such as the Māori language by "taking such action as is reasonable in the prevailing circumstances". The preamble to the Māori Language Act 1987 recognises Māori language as tāonga guaranteed by the Treaty of Waitangi.

⁷⁵ Law Commission, *Intellectual Property: The Context For Reform*, (NZLC R13, 1990), 3.

- 63 The Mataatua Declaration on Cultural and Intellectual Property Rights, June 1993, also makes several recommendations on such property rights, to indigenous peoples, states, national and international agencies, and to the United Nations.⁷⁶
- 64 In relation to Māori:
- Aroha Te Pareake Mead (Ngati Awa, Ngati Porou) . . . points out that the tangible and intangible aspects of property – that is, the cultural and intellectual aspects – are traditionally encompassed in Māori culture under the concept – tāonga. . . . The one concept – tāonga – relates to real, personal, tangible, intangible cultural and intellectual property. It encompasses both the physical and metaphysical, perceiving each to be interdependent on, and therefore inseparable from, one another. “Misappropriation of physical indigenous tāonga (assets) therefore, is wholly related to misappropriation of indigenous knowledge.”⁷⁷
- 65 International agreements being negotiated on a wide range of matters, such as for example trade and copyright, may have an impact upon the use of indigenous flora and fauna⁷⁸ and the use of te reo as brand names. Such agreements can therefore be relevant to the “full, undisturbed and exclusive” authority over tāonga

⁷⁶ On the 12–18 June 1993 in Whakatane, Aotearoa New Zealand, the 9 tribes of Mataatua in the Bay of Plenty convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples. Over 150 delegates from 14 countries attended and on the final day the Declaration was passed by the Plenary. The Declaration is reproduced as appendix E in *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples* (Te Puni Kokiri, Wellington, 1994).

⁷⁷ Mead, “Misappropriation of Indigenous Knowledge: The Next Wave of Colonialisation”, (1994) 3(1), Otago Bioethics Report 4–7; Lenihan, (Ngai Tuahuriri, Ngai Tahu Whanui) “A Time For Change: Intellectual Property Law and Māori”, (1996) 8(1) AULR 212.

⁷⁸ Thrush, *Indigenous Flora and Fauna of New Zealand*, Waitangi Tribunal Research Series 1995/1 (WAI 262, Wellington, 1995). This Tribunal report includes discussion of intellectual property law and indigenous peoples issues, relevant legislation and possible responses. Further, the Waitangi Tribunal began in September 1997 hearing the Intellectual Property Claim proper (WAI 262), otherwise known as the Flora and Fauna Claim lodged by six iwi in 1991. The claim seeks Māori guardianship of native flora and fauna and intellectual property rights over their culture. It is also supported by GATT Watchdog groups who focus upon foreign control of domestic resources under GATT and APEC trade agreements. See also *Mana News, Morning Report*, National Radio, 15 September 1997; *Morning Report*, National Radio, 16 September 1997; *Dominion*, 16 September 1997, 2.

provided by the Treaty of Waitangi.⁷⁹ One commentator has noted that

[i]n an increasingly globalised trading environment, businesses are seeking not only markets but also sources of innovation in and from the world's indigenous peoples. Indigenous peoples, individually (by person and by people) and collectively are, not surprisingly, seeking to protect their resources and their heritages. A recent focus of their attention has been the use of intellectual property law for such protection and calls have been made to include cultural heritage protection in both the international and domestic schemes of intellectual property law.⁸⁰

66 Another comments:

We should realise that the issue is control. Māori must be able to determine the appropriateness of the use being made of our cultural heritage. To permit otherwise would be to deprive Māori of their identity. The challenge for domestic and international communities is to acknowledge that Māori and other indigenous peoples have their own perspective of what intellectual and cultural property are and to recognise why such tāonga should be protected. . . . That Māori seek to preserve that intellectual and cultural property . . . should be seen as something positive.⁸¹

67 Concerns have been voiced over lack of consultation with iwi in the treaty making process.⁸² For example, in relation to the Multilateral Agreement on Investment negotiated by the government and concerning foreign investment in New Zealand, a commentator noted that the negotiation of international agreements by the Crown without consulting Māori has been happening since 1840

but most dangerously perhaps, in terms of our future well-being, in relation to the Uruguay round of GATT, the whole negotiations over intellectual property and now what have been so far secret negotiations on investment. Clearly any policy that occurs in this country is also

⁷⁹ See Māori Trade Marks Focus Group, *Māori and Trade Marks: A Discussion Paper* (Ministry of Commerce, Wellington, 1997), which discusses intellectual property laws, and Māori words and symbols, plus trade and trade mark matters.

⁸⁰ Jones, "Indigenous Peoples and Intellectual Property Rights", (1996) 4(2) Waikato LR, 117. Of relevance is the Member's Bill currently before the House, the Tāonga Māori Protection Bill 1996. As the long title indicates, it seeks to "make provision for the preservation of the Māori cultural heritage in Aotearoa, New Zealand, and for related purposes".

⁸¹ Lenihan, 214.

⁸² See further discussion on consultation in [paras 99–108](#).

Māori policy and we have a right to be involved in international negotiations. . . . Particularly in relation to the fact that, if we were able to negotiate specific protections with the Crown as part of a Treaty settlement in relation to resources, and if foreign companies sought to buy up or make investments in that area, those protections could well be seen as a restraint on investment and therefore in breach of the international agreement.⁸³

68 Further, for Māori,

the freeing up of trade creates open access to everything from our land to our tāonga, . . . we have no real information or input into the GATT process. Indeed the signing of the GATT agreement itself was done by the Crown without consultation with our people, an issue which is currently being pursued as a breach of the Treaty before the Waitangi Tribunal.⁸⁴

69 The need to work through the competing claims, as a result of the internationalisation of law, at both international and domestic level is apparent.

⁸³ Jackson (Ngati Porou, Ngati Kahungunu), *Mana News, Morning Report*, National Radio, 4 June 1997.

⁸⁴ Jackson (Ngati Porou, Ngati Kahungunu), *Kia Hiwa Ra*, June 1997, 18. See also [paras 74–77](#) on concerns over the Multilateral Agreement on Investment and [paras 193–194](#) for discussion on possible solutions.

4

Calls for a greater role for Parliament

70 **T**HE DEBATE ON THE TREATY MAKING PROCESS and particularly on Parliament's role in treaty making is not new. Consider in the United Kingdom for instance Ponsonby's 1915 book *Democracy and Diplomacy*, mentioned earlier. In New Zealand in 1921 the Customs Amendment Act s 10 provided, concerning tariffs that give effect to a customs agreement entered into by the New Zealand government:⁸⁵

(2) No such agreement or arrangement as is referred to in the last preceding subsection shall have any effect unless and until it is ratified by Parliament.

Further, the argument was made years ago that a constitutional convention had developed that the government will refer important treaties to Parliament so that that body can consider the government's action or proposed action.⁸⁶

71 More recently within New Zealand there have been various calls for Parliament to have a greater role in the treaty making process. Some say this is in part because of the general debate on process surrounding the advent of the Mixed Member Proportional (MMP) electoral system.

⁸⁵ Repealed in 1966. It appears, however, that the wording and workings of this section may not have been the model of parliamentary approval for treaties it first seems, with treaty ratification being a power that belongs to the executive and not the legislature. In practice the stipulation has been treated as relating to *domestic* customs law and not to the power of the executive to accept treaty obligations. See further Keith, "New Zealand Treaty Practice: the Executive and the Legislature" (1964) 1 NZULR 272, 289–290, for detailed explanation and discussion of the practice surrounding s 10.

⁸⁶ Keith, "New Zealand Treaty Practice: the Executive and the Legislature", contains detailed and extremely useful discussion on the convention and the role of Parliament in treaty making generally.

- 72 In June 1996 the Clerk of the House of Representatives, David McGee, published a paper “Treaties and the House of Representatives” in which he recommended that Parliament have a greater role in the treaty making process.⁸⁷ The *Briefing Papers to the Incoming Government* prepared by the Ministry of Justice in October 1996 made similar calls in light of increasing globalisation. In November 1997 the Foreign Affairs, Defence and Trade Select Committee tabled in the House its report which also endorsed change to the treaty process with a greater role for Parliament.⁸⁸
- 73 Members of Parliament from the Alliance political party have prepared a Bill which seeks to formalise Parliament’s role in the treaty making process. Their Bill is entitled the New Zealand International Legal Obligations Bill 1997. Likewise, members from the ACT political party have drafted a Bill, the Treaties (Parliamentary Approval and Treaties Information) Bill, which seeks to provide for parliamentary approval of treaties and for MFAT to inform the House on the progress of some treaty negotiations.⁸⁹
- 74 There have been calls through the media by various commentators for greater controls. Most recently these calls have been in relation to the Government plans to sign a treaty known as the Multilateral Agreement on Investment and a perceived lack of consultation over it. This treaty, devised by the Organisation for Economic Cooperation and Development (OECD), is being negotiated by MFAT and Treasury officials with their counterparts in the 29 member countries of the OECD.
- 75 The treaty aims to lift restrictions on cross-border investment – with provisions including, in brief, that signatories agree to give equal treatment to all treaty partners, that foreign investors must enjoy the same conditions as domestic investors, and that laws

⁸⁷ McGee, Clerk of the House of Representatives, “Treaties and the House of Representatives”, Annex D, *Report of the Standing Orders Committee On its Review of the Operation of the Standing Orders*, 1996 AJHR I.18B. See paras 150–160 for further detail on the possible use of select committees.

⁸⁸ See para 165 for details of the Select Committee’s report and recommendations.

⁸⁹ See paras 169, 171 and 192. As at November 1997, neither of these draft Bills had been successful in the ballot.

affecting investment should be open and understandable.⁹⁰ A commentator has noted:

Under the treaty, overseas investors would become empowered to enforce actions through New Zealand courts against local and national governments. Investors could argue that local laws and policies discriminated against them.⁹¹

76 A further media report:

The Ministry of Foreign Affairs and Trade has promised to consult more widely with Māori people about the Multilateral Agreement on Investment and the Ministry has also given an assurance that nothing will be signed if it undermines Māori treaty rights. Another round of negotiations is under way on the agreement in Paris. . . . A leaked draft of the agreement from May this year shows that New Zealand is not the only country where there are concerns about indigenous rights and cultural issues. Finland, Norway and Sweden have proposed a clause in the main text to protect the rights of their indigenous people, the Sami, to reindeer husbandry and other traditional methods of livelihood. . . . Jane Kelsey (Professor of Law at Auckland University) says the interesting thing about the proposal to protect Sami rights is that it's designed to stay in the document forever, whereas New Zealand is simply proposing a separate reservation in the agreement, to protect Māori rights, which may be removed some time in the future. Director of the Trade Negotiations Division at the Ministry of Foreign Affairs

⁹⁰ "Investment treaty nears completion", *Herald*, 7 April 1997. There is also discussion of the reservations countries might make against certain provisions of this treaty, for example, by New Zealand to protect the position of the Overseas Investment Commission. Opposition members of Parliament, and the Clerk of the House, have commented in the media upon the need for treaties such as this one to be put before Parliament.

⁹¹ Kelsey, "New treaty poses cost worry to business", *National Business Review*, 11 July 1997, in reference to the January 1997 draft of the treaty. See also: NZLJ editorial "Law By Executive Decree?", July 1997, 221; "Too many pacts for Parliament", *Independent*, 5, 23 May 1997 and editorial (Berryman), "The executive is selling our sovereignty – in secret", 8, 6 June 1997; "Secret plottings on foreign investment", *Herald*, A15, 9 May 1997 and "Foreign deal for cabinet eye only", 1, 21 May 1997; "Secrecy concerns Anderton", *Dominion*, 2, 22 May 1997. The Ministry of Justice is also developing a research paper examining New Zealand's treaty making process: Gobbi and Barsi, "New Zealand's Treaty-Making Process: Understanding the Pressures and Proposals for Reform (Draft No 3)", (Strategic Assessment Group, Ministry of Justice, Wellington, 1997). Also, in late 1996 the Director of the Legal Division at MFAT spent some time at Cambridge University, UK, studying other countries' treaty making practices; James, "In spring an old politician's thoughts rise with the sap", *National Business Review*, 17, 24 October 1997.

and Trade, Charles Finney, says New Zealand is insisting on a permanent reservation to protect Māori Treaty rights . . . if there was any risk of Māori interests being compromised in any way the Government would not be signing up to it. . . . the Ministry wants to be very cautious about the MAI agreement and is consulting regularly with the Ministry for Māori Development.⁹²

- 77 A Labour member of Parliament has drafted the Multilateral Agreement on Investment (Parliamentary Approval) Bill which seeks to require debate and approval from the House of Representatives before the Multilateral Agreement on Investment comes into effect.⁹³
- 78 There have also been similar calls, concerning Parliament's role in treaty making and consultation, in overseas jurisdictions.⁹⁴

⁹² *Mana News, Morning Report*, National Radio, Friday 19 September 1997. (This is a continuing issue – see also *Mana News, Morning Report*, National Radio, Wednesday 17 September 1997 and Thursday 2 October 1997.)

⁹³ Like the other draft Member's Bills on similar subject matter, as at November 1997 this draft Bill had not been successful in the ballot. The government has since made public a draft of the MAI.

⁹⁴ See [appendix A](#).

5

What are the issues for the treaty negotiation and acceptance stages if Parliament's role is changed?

79 **T**HERE HAS BEEN CONTINUING DISCUSSION of the issues surrounding the involvement of Parliament in the treaty making process. The practice was assembled and analysed in 1964 with the following questions raised:⁹⁵

- What treaties are deemed sufficiently important to be referred to Parliament?
- How and by whom is importance determined?
- Is the practice merely common usage or does it amount to a binding convention?
- Is it enough merely to refer the treaty or must Parliament be given the opportunity to approve the executive's action or proposed action?
- Would different rules, and therefore different actions by the executive, apply to different treaties?

80 The issues discussed in this report, surrounding treaty making and Parliament's possible role, relate to: the treaty making doctrine; the role of the courts; the "democratic deficit" and limitation of future governments;⁹⁶ timing (and matters of urgency, flexibility and confidentiality); treaty definition; and consultation.

THE TREATY MAKING DOCTRINE

81 Issues relating to treaty making are often expressed in terms of the doctrine that treaty making is the domain of the executive, and that the executive's role to govern and to enter into treaty

⁹⁵ Keith, "New Zealand Treaty Practice: the Executive and the Legislature", (1964) 1 NZULR 272, 279.

⁹⁶ See paras 57–58 for an explanation of "democratic deficit".

negotiations as outlined in the doctrine should not be limited. However, the issue in the *Labour Conventions*⁹⁷ case which outlined the doctrine was a matter of domestic law, not international law. It concerned the internal distribution of legislative powers – that is, the limitation of Canadian federal power to implement international obligations in areas of provincial jurisdiction without provincial co-operation. The Privy Council held that the Federal Government did not have the power to pass legislation to implement treaties which had subject matter that fell within provincial jurisdiction under s 92 of the Constitution Act 1982 (previously the British North American Act 1867).⁹⁸ It is therefore of limited help in terms of New Zealand’s current treaty making process.⁹⁹

82 In the intervening years this decision has been criticised. Canada is the only federal state with its treaty implementation power rigidly divided on the basis of the respective federal and provincial legislative jurisdictions. This has led to Canada’s capacity to implement treaties being described as “suffering from constitutional arthritis”.¹⁰⁰

83 Further,

[t]he argument that legislation to implement a Canadian treaty is within the federal power over the peace, order and good government of Canada was in fact accepted by the Privy Council in *Radio Reference*¹⁰¹ which was decided shortly before the *Labour Conventions* case. We now know too that this view attracted the support of at least one member of the Privy Council in the *Labour Conventions* case itself, because, although the Privy Council practice of that time did not permit the writing of dissenting opinion, Lord Wright subsequently disclosed in an article in the *Canadian Bar Review* that he had dissented. Since the abolition of Privy Council appeals there have

⁹⁷ *Attorney-General of Canada v Attorney-General of Ontario* [1937] AC 326. See paras 12–13.

⁹⁸ Rayfuse, “Treaty Practice: The Canadian Perspective”, in Alston and Chiam (eds), *Treaty-Making and Australia* (Federation Press, Sydney, 1995), 253.

⁹⁹ Although this internal distribution of legislative powers is essentially of no interest to New Zealand, it is of relevance to the position of the Cook Islands, Niue and Tokelau: Keith, correspondence, 14 October 1997. We include the *Labour Conventions* case discussion for completeness.

¹⁰⁰ Strom and Finkle, “Treaty Implementation: The Canadian Game Needs Australian Rules” (1993) 25(1) *Ottawa LR* 39, 47 and 60.

¹⁰¹ [1932] AC 304, 312. While this was not the only reason given for the decision it did seem to be part of the ratio decidendi: Hogg, *Constitutional Law of Canada* (3rd ed, Carswell, Toronto, 1992), 293.

been several dicta in the Supreme Court of Canada indicating a willingness to reconsider the reasoning in the *Labour Conventions* case,¹⁰² and it may well be that the peace, order, and good government argument will ultimately prevail. . . . While it is necessary to conclude that the *Labour Conventions* case is a poorly reasoned decision, it is much more difficult to be confident that the result is undesirable as a matter of policy within a federation such as Canada.

W R Lederman¹⁰³ has suggested a middle ground between full acceptance of the *Labour Conventions* rule and its complete rejection. He takes the view that the federal parliament ought to possess the power to implement treaties but he suggests that the Court should have to make a finding of “national concern” before upholding a federal statute that implements a treaty on a subject matter that would otherwise be within provincial jurisdiction. . . .

A different approach would be to confine the *Labour Conventions* rule to those treaties that are concerned only with the harmonization of the domestic law of states or the promotion of shared values in domestic law. The conventions in issue in the *Labour Conventions* case were of this kind, seeking to elevate the standards of working conditions in member states.¹⁰⁴ [footnotes added]

84 In relation to the extent of the doctrine Kenneth Keith noted in 1964 that

in recent times all governments have insisted, and their view has not been contested, that the making of treaties is within the Crown prerogative. Parliament has no power to ratify or give effective international approval to the treaty. There is, however, no such certainty about the existence or extent of Parliament’s right to express approval or disapproval of or otherwise to supervise the executive’s treaty actions.¹⁰⁵

85 The important question here is how far Parliament should go in its supervision and monitoring in light of increasing globalisation and lawmaking offshore. Should Parliament’s role in supervising and monitoring the executive – and thereby the treaty making process – change? For Parliament to continue to be the effective

¹⁰² *Johannesson v West St. Paul* [1952] 1 SCR 292, 303; *Francis v The Queen* [1956] SCR 618, 621; *Re Offshore Mineral Rights of BC* [1967] SCR 792, 815–817; *MacDonald v Vapor Canada* [1977] 2 SCR 134, 167–172; *Schneider v The Queen* [1982] SCR 112, 134–135; see also Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38 Can Bar Rev 135, 142–143; Hogg, 294, note 49.

¹⁰³ Lederman, *Continuing Canadian Constitutional Dilemmas* (Butterworths, Toronto, 1981), ch 19. See also Hogg, 295.

¹⁰⁴ Hogg, 296.

¹⁰⁵ Keith, “New Zealand Treaty Practice: the Executive and the Legislature”, 279.

lawmaker in future times is this change essential? Parliament's monitoring role could be employed to strike a balance between the power of the executive to freely make and execute international agreements with other nation states, and the calls for an increased parliamentary involvement.

The object of the reform process should be to ensure that the . . . Parliament is able to participate in the process in a way that ensures that the Commonwealth is not unduly hampered in its ability to participate in foreign affairs and meet its international obligations.¹⁰⁶

- 86 Further, what are members of Parliament going to do in a reformed treaty making process and how are they going to it?

One practical problem with the bulk [of international treaty law] needs to be taken on board. It is that members of Parliament are exceedingly busy and, with the best will in the world, it would be hard for them to read and absorb, let alone evaluate, the contents of all the Treaties with which New Zealand is concerned. . . . The pressure on Parliamentary time seems so great that it is idle to expect them to debate Treaties very often in the Chamber. There are opportunities for this to be done when the occasion calls for it, but it does not seem to happen very often. It most frequently occurs when it is necessary to introduce legislation in order for New Zealand to ratify a Treaty.¹⁰⁷

THE ROLE OF THE COURTS

- 87 Decisions reached by the courts involving consideration of rights and obligations contained in international instruments to which New Zealand is a party, but which may not have yet been implemented in domestic law, have been criticised. The courts have no direct constitutional role of incorporating treaty obligations into domestic law. That role can only be for Parliament unless New Zealand makes a doctrinal change to treaties as self-executing instruments.¹⁰⁸
- 88 Such decisions as *Teoh*¹⁰⁹ have been seen as a form of lawmaking beyond the roles inherent in the traditional treaty making doctrine

¹⁰⁶ Naylor, "Australia's Treaty Making Process: Democracy in Action?" (Winter 1995) Australia Law Reform Commission 67 Reform 40.

¹⁰⁷ Palmer, correspondence, 30 September 1997. See [chapter 7](#) on how reforms to the treaty making process might be shaped.

¹⁰⁸ Office of the Clerk of the House of Representatives, correspondence, 17 October 1997. See further on self-executing treaties in [paras 130–131](#).

¹⁰⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; see [paras 39–40](#).

and the separation of powers. In relation to the courts not considering treaties unincorporated into domestic law, one correspondent noted

it is not just a question of individuals being unable to enforce rights in unincorporated human rights treaties, but also of duties obligations and prohibitions in treaties not being imposed on individuals unless Parliament chooses to incorporate the treaty provisions into domestic law.¹¹⁰

89 Further, another commentator:

If we accept the principle that, consistent with the democratic underpinning of our society, law should preferably be made by democratically elected lawmakers, Parliament should only leave laws to be made by the Courts where it is *not appropriate* that those laws be made by the Legislature, and it is *appropriate* that they be made by the Courts. Indeterminacy in legislation therefore is not inherently a bad thing. It is only bad if, in the particular circumstances, the required rule-making is more appropriate for the Legislature than the Courts.¹¹¹

90 Indeed there is the possibility that the courts, which must reach a decision in each case, find themselves in a difficult and undesirable situation. A commentator has stated:

What has turned a less than satisfactory parliamentary situation into a thoroughly unsatisfactory one are the related judicial developments illustrated by litigation such as that concerning the issue of a search warrant for the cockpit voice recorder. Increasingly, treaties that have not been legislated into New Zealand law are being held by the courts to have legal significance in our domestic law. . . . From a democratic point of view, an approach to law-making which permits treaty provisions to be incorporated into our law without reference to parliament is thoroughly undesirable.¹¹²

91 But the alternative is to exclude New Zealand's international law obligations from judicial consideration on the basis that Parliament can and will provide a general codification of public policy. We see no likelihood of such development. The courts will continue to have to fill legislative gaps to decide cases, and adopt principles of interpretation to do so systematically. It is undesirable for the

¹¹⁰ Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

¹¹¹ Harris, "The Law-Making Power of the Judiciary", in Joseph (ed), *Essays on the Constitution* (Brookers, Wellington, 1995), 270.

¹¹² McGee, "Treaties – A Role For Parliament?", (1997) 20(1) *Public Sector*, 3.

courts to risk putting New Zealand in breach of international law where that can be avoided. To do so requires the courts to take account of our international obligations to the extent that they do not thereby infringe the will of Parliament expressed in statute. The decisions on this point such as *Tavita* and *NZ Airline Pilots' Association*¹¹³ may be seen as a response not only to internationalisation but to the legislature's failure to implement important changes to the domestic law in order to comply with obligations incurred in the international arena – the “wide tracts” referred to in [para 4](#).¹¹⁴ As one commentator has written:

All that was required was for the court to draw legal consequences for private parties from its analysis of the international law.¹¹⁵

92 Some of these developments may be seen as the courts response to a “rights consciousness” affirmed in international, regional and national human rights instruments and an emerging reconsideration of the role of the courts regarding human rights issues.¹¹⁶

93 The Ministry of Justice describes this situation thus:

Essentially, the judiciary has become more active in the process due to globalisation, and Parliament has not yet reacted to this development. In the absence of a clear expression of parliamentary will, the courts have no recourse but to rely on the common law to resolve the disputes that are before them. Increasingly, due to the internationalisation of society, the courts are finding it necessary to look to international law to determine common law. In these circumstances, reaching the conclusion that ratified but as yet unincorporated treaties have the force of law is not unreasonable or illogical.

From a constitutional perspective, this possibility is the driving force for change. If Parliament does not take a more active role in the treaty-

¹¹³ See [paras 40–41](#).

¹¹⁴ Critical for meeting and overcoming neglect of international treaties and their effect is the education and general culture of the legal profession, law schools, government lawyers, officials, Ministers and others as indicated by Higgins, *Problems & Process: International Law and How We Use it* (Clarendon Press, Oxford 1994), chapter 12, and Jennings, “An International Lawyer Takes Stock” (1990) 39 ICLQ 513. One significant element in that process of education in one area is the series of human rights conferences of senior Commonwealth judges, most recently at Bloemfontein, 19 CLB 1644. See also Kirby, “The Australian Use of International Human Rights Norms: From Bangalore to Balliol – or A View from the Antipodes” (1993) 16 UNSWLJ 363.

¹¹⁵ Higgins, 213.

¹¹⁶ See Cooke, “Fundamentals” [1988] NZLJ 158.

making process, the courts will fill the void. These developments have the potential to increase the importance of the judiciary in the treaty-making process at the expense of parliamentary sovereignty.¹¹⁷

THE “DEMOCRATIC DEFICIT” AND LIMITATION OF FUTURE GOVERNMENTS

- 94 A gap in the existing arrangements appears when the executive decides to accept a treaty which does not require implementing legislation. This is either because the present state of the law (including legislation) already gives full effect to the treaty or no legislation at all is required (possibly because the government will accept the treaty with reservations). This gap is referred to as one aspect of the “democratic deficit”.¹¹⁸ Two recent instances are New Zealand’s acceptances of the second optional protocol to the International Covenant on Civil and Political Rights concerning capital punishment in 1990, and the Convention on the Rights of the Child in 1993.
- 95 In the former case, Parliament had debated and enacted the Abolition of the Death Penalty Act 1989 but at that stage the drafting of the protocol had not been completed and Parliament had no indication of the government’s intention to accept the protocol. New Zealand’s acceptance was effected in the conventional way by executive action following a Cabinet decision. Parliament and the public were not given timely notice of the government’s intention to ratify the Convention. In the case of the Children’s Convention, which had been the subject of a lengthy public controversy, the government moved to ratification without any indication that it was going to take that step.
- 96 The consequence of those two actions is that New Zealand is bound by important undertakings, without in the former case any express power of withdrawal. The death penalty protocol appears to be binding without limit of time.¹¹⁹ The undertakings limit, in

¹¹⁷ Gobbi and Barsi, “New Zealand’s Treaty-Making Process: Understanding the Pressures and Proposals for Reform (Draft No 3)”, (Strategic Assessment Group, Ministry of Justice, Wellington, 1997), 3. See also Higgins, 216; *People’s Union for Civil Liberties v Union of India* (1997) 3 SCC 433, 441–442. See para 204 of this report on possible options concerning the role of the courts.

¹¹⁸ See paras 57–58 for an explanation of “democratic deficit”.

¹¹⁹ The conclusion that this treaty is binding without limit of time is supported by the omission of an express withdrawal provision compared with the frequent inclusion of such provisions in other human rights treaties. For instance, express withdrawal provisions apply to the declarations under article 41 of

substance, the power of the New Zealand Parliament. The significance of the actions in the death penalty case is greater when it is recalled that at the time the Government accepted the death penalty protocol it had dropped the idea of an entrenched Bill of Rights, and even an entrenched Bill of Rights would have been subject to amendment through a referendum or the support of three quarters of the members of the House.

- 97 The Law Commission has no objection to those “permanent” aspects of the treaties or to the government’s decisions. They are inherent in the nature of the international community and the law which regulates it. What the Law Commission does want to call attention to is the lack of a simple means of alerting the House to the government’s intention to accept such a treaty, with the consequence that the House can take the matter up in a timely way if its members wish. There is, as well, no systematic notice to the wider public of the intended action.
- 98 The report of the Foreign Affairs, Defence and Trade Select Committee on the treaty process raises a further point with regard to the limitation of the role of Parliament:

An additional point to consider is that, outside of its power to refuse to pass legislation outright, Parliamentary select committees have a lesser capacity to amend treaty implementing legislation than they do for any other type of legislation. Where a treaty text is to be directly incorporated into law, no amendments that were contrary to the provisions of the treaty can be incorporated into the implementing legislation because this would prevent New Zealand becoming party to the treaty. This arguably limits the scope for select committee input into implementing legislation considerably more than would be the case for any other kind of legislation. Therefore, in practice, Parliament is bound by the terms of a treaty in which it has had no involvement.¹²⁰

the International Convention on Civil and Political Rights, the first optional protocol, and the genocide, apartheid, torture, racial discrimination, children’s, slavery, freedom of information, statelessness, refugee, and Geneva conventions. For the general legal rule see article 56 of the Vienna Convention on the Law of Treaties (also articles 54(b) and 62), and Jennings and Watts, *Oppenheim’s International Law* (9th ed 1992) vol 1, para 647. See also Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press, Oxford, 1994).

¹²⁰ *Inquiry into Parliament’s Role in the International Treaty Process: Report of the Foreign Affairs, Defence and Trade Committee*, 1997 AJHR I.4A, 5.

CONSULTATION

- 99 Consultation practices, or the lack of such practices and processes, are often raised as an issue in relation to the treaty making process, and as a subset of “democratic deficit” discussions. For Māori, there is recognition that the principles of the Treaty of Waitangi (plus law and practice) increasingly require consultation with Māori on proposals which affect Māori interests.¹²¹
- 100 Among the advantages of consultation are its assistance in:
- determining whether there really is a problem to be addressed;
 - defining the problem;
 - assembling relevant information and ideas;
 - enhancing the quality of the text which results (for a new treaty obviously);
 - making it more acceptable and more likely to be complied with;
 - making it better known; and
 - lessening the need for later wasteful and unsettling amendment.

A cautionary note is that a poorly designed consultation process can be bureaucratic and hinder New Zealand’s ability to prepare for and perform in international treaty negotiations.¹²²

- 101 In the first stage of treaty making the executive is, of course, free to involve other interests in the negotiation process, for instance through appropriate consultation or even as members of the negotiating team.¹²³ International agreements may themselves require the involvement of a wider group of participants, for example, the International Labour Organisation’s (ILO) Constitution provides for the tripartite composition of national delegations to the conferences which consider the ILO’s draft Conventions.
- 102 In practice too, the involvement of wider groups of participants is increasingly to be found, for instance in multilateral commercial negotiations in the World Trade Organisation (WTO) or in bilateral commercial negotiations, for instance with the European

¹²¹ Te Puni Kokiri is currently updating its 1995 publication *Consultation with Māori: A Guidebook* which covers the role of Te Puni Kokiri in facilitating consultation with the Crown and provides a guide to successful consultation with iwi and hapu. See paras 59–69 for detail of Māori concerns with the internationalisation of law.

¹²² Coll-Bassett, correspondence, 7 October 1997.

¹²³ See the *Cabinet Office Manual* (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 1996) in relation to departmental consultation.

Union or Australia. Consultation is increasingly occurring in environmental matters, for instance in respect of the ozone layer agreements. Richard Nottage, Secretary of the Ministry of Foreign Affairs and Trade (MFAT), provided a valuable commentary on the GATT Uruguay Round consultation process and seven key principles of effective consultation in the August 1994 MFAT *Record*:

Uruguay and Morocco may seem a long way from New Zealand. But these negotiations were the subject of extensive consultation and interaction with business, academic, media and community groups who were the stakeholders in the whole exercise. . . .

The first principle is that consultation with stakeholders is not an additional burden, but a necessary prerequisite for effective policy-making. Trade policy certainly needs to be informed by the private sector. It is business, not the government, which conducts international trade and investment. And trade policy can also benefit from the analytical input of academics and research organisations. Public perceptions of trade policy can determine overall effectiveness. . . .

The point is that policy cannot be got right without consultation. But it cannot be turned on like a tap. Consultation requires constant attention and needs to be kept alive during less active phases of policy development.¹²⁴

- 103 Wider participation can be seen in the harmonisation of business law under the agreement for Closer Economic Relations (CER) with Australia. A mutual Australian and New Zealand process has been active since at least the late 1980s with the establishment of the New Zealand Consultative Group on Business Law, consisting of officials, business people and accountants, and an equivalent body in Australia. The process in respect of Trans-Tasman mutual recognition provides a further instance with “A Proposal for the Trans-Tasman Mutual Recognition of Standards for Goods and Occupations: A Discussion Paper Circulated by the Council of Australian Governments and the Government of New Zealand” (April 1995). The association of non-governmental organisations with major international conferences can also be seen as part of those broader developments. Those conferences are also important

¹²⁴ “The GATT Uruguay Round 1984–1994: 10 Years of Consultation and Cooperation”, address to Senior Executive Service Conference, Wellington, 19 August 1994, 3(3) MFAT *Record*, 17–21. The speech goes on to outline a further six principles of consultation: effective consultation requires leadership and commitment; understanding the priorities and interests of stakeholders; flexibility of consultative structures; using appropriate communication tools; developing staff consultation skills; and dealing with expectations raised during consultation.

for the production of texts which are not in treaty form but which are nevertheless significant.

- 104 Legislation increasingly requires consultation before regulations are made and over the years the parliamentary select committee process has developed to enable wide public participation in the process of the making of primary legislation. Practice and related statements also emphasise the importance of consultation when Bills are being drafted (eg, Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (rev ed 1991), paras 21–29, and the Law Commission Act 1985 s 6(2)(c) and the process of consultation it follows).
- 105 It is to be emphasised that the critical stage for consultation will often be before the international text is settled. After the negotiation is complete it is highly unlikely that the text can be altered. Generally, the only courses then open will be to accept or reject the established text. In some cases there may not even be that choice since the international decision may become internationally binding without further action by the government.¹²⁵ Even if the government does in law have a choice whether or not to accept, that choice might not be a real one if, for instance, the text is very widely supported and standing aside would cause real disadvantage to the national interest.
- 106 In these situations, the later legislative stages in New Zealand do not allow real consultation. Parliament, in enacting the primary legislation, or the executive, in making subordinate legislation, may have no choice, or at least no real choice. Consultation in such circumstances can, however, still be of value by serving to forewarn or inform interested or affected groups of the limitations on New Zealand's ability to negotiate certain desired terms or conditions.
- 107 Some negotiations have to be private, they may move rapidly, and the decisive proposals and a final compromise often appear very late in the course of the negotiation leaving no chance for further consultation. Those elements of effective negotiation must be appropriately protected.¹²⁶ But, as indicated, practice does show that consultation is sometimes possible and that in some cases, if consultation is to be effective, it has to occur at an early stage. As

¹²⁵ See, for example, the commentary on GATT practice in *New Zealand Consolidated Treaty List as at 31 December 1996: Part One (Multilateral Treaties)*, 1997 AJHR A.263 367–369.

¹²⁶ By, for example, the use of parliamentary committees – see [chapter 7](#).

well, many international processes are public, at least in part, and lengthy, allowing time for consultation. This is particularly so of the processes leading to major multilateral treaties.

108 A commentator has noted:

[T]he culture of consultation on the part of government departments . . . could be enhanced. In the case of prospective negotiation under GATT/WTO, or of international air transport agreements, or international fishing agreements and the like, consultation with concerned and relevant New Zealand business interests does occur. But the practice of consulting with non-governmental environmental, human rights, private or disarmament groups and the universities as well as Māori and Parliament is a good deal less developed. The absence of genuine exchange about policy ideas with the non-official community inside New Zealand indeed contrasts with what happens elsewhere (eg Australia). There are exceptions. Some improvements have occurred. But there is, in my opinion, some good way still to travel. Part of Parliament's oversight should entail ensuring that departments are in fact consulting.

Considerations of secrecy and the need for swift policy formulation in response to rapid external developments are part and parcel of contemporary international relations. But for the great bulk of international trade, economic, environment etc negotiation today, secrecy is not a vital factor. Most negotiation is at the global (multilateral) level. It is not country-to-country bilateralism. And for most issues on this international agenda, the non-government actors in the form of multinational business, scientists, global environmental groups, or human rights bodies are better informed than governments about key issues in any event. Governmental secrecy is not an overriding factor in most instances. And the plotting ahead of the international agenda of negotiating conferences is sufficiently defined in advance, to obviate the excuse of the need for urgency in policy formulation, as an explanation for a lack of consultation. . . . Interim reports of progress in a negotiation (the GATT Uruguay Round lasted nine years) must be encompassed in the consultation process.¹²⁷

TIMING – URGENCY, FLEXIBILITY, CONFIDENTIALITY

109 Timing issues relate to the timing of any possible intervention for parliamentary consideration and approval in the treaty making process. It might be helpful here to note that consideration of Parliament's role is distinct from consideration of Parliament's performance. Performance problems of overload and delay are of

¹²⁷ O'Brien, correspondence, 23 October 1997.

course of some bearing to this discussion but are addressed through internal parliamentary mechanisms such as the Standing Orders and the Business Committee of the House.

- 110 If a parliamentary approval procedure is timed to occur as the treaty is being negotiated/created, the executive may express concerns about confidentiality, flexibility and urgency as follows:
- maintaining the confidentiality of potentially sensitive negotiations, for example, in relation to trade or where a requirement of non-publicity has been set;
 - maintaining the confidence of other parties to negotiations in light of possible delays while requisite parliamentary approval is being sought;
 - maintaining the confidence of other parties to negotiations in light of possible changes to the treaty text under negotiation as a result of any parliamentary approval process;
 - maintaining the flexibility to respond quickly to urgent matters when necessary, for example, to military developments in neighbouring countries;
 - for those treaties that require a further legislative step, the clogging of the already busy parliamentary timetable and legislative programme (and potentially with treaties that are of little interest to Parliament); and
 - resource implications to cover the work which may be required of those in the executive as well as in the House to deal with any approval mechanisms.
- 111 Timing problems associated with urgency and confidentiality are not insurmountable. For example, Parliament has the ability, through taking urgency, to deal rapidly with matters such as a form of treaty approval, and a possible role for select committees in any parliamentary approval process may protect confidentiality of sensitive treaty negotiations.¹²⁸ The need for flexibility could be addressed in the design of any parliamentary approval process. (On the point of flexibility, it has already been noted in [chapter 2](#) on the current treaty making process that for all treaties there is an existing “approval” step, involving gaining Cabinet approval for any treaty before it is signed. Suggestions of accommodating different monitoring and approval steps by Parliament are therefore not totally foreign.)
- 112 There are anticipated problems with parliamentary time and clogging of the legislative programme. In relation to these it should be noted that under the current process legislation is passed for

¹²⁸ See [paras 150–160](#) and [paras 176–177](#).

any new treaty (which requires domestic implementing legislation) prior to the government signing the treaty, and that several international treaties are currently awaiting a slot in the legislative programme.¹²⁹

TREATY DEFINITION/TYPE

- 113 As well as issues of timing, there are issues related to treaty definition. These consider the type of treaty that is being negotiated/created (eg, whether it is multilateral or bilateral) and whether that will be helpful in determining what treaties are subject to an approval process. A treaty may be, at one extreme, an exchange of letters, at the other are complex multilateral conventions; it may come into effect immediately upon the signature of the State; or it may require a further step of implementation domestically.
- 114 It is useful to note the facts about the range of treaty actions before contemplating treaty definition as an identifier for possible parliamentary involvement. In the 4 years 1990–1994, 109 treaties were tabled in the New Zealand Parliament and published in the New Zealand Treaty Series.¹³⁰ All were already binding on New Zealand. That is to say the tabling was for the record and for information; at the time of tabling the House could take no effective action (although it may have already taken action to pass necessary legislation). The treaties may provide a useful sample in relation to issues of practicability for any reform proposals. Included in the 109 treaties were multilateral treaties relating to international criminal law (war crimes, hostage taking, narcotics),

¹²⁹ An example mentioned to the Commission by Don MacKay, Deputy Secretary, MFAT, is the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Commission understands that it is relatively common in New Zealand for there to be a long gap between signature and ratification – an extreme example is the 1875 Convention respecting the Creation of an International Office of Weights and Measures to which New Zealand became a party 115 years after its adoption: Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

¹³⁰ A more complete list of New Zealand treaty actions than treaties tabled (which are confined to treaties that have entered into force for New Zealand but do not include treaties signed subject to ratification, or definitively signed but not yet in force, or treaties from which New Zealand withdraws) is to be found in an appendix to each annual report of MFAT: Office of the Clerk of the House of Representatives, correspondence, 17 October 1997. See also *New Zealand Consolidated Treaty List Parts One and Two*, and the statistics in [para 14](#) of this report.

intellectual property and child abduction; and bilateral treaties covering extradition, double taxation, and social security that required legislative action.

- 115 About 70% of the treaties were bilateral and with only a few exceptions those treaties came into force as a result of signature and with no other action. A small number were subject to ratification: for example, a treaty of territorial delimitation with the United States (relating to the boundary between Tokelau and American Samoa), an extradition treaty with Fiji, an air transport agreement with Argentina, and some double tax agreements. A third small group of bilateral treaties, including double tax, social security, visa abolition, investment protection and trade agreements, entered into force following the parties notifying or confirming to one another that the necessary legislative and other steps had been taken.
- 116 The line between restricted multilateral treaties (of a regional nature) and general multilateral treaties is somewhat arbitrary; in the former group can be included those related to South Pacific matters and a recent agreement relating to war graves between Tunisia and five allied states. Under 10% of the 109 treaties come into that category: some came into force on signature, while others required ratification or further action.
- 117 The 26 multilateral treaties in the group of 109 were all subject to some further action after the text was established by the negotiation, that is, action of ratification, acceptance, or accession (the particular action depending on whether the state had signed the text or not, and on the formal requirements of the treaty). That is to say, in all those cases the text had been established some time before the government ratified, accepted or acceded to it. In almost all cases the period between the text being established and being accepted was more than 2 years – sometimes well over that (31 years for accepting the Constitution of the Centre for Cultural Property). Only rarely does ratification of a multilateral treaty follow closely on signature.
- 118 With the bilateral treaties subject to ratification in the group of 109, the periods are shorter – only 3 weeks in the case of the extradition treaty with Fiji (where implementation in New Zealand law was effected by an Order in Council rather than an Act) – but in other cases over a year.
- 119 By way of analogy, the difference between treaties subject to further action and those binding on signature or (with some important qualifications) between multilateral and bilateral treaties might

be equated to the difference between primary and secondary legislation. The former are more concerned with principle and policy, the latter with detail and implementation.¹³¹ Similarly, Parliament is more likely to have an interest in the former. The equation is not exact (compare, for example, the original bilateral CER agreement with the latest multilateral adjustment to the schedules in the ozone layer treaty) but it does appear to provide a useful guide.

- 120 Treaty definition issues are often addressed in terms of subject matter,¹³² with the subject matter of some treaties, such as human rights, described as being of potential interest to Parliament while others are not. For instance, both a “minor” arrangement concerning our trade in sheep meat,¹³³ and the GATT, are treaties that deal with the subject matter of trade, yet Parliament and the public at large clearly have a stronger interest in the far reaching implications of the latter – GATT – and treaties concerning the WTO.¹³⁴
- 121 A further example, certain defence arrangements with other states may be thought not to affect individual rights within New Zealand and therefore to be of little interest to either Parliament or the public (through the select committee process), while important environmental agreements such as the Vienna Convention for the Protection of the Ozone Layer may be the opposite. However, some of the treaties which have been the subject of parliamentary interest and action, including approval, are in fact defence arrangements which although they may not immediately directly affect individual rights can, nevertheless, be of major importance.¹³⁵ In general, the

¹³¹ See Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (Report 6, December 1991), para 114.

¹³² See Law Commission’s *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996), paras 24–25 on the range of treaty subject matters.

¹³³ Agreement in the Form of an Exchange of Letters Adjusting the Quantities provided for in the Voluntary Restraint Agreement Between New Zealand and the European Community on Trade in Sheepmeat and Goatmeat as a Result of the Enlargement of the Community (B1995/14).

¹³⁴ Although of course for interested or affected groups the former “minor” arrangement would be of interest and the Meat Export Control Act 1921–1922 provides for strong industry involvement in implementing sheep meat quota: McLean, correspondence, 9 October 1997; re GATT see *Sigma Agencies Ltd v Collector of Customs (Northern Region)* [1997] 1 NZLR 467.

¹³⁵ Consider, for example, opinions expressed on the defence arrangements between New Zealand and Indonesia. Note also [paras 113–115](#) on the subject matters of the 109 sampled treaty actions.

question of impingement on individual rights is not necessarily a determinant when considering possible parliamentary interest.

- 122 On closer examination it may be that treaty definition alone is no more than a “useful guide” to determining which treaties “require” parliamentary consideration and approval, but is not a sufficient indicator of whether or not Parliament will have an interest in a particular treaty. “The immediate effects of some treaties may be obvious while the long term effects of others are not. Consultation is more likely to elucidate the potential effects of all categories of treaties.”¹³⁶ This discussion also raises the associated issues of who would be the appropriate body to determine which treaty definitions or types should go before Parliament and when. Some suggest the House to be that appropriate body.¹³⁷
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¹³⁶ Davidson, correspondence, 16 October 1997.

¹³⁷ Gobbi, correspondence, 31 October 1997; Office of the Clerk of the House of Representatives, correspondence, 17 October 1997.

6

The treaty implementation stage: the practice and issues

- 123 **I**T IS INSUFFICIENT TO CONSIDER how the treaty making process may be improved, without considering the means of legislative treaty implementation – an area of prime parliamentary involvement. A treaty may, for instance, be developed and approved by an ideally democratic process but still fail to reach its potential if the relevant implementing legislation is inadequate. The four broad approaches to implementation in [para 125](#) address that point.
- 124 At issue is that to date there is no one coherent scheme for noting that domestic legislation implements an international treaty obligation. Legislation may, for instance, have been created prior to, but later considered as sufficient implementation of, a treaty obligation; or the legislation may have been amended to implement part or all of a subsequent treaty obligation; or the legislation may have been created in its entirety to implement part or all of a new treaty obligation. Only in the latter case is there a developing practice of noting the relevant international instrument (eg, see the long title of the New Zealand Bill of Rights Act 1990). There is no indication that the other legislation implements treaty obligations.¹³⁸
- 125 The four broad approaches to the legislation needed to implement treaties are:
- A no legislation is required
 - B the statute gives direct effect to the treaty text by using a formula to the effect that the treaty provisions “have the force of law” in the country in question
 - C the statute uses some of the wording of the treaty, incorporated into the body of the relevant area of law, or indicates in some other way its treaty origins

¹³⁸ See the Law Commission’s *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996), appendix C, “Statutes with possible implications for New Zealand treaty obligations”.

D the substance of the treaty is incorporated into the body of the law, without any obvious sign that it has happened.

In addition, primary legislation might authorise

E the making of subordinate legislation (regulations or rules) which is to give effect to identified treaties or is not to be inconsistent with them. That subordinate legislation might take any of the forms B, C or D.

126 Treaty and legislative practice are now briefly discussed under these headings. The allocation among those headings turns on (1) the personal scope of the rights, interests and duties created by the treaty, (2) the nature of the rights, interests and duties stated in the treaty, and the specificity of the drafting, and (3) the importance in terms of policy and principle of the matters involved. The last is particularly relevant to the choice between primary and secondary legislation. Some legislation will not fall clearly within one of the categories: much legislation, for instance, combines elements of B and C, and statutes often implement major treaty provisions while delegating authority for detailed implementation.

127 Importantly, detail and examples of these categories of legislative practice in relation to treaties can be found in the Law Commission's previous report in this area: *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996). It is not intended to reproduce that material here – references to the relevant paragraphs from that report are given.

A *No legislation is required*

128 If the treaty essentially operates at the international level between states, creating rights and obligations only for them, then generally no question of national law arises. National law need not be changed; no rights and obligations under it are involved. In other cases no legislation will be judged necessary for a quite different reason – that the law is considered as already giving effect to the treaty (as in option D) or any difference can be handled by making reservations. (See *A New Zealand Guide to International Law and its Sources*, paras 47–48).

B *The statute gives direct effect to the treaty text*

129 Many statutes enacted throughout the Commonwealth set out the treaty text and then provide that all or part of it are to “have the

force of law” in the particular country. Although the legislation may, in addition, provide some support for the treaty (for instance, in naming the courts to exercise jurisdiction under the treaty), essentially in these cases the treaty is left to speak for itself. The treaty text, for example, may be placed in a schedule with the legislative provisions stating that the text has the force of law.

- 130 Although the distinction between self-executing and non self-executing treaties arose in different constitutional systems for a different purpose, it is useful here. Self-executing treaties become binding and effective domestically as a result of entering into the treaty at the completion of negotiation. Non self-executing treaties are not binding domestically until some further step is taken, usually the passing of domestic legislation. The distinction between the two is further explained as follows:

Only such provisions of a Convention are self-executing which may be applied by the organs of the State and which can be enforced by the Courts and which create rights for the individuals; they govern or affect directly relations of the internal life between the individual, and the individuals and the State or the public authorities. Provisions which do not create by themselves rights or obligations of persons or interests and which cannot be justiciable or do not refer to acts or omissions of State organs are not self-executing.¹³⁹

- 131 If a treaty provision falls within the second “non-self-executing” category, the United States’ jurisprudence and extensive national practice emphasise that further action must be taken by national authorities and especially legislative authorities before the treaty provisions can be given effect by national courts. (See *A New Zealand Guide to International Law and its Sources*, paras 49–52, in particular for characteristics of treaties which indicate the need for that further action.)

C *Some treaty wording is incorporated into the body of the law*

- 132 As already indicated there will often be good reason for incorporating the substance of the treaty provision into the body of the law rather than leaving it to speak for itself. Sometimes this will be done relatively conspicuously – the case considered under this heading; sometimes the treaty origin or connection will be obscured – the case considered in option D.

¹³⁹ *Malachtou v Arnefti* (1987) 88 ILR 199, 212–213.

133 The indication of the treaty origin may appear by the use of treaty wording, or by express reference to the treaty, or both. Major instances concern criminal offences and regulatory matters. (See *A New Zealand Guide to International Law and its Sources*, paras 53–54.)

D *The substance of the treaty is incorporated into the body of the law without any obvious sign that it has happened*

134 If the government decides that existing domestic legislation already implements the treaty, then no sign will be added to the relevant legislation to indicate that, for the future, that legislation also serves the purpose of implementation. The legislation is not, for example, amended to note that it is now considered as implementing New Zealand's obligations under a certain treaty. Treaties falling into two groups, human rights treaties and international crime conventions, provide instances. (See *A New Zealand Guide to International Law and its Sources* paras 55–61 and appendix C.)

135 A danger with this approach to implementation (raised in *A New Zealand Guide to International Law and its Sources* and sufficiently important to be mentioned again here) is that those responsible for administering, applying and interpreting the legislation or for proposing and approving amendments to it, may be unaware of the treaty relationship if the legislation is silent about its international origins or context. That may unknowingly lead to breach of treaty obligations. It is likely, as well, to deprive the user of the statutes of relevant interpretative and other information. The danger can be avoided by appropriate notes to the legislation or, of course, by using one of the express reference devices mentioned in [para 199](#) of this report.

E *Authority is delegated to implement the treaty*

136 Many statutes delegate authority to subordinate lawmakers to make regulations and rules to give effect to treaty obligations and international recommendations. The general approach to the appropriateness of delegating lawmaking power would appear to apply in this context. It has been stated in this way:

The line between the primary and the delegated lawmaker should in general be that between principle and detail, between policy and its implementation. Parliament with its representative composition and

through its public processes should address and endorse (or not) the policies presented to it by the executive, while recognising that matters of less significance or of a technical character, or requiring rapid adaptation or experimentation might be left to subordinate lawmaking. Another situation in which lawmaking powers might be and are delegated – and in broader terms – is to deal with emergencies.¹⁴⁰

- 137 There is the further element that once Parliament has given effect to the initial treaty obligation, it might appropriately delegate authority to give effect to amendments and additions to the original treaty. Parliament has established the basic policy and has recognised the external source of the law and future changes might be technical and need to be made frequently. Much Commonwealth practice supports such delegation; the United Kingdom European Communities Act 1972 might be seen as a notable example.¹⁴¹ (See *A New Zealand Guide to International Law and its Sources*, paras 62–64.)
- 138 The empowering provisions vary considerably in their scope:
- (1) Some appear to be unlimited, authorising the making of regulations to give effect to *any* international agreement, for example, Antarctic Marine Living Resources Act 1981 s 17(d) (cf (e) and (f)), Fisheries Act 1983 s 89(5), Marine Mammals Protection Act 1978 s 28(1)(g). Presumably those powers should be read in the context of the general subject area of the treaty in issue.
 - (2) Other empowering provisions usefully make that limit to the general subject area of the treaty explicit, for example, Civil Aviation Act 1990, Enemy Property Act 1951 s 3(1)(a), Geographical Indications Act 1994 s 20(m), International Energy Agreement Act 1976 s 4, Maritime Transport Act 1994, Mutual Assistance in Criminal Matters Act 1992 s 65, Resource Management Act 1991 s 360, Territorial Sea and Exclusive Economic Zone Act 1977 s 9, Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 s 8(3), Transport (Vehicle and Driver Legislation and Licensing) Act 1986 s 48.

¹⁴⁰ Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (Report 6, rev ed 1991), para 114.

¹⁴¹ Lord Howe has recently recorded the throughput of Community legislative instruments at between 650 and 800 a year, “Managing the Statute Book” [1992] St L R 165, 173.

- (3) Other empowering provisions are more specific about the particular matters that the regulations can cover, for example, Antarctica Act 1960 s 6A, Antarctica (Environmental Protection) Act 1994 s 55, Copyright Act 1994, Diplomatic Privileges and Immunities Act 1968, Geneva Conventions Act 1958 s 9(b), Layout Designs Act 1994 s 37, Patents Act 1953.
- (4) Others may also give the regulation maker the power to override statutes, for example, United Nations Act 1946 s 2(2), Territorial Sea and Exclusive Economic Zone Act 1977 s 30, Social Welfare (Transitional Provisions) Act 1990 s 19, Extradition Act 1965, Child Support Act 1991 s 215.
- 139 As a further point on implementation through delegated authority and subordinate instrument, the areas in which the delegated powers can be exercised are also very varied and include:
- international sanctions, for example, United Nations Act 1946;
 - international trade, for example, Tariff Act 1988, Dumping and Countervailing Duties Act 1991, Customs Act 1966;
 - international finance, for example, Income Tax Act 1994 (double taxation agreements);
 - international communications, for example, Civil Aviation Act 1990, Maritime Transport Act 1994, Transport (Vehicle and Driver Registration and Licensing) Act 1986, Radio-communications Act 1989, Telecommunications Act 1987;
 - international spaces, for example, Antarctic Marine Living Resources Act 1981, Territorial Sea and Exclusive Economic Zone Act 1977, Fisheries Act 1983;
 - environment, for example, Ozone Layer Protection Act 1990, Trade in Endangered Species Act 1989, Resource Management Act 1991;
 - assistance in legal proceedings, for example, Mutual Assistance in Criminal Matters Act 1992, Judicature Act 1908, Reciprocal Enforcement of Judgments Act 1934, Extradition Act 1965.
- 140 There is one further and final point to be made in relation to implementation generally, and that is the matter of what may be termed the process of continuing implementation. This relates in particular to governmental reporting to United Nations treaty committees – our ongoing obligation to continue the implementation of our international obligations (particularly in relation to human rights treaties) and revisit the necessity for the reservations made previously.

141 An example is the regular reporting by the government to Parliament on its attitudes to recently adopted International Labour Organisation Conventions, as required by the Constitution of the International Labour Organisation (226 NZPD 822). It may be suggested that insufficient advantage is taken of that process.¹⁴² A further example, and one where the process of continuing implementation is of particular importance in New Zealand, is the Treaty of Waitangi, and the Government's ongoing obligations under that treaty.

¹⁴² Keith, "Governance, Sovereignty and Globalisation", paper presented at the 1997 5th Biennial Conference of the New Zealand Council of Trade Unions, 12.

7

Law Commission recommendations: a greater role for Parliament and others

- 142 **T**HE FOLLOWING PARAGRAPHS CONTAIN the Law Commission's three main recommendations, plus subsidiary recommendations for the possible means by which each of the three can be adopted. Relevant process suggestions by others are included to provide completeness.
- 143 The Commission's main and subsidiary recommendations should be seen as addressing the treaty making process on a continuum, from start to finish. In the early stages the Commission proposes formal processes of notification and consultation, with the establishment and use of a Treaty Committee of Parliament for such notification and consultation. Further, such a committee may determine which treaties are tabled in the House – a process the Commission recommends along with appropriate treaty impact statements. At the end of the process, the Commission recommends desirable drafting practices for implementing legislation (at a minimum the noting of the statute's international origins). Legislation may be deemed necessary, although the Commission considers that these process changes are achievable through the drafting of further Standing Orders.

RECOMMENDATION 1

- 144 *The Law Commission's first main recommendation is that the value of notification and consultation with Parliament and affected or interested groups at the negotiating stage be recognised, with the purpose of developing and formalising such practices.*
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Early notification and consultation

- 145 Early notification should be given of the matters that are the subject of negotiations, as in the current publications of the Australian Department of Foreign Affairs and Trade (DFAT). Amongst other material, the DFAT website on the internet¹⁴³ provides a “List of Multilateral Treaty Actions Under Negotiation” covering a 12-month period. It provides contact details for the relevant department plus a contact person’s name for each treaty listed. In New Zealand, such notification of treaty action might also be given specifically to Parliament and particular interest groups. No doubt there will be limits to such practice, for example, not all open covenants can be openly arrived at (to refer to the point by President Woodrow Wilson),¹⁴⁴ but practice suggests that in many cases the processes can be open, at least in part.
- 146 In connection with material available via the internet, there is a general point to be made here concerning the provision of information about New Zealand’s treaty making process – whether to Parliament, departments, non-governmental organisations or others, and whether in the House, over the internet or as written material. Commission correspondents and the report of the Foreign Affairs, Defence and Trade Select Committee noted the lapse of institutional debate on matters of foreign affairs with the day-long foreign affairs debates in the House ceasing some time ago.¹⁴⁵ The Select Committee’s report recommends to the House and the Standing Orders Committee that 3 hours be set aside to debate treaties and related foreign policy issues at the beginning and end of each parliamentary year.
- 147 The Law Commission suggests that the Ministry of Foreign Affairs and Trade (MFAT) emulate the DFAT website, which in addition to the written versions could be a helpful way in which to distribute MFAT’s annual reports (containing treaty lists as mentioned earlier) and its useful Information Bulletin publication series (of

¹⁴³ See [appendix B](#) for the website address.

¹⁴⁴ “Open covenants of peace openly arrived at.” Address to Congress, 8 January 1918. First of *Fourteen Points*.

¹⁴⁵ Foreign Affairs, Defence and Trade Select Committee, *Inquiry into Parliament’s Role in the International Treaty Process: Report of the Foreign Affairs, Defence and Trade Committee*, 1997 AJHR I.4A, 7; Small, conversation, 13 November 1997; Keith, correspondence, 14 October 1997.

which 11 of the approximately 60 titles are still available). The development of formal notification practices may also be helpful in terms of the creation of an MFAT manual on its treaty making process.

- 148 The notification the Commission recommends can be extended to include consultation. Consider, for example, the consultation process undertaken in 1995 (and still ongoing) by Te Puni Kokiri on the draft Declaration on the Rights of Indigenous Peoples.¹⁴⁶ That draft is of a non-binding declaration, not a treaty, but there was formal public consultation. Comparable are the processes involved in preparing a government position for major international conferences such as those on the environment, human rights, population, social policy and women.

Due to New Zealand's small size and limited diplomatic resources, it is not able to be involved in all the international negotiations that go on and which lead to treaties, and it has to select which ones are of most vital importance to it. That selection is essentially done by the Executive Government, and there may be a role for Parliament in scrutinising the selection process and perhaps from time to time making recommendations for its adjustment.¹⁴⁷

- 149 Formal methods of and procedures for consultation may be built into a process of early notification by the use of a particular parliamentary/select committee with associated procedures for receiving submissions.

RECOMMENDATION 1A

- 150 *The Law Commission recommends that consideration be given to the establishment of a Treaty Committee of Parliament.*
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A Treaty Committee role

- 151 A Treaty Committee, as a committed parliamentary/select committee, could inquire into and report on matters which are the

¹⁴⁶ Te Puni Kokiri's publication (presently being updated), *Consultation with Māori: A Guidebook* (Wellington, 1995), will be instructive in the development of formal consultation processes with iwi and hapu in relation to imminent treaty actions.

¹⁴⁷ Palmer, correspondence, 30 September 1997.

subject of an international negotiating process.¹⁴⁸ As the Ministry of Justice notes:

This procedure [of parliamentary approval] could start with the creation with a select committee charged with its development. All treaties could be referred to it. It could, along-side its normal treaty investigations, be empowered to recommend whether a treaty needed to go to Parliament for debate or approval or both. This would permit treaties to be selected on a case by case basis, rather than by class or some other uncertain . . . standard. In this way, Parliament could devote its resources to important treaties. . . .¹⁴⁹

- 152 That is not to say that the committee would participate in any direct way in the negotiations (although members of Parliament might be members of the government delegation), rather it would provide a forum for the exchange of information and the expression of opinions. It could control the confidentiality of a particular treaty discussion being able to meet *in camera* (that is, behind closed doors), provide a forum for consultation and submissions, and undertake to keep the House abreast of treaty developments. It might itself adopt a position on the issues.
- 153 It is possible that the Foreign Affairs, Defence and Trade Select Committee could be given powers to consider treaties – as the Committee itself has recommended in its *Inquiry into Parliament's Role in the International Treaty Process*.¹⁵⁰ Alternatively (or in addition), it is possible that existing select committees could deal with the treaties that cover relevant subject matter.

It would be possible to devise a fairly simple procedure for the appropriate Select Committee to receive notification of treaties being negotiated via the Clerk of the House . . . then envisage some procedure similar to that followed by the Regulations Review Committee whereby the Committee can examine drafts and report on them to the House.¹⁵¹

¹⁴⁸ For a description of parliamentary committees, function and membership see chapter 9, “Parliamentary Committees” in Ringer, *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991), 127.

¹⁴⁹ Gobbi and Barsi, “New Zealand’s Treaty-Making Process: Understanding the Pressures and Proposals for Reform (Draft No 3)”, (Strategic Assessment Group, Ministry of Justice, Wellington, 1997), 30; Australian Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (AGPS, Canberra, 1995), para 16.65.

¹⁵⁰ See para 165 of this report for further detail.

¹⁵¹ Palmer, correspondence, 30 September 1997. The Australian DFAT’s internet website has a list of all treaties being negotiated in a 12-month period and the person to contact in the relevant department – see [appendix B](#).

- 154 In his paper “Treaties and the House of Representatives”¹⁵² the Clerk of the House, David McGee, recommended a procedure of tabling draft international treaties and referring them to the appropriate subject select committees for consideration. Under these proposals, the Foreign Affairs, Defence and Trade Select Committee would be at the centre of the treaty approving process by allocating treaties to individual committees for scrutiny and keeping the overall process under review. It would then be the role of that chosen subject select committee to brief the House as to progress. The Clerk also recommends that although the House would only be able to approve or reject a draft treaty, the select committee could in its report recommend amendments or reservations if it saw fit.
- 155 The Commission considers, however, that the development of a specific Treaty Committee has its merits. The committee, with committed time and personnel, would develop expertise and interest in treaties, treaty processes and treaty law.

The roles of Parliament and the executive could be modified by establishing a parliamentary committee dealing exclusively with treaties. This committee could evolve from one already present in Parliament, but the other roles or functions of that committee might eclipse its treaty focus. This risk suggests that a new treaty focused committee would be preferable. A specialised committee is also likely to bolster Parliament’s role in the treaty-making process, which would not be the case if referring treaties, by subject matter, to existing committees.¹⁵³

- 156 There is scope for such a parliamentary committee, established in a reform of New Zealand’s treaty making process, to have a broader role than merely considering the treaties which are placed before it. Such a committee could also look at the treaties which New Zealand has neither ratified nor signed. New Zealand has not, for example, ratified any International Labour Organisation (ILO) treaties for 20 years. Such a committee could also ask for justification of the selection of treaties – which at times has reflected the fact that certain types of treaties come and go in popular cycles. For instance, treaties on the environment were very popular in the 1980s, whereas in the 1930s there were 20 to 30

¹⁵² *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders Committee*, 1996 AJHR I.18B, annex D. See further detail of the paper by the Clerk of the House in [paras 172–174](#) of this report.

¹⁵³ Gobbi and Barsi, 30; *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, paras 15.15–15.29.

Legal Proceedings Conventions concerning evidence in civil and commercial matters. Now, in the late 1990s, there is a surge of treaties concerning co-operation between countries on criminal matters.¹⁵⁴

- 157 The Ministry of Justice has provided the following detail concerning a specialised committee:

It would also allow for the pooling of resources, thereby increasing parliamentary experience and expertise, which would improve the quality of Parliament's recommendations. However, given the range of topics that treaties cover, the committee may not be able to cover all topics in sufficient depth with only the knowledge and time of its members. It may, as other select committees do, solicit advice from experts in appropriate circumstances, ensuring effective time management and focused debate on the merits of particular treaties or some aspect of the treaty-making process. A specialised committee would also promote consistency of scrutiny standards and criteria.

This specialised committee could keep Parliament informed of the executive's treaty-making activities and involve the public by allowing it an opportunity to be heard and to be kept informed. To ensure its effectiveness, the committee should have the scope to examine any treaty, analyse the nature of its obligations, and to recommend whether it should be accepted, with or without reservations. It should also be able to examine any changes in the nature of obligations already incurred (eg, examining a proposed removal of a reservation) and have the authority to review any treaty and its implementing legislation.

As the House is currently constituted, the committee's recommendations would not be binding on the executive unless Parliament acted on them by passing the necessary legislation. However, the threat of legislation could make the executive responsive to the committee's recommendations. This assumes that Cabinet's control of Parliament is not as assured as it has been in the past. If parliamentary approval were required to ratify treaties, this committee's importance to the executive would be greatly enhanced.¹⁵⁵

- 158 The Australian Joint Standing Committee on Treaties provides a possible model. In Australia, the Australian Law Reform Commission (ALRC) recommended that, to help ensure accountability and acceptability of international obligations arising

¹⁵⁴ Small, comments at an International Law Association (New Zealand Branch) Seminar on Treaty Making, Wellington, 13 May 1997.

¹⁵⁵ Gobbi and Barsi, 31; *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, paras 15.15–15.29.

out of the treaty making process, such a committee should perform the following functions:

- receive reports, copies of treaties and other relevant documentation (eg, summaries of treaty negotiations) from the Department of Prime Minister and Cabinet (DPMC) and the Department of Foreign Affairs and Trade (DFAT) concerning the status of treaties and treaty negotiations;
- issue periodic reports to federal Parliament on treaty making in Australia, including the status of negotiations, and highlight important matters ahead of ratification;
- keep under review the Principles and Procedures for Commonwealth-State Consultation on Treaties and other relevant practices adopted by DFAT.¹⁵⁶

159 The ALRC favoured allowing the committee to recommend, as part of its report into each treaty proposal, whether the question of ratification should be referred to Parliament – seen as desirable in the case of treaties which could be expected to be controversial. Other treaties, not warranting this type of attention, could be more appropriately dealt with by the committee directly.

160 In New Zealand a Treaty Committee could be established, and its role, functions, and powers determined, under the Standing Orders. (See *Standing Orders of the House of Representatives* (Wellington, 1996), chapter IV, Standing Orders 188–251 covering the establishment of committees and their meetings, powers, conduct of proceedings, hearing of evidence, information and confidentiality of proceedings and reports.)

Statement to the House

161 As part of a notification process statements could be made to the House on a proposed treaty obligation by the responsible Minister, sometimes with a statement by an opposition spokesperson (as was done with the treaty of friendship with Western Samoa, the South East Asian treaty and the Japanese trade agreement). Such statements on treaty developments could also come from a Treaty Committee.

¹⁵⁶ Naylor, “Australia’s Treaty Making Process: Democracy in Action?” (1995) Australia Law Reform Commission 67 Reform 42. See further appendix A of this report, [paras A20–A22](#), on the Australian Committee on Treaties, and Principles and Procedures.

RECOMMENDATION 2

- 162 *The Law Commission recommends that consideration be given to the introduction of a practice of the timely tabling of treaties so that members of the House can determine whether they wish to consider the government's proposed action.*
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Relevant House discussion and debate

- 163 New Zealand practice indicates a range of possible parliamentary involvement distinct from that which arises in the last stage of treaty making – when Parliament considers implementing legislation. Parliament may consider all or some treaties.

Whether parliamentary approval extends to all or just certain types of treaties, it generally takes one of two forms: active or passive. The active approach would require Parliament to pass a motion of acceptance for every treaty before it could be ratified. The passive approach would allow the approval of treaties by default. For example, if a treaty has not been brought to the attention of the House and debated after a certain time (eg, 15 sitting days) the treaty is presumed accepted. This method requires less parliamentary resources, but it invites neglect. It also requires procedures that can be used to bring treaties to the attention of the House, trigger debate, govern how quickly the debate must proceed and when it should conclude, and provide the House with a course to follow once it reaches a final decision.¹⁵⁷

- 164 Parliamentary consideration and approval of treaty obligations could also be developed through debate in the House, after appropriate notice and tabling of the treaty papers. A discussion in the House in the course of a relevant debate would allow members the opportunity to express their views on the intended action – as with the peace treaty with Japan and the ANZUS treaty. A 1997 Memorandum to the Foreign Affairs, Defence and Trade Select Committee by the Rt Hon Mike Moore MP, *Memorandum on Foreign Policy, Trade, and Other Treaty Issues*, made a recommendation for formal debates in the House dedicated to treaty obligations.

¹⁵⁷ Gobbi and Barsi, 30. See also para 146 of this report.

Tabling of treaties

165 In response to this memorandum, the Foreign Affairs, Defence and Trade Select Committee have reported to the House. The Committee's *Inquiry into Parliament's Role in the International Treaty Process*, tabled on 18 November 1997, importantly recommends the Government amend the treaty process by adopting the following steps (reproduced here in full):

- 1 That, for a trial period of 12 months, all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) should be tabled in the House prior to ratification, accession, acceptance or approval and be subject to the following procedure.
- 2 A document along the lines of a "National Interest Analysis" would be prepared for each treaty and tabled in the House at the same time.
- 3 Both the treaty and accompanying "National Interest Analysis" would be referred to the Foreign Affairs, Defence and Trade Committee upon tabling. This committee could retain the treaty documents for itself, or refer them to a more appropriate select committee, for inquiry and report back to the House, if the relevant committee considers an inquiry necessary, within 15 sitting days of tabling in the House.
- 4 If requested by members, the House should provide an opportunity for members to debate any select committee reports on treaties in the House (in addition to the existing opportunities and the proposal in recommendation 1).
- 5 The Government will not ratify, accede to, accept or approve any treaty until after a select committee reports on its inquiry into a treaty or 15 sitting days elapses from the date the treaty is tabled, whichever occurs first.
- 6 In the event that the Government needs to take urgent action in the national interest in ratifying, acceding to, accepting or approving a treaty, and it is not possible to table it beforehand, it will be tabled as soon as possible after such action has been taken together with an explanation to the House.

166 There is a fair measure of similarity between these recommendations and the Commission's own. However, it can be noted that these provisions will relate, in the main, only to multilateral treaties. New Zealand's bilateral treaty actions, which include such instruments as CER, would not be tabled and considered.¹⁵⁸

¹⁵⁸ See *New Zealand Consolidated Treaty List as at 31 December 1996: Part Two (Bilateral Treaties)*, 1997 AJHR A.265, 49.

167 In addition to the Select Committee recommendations reproduced in [para 165](#) concerning the tabling of treaties, the Ministry of Justice have detailed the following:

Currently, the executive, approximately twice a year, tables in the House the treaties that it has executed. They are tabled in bulk without any explanatory material. The government of the day rarely sets aside time to discuss any of these treaties. As a result of this practice, it has been proposed that all treaties, with certain exceptions, should be individually tabled at least 15 sitting days before they are ratified. These exceptions would allow for treaties dealing with urgent or sensitive matters. In these cases, it is argued that information about the treaty should be made public as soon as possible after it is executed.

Article 102¹⁵⁹ of the Charter of the United Nations [obliges member states to] provide for public notification and publishing of any agreements entered into by member states, to discourage secret treaties and agreements. All treaties signed by a country should ultimately be made public. If the national interest demands that a treaty not be tabled before it is executed, it is argued that the executive should only be able to withhold that treaty from Parliament on the condition that it table the treaty as soon as it can along with reasons for the delay. Usually, the need for confidentiality arises only during the negotiation phase of a bilateral treaty, generally for reasons of commercial sensitivity.¹⁶⁰ [footnote added]

168 Provision for a procedure of timely tabling of treaties as contained in the Commission's second main recommendation could be made in the Standing Orders. Such Orders could provide for the tabling of certain categories of treaties (perhaps as determined with the assistance of a Treaty Committee)¹⁶¹ and for the treaty to be accompanied by a treaty impact statement (see [paras 179–184](#) on these statements).

169 One approach to the tabling of treaties is expressed in the New Zealand International Legal Obligations Bill 1997, prepared by

¹⁵⁹ Article 102 of the Charter states: "Every treaty and every international agreement entered into by any Member of the United Nations . . . shall as soon as possible be registered with the Secretariat and published by it".

¹⁶⁰ Gobbi and Barsi, 30–31; *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, paras 15.1–15.5, 15.8–15.10. The UK Ponsonby Rule denotes a similar process – see [appendix A](#) of this report.

¹⁶¹ See the Canadian criteria at [para A93](#) for a useful although general starting point. (Further criteria may need to be added to identify more clearly treaties having implications for human rights, rights secured under the Treaty of Waitangi, or the customary rights of Māori); Dawson, correspondence, 15 October 1997. See the broader criteria used by France at [para A39](#).

Alliance members of Parliament and at present awaiting the ballot. This Bill proposes that before any international legal obligation is entered into the treaty must be tabled in the House of Representatives. Members would then have 14 sitting days in which to give a notice of motion objecting to the treaty – such notice would bar the Crown from becoming a party to the treaty unless that treaty is approved by a resolution of the House of Representatives.¹⁶²

- 170 A commentator has suggested that the minimum number of sitting days before a treaty is ratified be increased. This would maximise time for parliamentary comment and also allow whoever is negotiating the treaty on New Zealand's behalf (usually MFAT) sufficient time to respond to parliamentary input.¹⁶³
- 171 There has also been a draft Bill, prepared by the ACT political party, the *Treaties (Parliamentary Approval and Treaties Information) Bill*, which proposes that the House consider and approve all treaties prior to New Zealand becoming a party (or withdrawing) but without specifying the process by which such approval might be achieved. The draft Bill also proposes that the relevant Minister keeps the House informed of developments that the Minister judges to be of interest concerning a treaty.¹⁶⁴
- 172 Amongst the 11 recommendations made by the Clerk of the House, David McGee, in his paper "Treaties and the House of Representatives"¹⁶⁵ are the following:
- Before the House ratifies any treaty, it should be necessary for the House to approve the making of that treaty.
 - Prior parliamentary approval to ratify a treaty may be given by a simple resolution of the House.
 - For the purpose of considering whether to approve a treaty, the treaty should be tabled in the House in draft.
 - After being tabled the draft treaty would be referred to the appropriate select committee for consideration.
 - A time limit within which the committee must report the draft treaty back to the House would be imposed (say, 15 sittings days).

¹⁶² As at November 1997 this draft Bill had not been successful in the ballot.

¹⁶³ Coll-Bassett, correspondence, 7 October 1997.

¹⁶⁴ As at November 1997 this draft Bill had not been successful in the ballot.

¹⁶⁵ *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders Committee*, 1996 AJHR I.18B, annex D.

- 173 Under these proposals the House would only be allowed to approve or reject a draft treaty, although any amendments and reservations to a treaty would also require House approval (with recommendations for such reservations and amendments able to be proposed by the relevant select committee).
- 174 Further, the Clerk has recommended that the requirement of mandatory parliamentary approval be backed by legislation but that the process by which this is obtained be set out in Standing Orders (see also paras 187–192). Another commentator has noted that a select committee may not be a satisfactory sole mechanism for determining which treaties are referred to the House, and that for significant treaties a disallowance mechanism is preferable.
- 175 A possible model for the mechanism is suggested as the Regulations (Disallowance) Act 1989 ss 4–10 and associated Standing Orders 195–198.¹⁶⁶ Section 4 of the Act provides for regulations to be laid before the House, and s 5 permits the House to disallow any such regulations by resolution. The analogous Standing Orders provide as follows:

195 Regulations Review Committee

The House appoints a **Regulations Review Committee** at the commencement of each Parliament.

196 Functions of committee

- (1) The committee examines all regulations.
- (2) A Minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister.
- (3) The committee may consider any regulation-making power in a bill before another committee and report on it to the committee.
- (4) The committee may consider any matter relating to regulations and report on it to the House.

197 Drawing attention to a regulation

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).

¹⁶⁶ Dawson, correspondence, 15 October 1997.

- (2) The grounds are, that the regulation—
- (a) is not in accordance with the general objects and intentions of the statute under which it is made:
 - (b) trespasses unduly on personal rights and liberties:
 - (c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
 - (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:
 - (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
 - (f) contains matter more appropriate for parliamentary enactment:
 - (g) is retrospective where this is not expressly authorised by the empowering statute:
 - (h) was not made in compliance with particular notice and consultation procedures prescribed by statute:
 - (i) for any other reason concerning its form or purport, calls for elucidation.

198 Procedure where complaint made concerning regulation

- (1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.
- (2) Unless the committee decides, by leave, to proceed no further with the complaint, the person or organisation concerned is given an opportunity to address the committee on the regulation. The committee decides whether to examine the regulation and the complaint further.

Tabling of urgent treaties

- 176 The Clerk of the House also recommended that in the case of a treaty certified by the government to be of an urgent nature the treaty could be entered into and then tabled in the House at the first opportunity. The House would then have 15 sitting days to examine the treaty and determine whether to disallow it. A commentator has noted:

Where the usual disallowance mechanism is not followed, in situations of confidentiality or urgency, the provisions of the Fiscal Responsibility Act 1994 may provide a useful model. Section 4(3)(b)(i) of that Act provides that where the Government departs from the prescribed principles of fiscal responsibility in a particular case the Minister of Finance shall specify “the reasons for the government’s departure from

those principles”. That Act, in laying down important financial reporting requirements on the part of the Government, may also be a useful model for legislation requiring treaty impact statements to be prepared, published, and laid before the House.¹⁶⁷

177 The Foreign Affairs, Defence and Trade Select Committee’s sixth recommendation in its *Inquiry into Parliament’s Role in the International Treaty Process* is that:

6 In the event that the Government needs to take urgent action in the national interest in ratifying, acceding to, accepting or approving a treaty, and it is not possible to table it beforehand, it will be tabled as soon as possible after such action has been taken together with an explanation to the House.

Resolution by the House

178 Approval of the government’s intended action may be given by a House resolution – as with some treaties of peace and the Charter of the United Nations (both of which were also the subject of implementing legislation) and the partial test ban treaty.

RECOMMENDATION 2A

179 *The Law Commission recommends that consideration be given to the preparation of a treaty impact statement for all treaties to which New Zealand proposes to become a party.*

*Treaty impact statements*¹⁶⁸

180 Practice in both Australia and the United Kingdom suggests the preparation of treaty impact statements – in the United Kingdom they are prepared for all treaties tabled in Parliament while the Australian practice is more comprehensive by extending to every treaty. Given that it is possible not all treaties need to be tabled in the House under a reformed process, the practice in New Zealand could be that all treaties should be referred to a Treaty Committee, and those the Treaty Committee refers to the House be accompanied by a treaty impact statement.

¹⁶⁷ Dawson, correspondence, 15 October 1997.

¹⁶⁸ Such statements are also referred to as National Impact Statements or Explanatory Memoranda, although the Law Commission favours the term “treaty impact statement”.

181 The Foreign Affairs, Defence and Trade Select Committee's *Inquiry into Parliament's Role in the International Treaty Process* has recommended

- 2 A document along the lines of a "National Interest Analysis" would be prepared for each treaty and tabled in the House at the same time.
- 3 Both the treaty and accompanying "National Interest Analysis" would be referred to the Foreign Affairs, Defence and Trade Committee upon tabling.

182 The Ministry of Justice has also noted that:

TIS [treaty impact statements] would clarify the implications of a treaty, improve and promote information given to the community, and demonstrate just how a treaty relates to the national interest. TIS are a more involved undertaking than explanatory notes.¹⁶⁹

Both the Australian Senate Legal and Constitutional References Committee report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, and the report by the New Zealand Foreign Affairs, Defence and Trade Select Committee¹⁷⁰ recommend that treaty impact statements should provide the following information:

- reasons for New Zealand being a party to the treaty;
- any advantages and disadvantages to New Zealand of the treaty entering into force in respect of New Zealand;
- any obligations which would be imposed on New Zealand by the treaty;
- any economic, social, cultural, and environmental effects of the treaty entering in force in respect of New Zealand, and of the treaty not entering in force in respect of New Zealand;
- the costs to New Zealand of compliance with the treaty;
- the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects;
- measures which could or should be adopted to implement the treaty, and the intentions of the government in relation to such measures, including legislation;
- whether the treaty provides for withdrawal or denunciation; and
- a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty.

¹⁶⁹ Gobbi and Barsi, 32–33.

¹⁷⁰ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, paras 15.47–15.52, 15.77; *Inquiry into Parliament's Role in the International Treaty Process*, appendix 2, 12.

- 183 The final point in this list could address the point made by one correspondent that part of Parliament's role should entail ensuring that departments are in fact consulting.¹⁷¹ However, the Commission suggests that treaty impact statements include an amended requirement from the above list plus one additional requirement, as follows:
- a statement setting out the consultations which have been undertaken or are proposed with the community, **Māori** and interested parties in respect of the treaty; and
 - **whether the treaty has any effect upon rights provided by the Treaty of Waitangi.**
- 184 An additional note concerning treaty impact statements is that the introduction of such a procedure is analogous to two existing procedures. They are the requirement for recording financial and legislative implications of cabinet submissions (see the *Cabinet Office Manual*, paras 4.6–4.36), and the noting of compliance with legal principle and obligations in proposals for Bills (see the *Cabinet Office Manual*, para 5.26).¹⁷²
- 185 It is important to put the proposals mentioned so far, regarding notification, consultation, a Treaty Committee, tabling, and treaty impact statements, into context. Concerns expressed in New Zealand on matters such as confidentiality relate to a small proportion of the treaties which are negotiated each year.

In the year between 1 July 1996 and 30 June 1997 New Zealand signed, ratified, accepted, approved or acceded to 35 treaties. Many of these treaties were routine bilateral agreements not of a controversial nature.¹⁷³

Most bilateral treaties raise no general public issue at all. But some do, for instance some of the treaties relating to major CER developments and double taxation. And then there are the multilateral treaties, especially those of major importance and which have been the subject of public attention – foreign investment, international labour, environment, and human rights conventions in particular.

- 186 In some cases the government might make the assessment that a treaty is of major importance, and promote parliamentary consideration itself. In other cases, parliamentary consideration of the

¹⁷¹ O'Brien, correspondence, 23 October 1997.

¹⁷² *Cabinet Office Manual* (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 1996).

¹⁷³ *Inquiry into Parliament's Role in the International Treaty Process*, 8.

required legislation will provide sufficient opportunity to consider the executive's action. But in other cases that will *not* be so. The practices and proposals mentioned above support proposals for better and more timely information to Parliament.

LEGISLATIVE REQUIREMENTS

187 One point to consider is whether requirements should be imposed by legislation for notification, consultation, committee, treaty impact statements and tabling procedures.

Legislation putting these procedures in place may be required to ensure that the executive abides by them. In and of itself, a 15 day sitting rule is of limited value if the Government does not have to devote any parliamentary time to debate the treaties it tables or to motions regarding their approval, as experience in the United Kingdom has shown.¹⁷⁴

188 The legislation issue arises, in part, because Parliament increasingly requires consultation – the growing internationalisation of matters once thought domestic may justify it. This point is illustrated by the Ozone Layer Protection Act 1990 where, under s 53(2), certain Orders in Council can only be made if the Minister has consulted with appropriate persons and is satisfied that New Zealand will be able to give effect to its relevant international obligations after making the Order. In this case the relevant commitments will have already been the subject of international negotiations which may have led to binding decisions. To be effective, any statutory obligation for consultation should occur at an early stage in the treaty making process.

189 A commentator has noted that

the main advantage of seeking to improve accountability in the treaty making process by setting out requirements in legislation is that it raises up a definite standard which is publicly available.¹⁷⁵

190 Another commentator noted that

[c]onsideration should be given to amending the Foreign Affairs Act 1988 to place a duty on the Executive Government to transmit draft treaties to Parliament and otherwise provide appropriate notification of negotiations in which it is engaged. There should also be an

¹⁷⁴ Gobbi and Barsi, 32; Templeman, "Treaty-Making and the British Parliament" (1991) 67 Chicago-Kent LR 461.

¹⁷⁵ Coll-Bassett, correspondence, 7 October 1997.

obligation to table treaties that are subject to ratification acceptance or accession in a timely fashion.¹⁷⁶

191 A cautionary note is added:

In essence, the changes sought in New Zealand are changes to increase the power of the legislature and reduce control of the Executive. These are consistent with the direction in which our constitution has been moving, but it does not need to be done by elaborate statutory provisions. Indeed, the American experience would suggest we should avoid too much positive law on the topic.¹⁷⁷

192 We have already noted the draft Bills that members from the different political parties have drawn up¹⁷⁸ – two addressing parliamentary approval of treaties generally and one concerned specifically with one treaty. The Commission considers it unnecessary to legislate unless and until it appears that the suggested changes to Standing Orders are insufficient. But if legislation is thought necessary a broader perspective than that suggested to date would be beneficial, with legislation that covered the spectrum of the treaty making process. Such legislation (along with the relevant Standing Orders) would address, for instance:

- the establishment and functions of a Treaty Committee of Parliament,
- formal processes of notification and consultation,
- the practice of timely tabling of treaties,
- the preparation of treaty impact statements, and
- a direction as to desirable drafting practices of implementing legislation (at a minimum the noting of the statute's international origins).

ADDRESSING MĀORI CONCERNS

193 Māori concerns the lack of consultation by their treaty partner over various international agreements and lack of control over the creation of international obligations have been noted earlier. Steps to consult with Māori could be included in the above proposals, as part of a Treaty Committee process. As suggested above, the effect of a proposed international agreement upon iwi Treaty of Waitangi partners could be included as a necessary part of any treaty impact statement.

¹⁷⁶ Palmer, correspondence, 30 September 1997.

¹⁷⁷ Palmer, correspondence, 30 September 1997.

¹⁷⁸ See paras 73, 77, 169, 171. See also para 175 for a possible model.

194 Further, broader, suggestions have been made, some specifically using the concept of intellectual property to provide protection against the possible creation of inappropriate international obligations.¹⁷⁹ Much consideration beyond the scope of this report is required before policy can be formed.

RECOMMENDATION 3

195 *The Law Commission recommends that, so far as practicable, legislation implementing treaties or other international instruments give direct effect to the texts, that is, use the original wording of the treaties, and that when that is not possible, the legislation indicate in some convenient way its treaty or other international origins.*

Implementation

196 The governing principle is that national law must give full effect to relevant treaty provisions as it must give full effect to other rules of international law. States cannot excuse non-compliance with their international obligations by reference to inadequate national law (see article 27 of the Vienna Convention on the Law of Treaties). Governments need to have practical arrangements to ensure that happens. As noted earlier, the *Cabinet Office Manual* requires Ministers, when proposing new legislation to report on

¹⁷⁹ These proposals include: the improvement of intellectual property law regimes to incorporate cultural heritage property (including indigenous flora and fauna, *te reo*): Jones, “Indigenous Peoples and Intellectual Property Rights” (1996) 4(2) *Waikato LR*, 140; Lenihan (Ngai Tuahuriri, Ngai Tahu Whanui), “A Time For Change: Intellectual Property Law and Māori” (1996) 8(1) *AULR*, 213–214; the establishment of a Māori Intellectual Property Commissioner, responsible to hold property in trust that has not been identified as belonging exclusively to individual *iwi*, and amongst other tasks to advise government and the Commissioner of Copyrights, Patents, etc on policy: Lenihan, 213–214; the widening of the copyright law regime: Jones, 140; the development of practical measures to uphold article 29 of the draft Declaration on the Rights of Indigenous Peoples concerning cultural and intellectual property; the establishment of legislative measures to protect *tāonga*, such as making the protection of tangible *tāonga* Māori the domain of the Ministry of Māori Development *Te Puni Kokiri*, establishing a register to record Māori *tāonga* held offshore, and establishing a charitable trust to administer that register (as included in the member’s Bill currently before the House, the *Tāonga Māori Protection Bill* 1996); constitutional change to provide a framework in which Māori *tāonga* are adequately protected and which Māori control: Lenihan, 214.

the proposal's compliance with New Zealand's international treaty obligations and the New Zealand Bill of Rights Act 1990 (the latter closely follows the International Covenant on Civil and Political Rights). The Human Rights Committee, set up under the Covenant, has recently called attention to that linkage.

- 197 In many cases the best means of giving full effect to the treaty is that the treaty text itself is given the force of law.¹⁸⁰ Whether, in the case of each particular treaty, this “force of law” implementation method is practicable depends upon the specificity and precision of the language used in the treaty text. The “force of law” legislative technique is then to be supplemented by a judicial approach which, according to Lord Wilberforce (quoting Lord Macmillan), is to be appropriate for the interpretation of an international convention, unconstrained by technical rules of English law or English legal precedent, and on broad principles of general acceptance.¹⁸¹ That international approach to the interpretation of treaties is now facilitated by the provisions of articles 31 to 33 of the Vienna Convention on the Law of Treaties. It is also facilitated by directions in particular treaties, such as article 7 of the United Nations Convention on Contracts for the International Sale of Goods, which requires that regard be had to its international character, the need to promote uniformity in its application, and the observance of good faith in international trade.¹⁸²
- 198 Such an approach to interpretation can also be adopted when treaties, although not directly implemented or not even mentioned in the text, are recognised as relevant to the legislation.¹⁸³ It is, however, easier to justify such an international approach where the relationship to the treaty is explicit. The lack of reference might also mean that the treaty connection is neglected, not only when the relevant legislation is being interpreted, but also when it is being reviewed. As mentioned already, such neglect increases the danger of inadvertent breach.

¹⁸⁰ This is as distinct from a treaty being self-executing – see the discussion of option A in chapter 6, [para 128](#).

¹⁸¹ *James Buchanan and Co v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152.

¹⁸² Those provisions are discussed in the reports of the Law Commission: *A New Interpretation Act* (NZLC R17 1990), paras 38, 54, 106, 109 and appendix D; and *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed acceptance* (NZLC R23 1992), paras 42–50; see also the report on *Arbitration* (NZLC R20 1991), paras 205–208.

¹⁸³ See, for example, *DPP v Pete* [1991] LRC (Const) 553 (Tanzania CA); *R v Keegstra* [1991] LRC (Const) 33 (SCC).

- 199 If the implementing legislation cannot give the treaty text the direct force of law, practice also indicates that the significance of the treaty can often be indicated in other ways. For example, an indication can be included in the title, preamble, a purpose provision, as a limit on or in the definition of delegated legislative powers or administrative powers (as in extradition provisions), or in a simple note in the text of the legislation. Such notation is relevant to new legislation, amending acts, and to acts which are unchanged but have been subsequently recognised as implementing a new treaty obligation.
- 200 Indeed, one of the 11 recommendations made by the Clerk of the House¹⁸⁴ is that “any legislation to implement a treaty should, in its title, its preamble or in a purpose clause, make it explicit that it is being promoted for the purpose of permitting New Zealand to ratify the treaty”.
- 201 The changes necessary to enforce this recommendation and to standardise preferred forms of implementing legislation may, to be effective, require a direction of the Attorney-General to Parliamentary Counsel. There is legal power to give such directions under the Statutes Drafting and Compilations Act 1920, s 2(2) (and see also s 5(a)).¹⁸⁵
- 202 It is worth mentioning the work of the International Law Commission (ILC).¹⁸⁶ The ILC has a real interest in the question of acceptance and implementation of treaties in connection with the need for a body (in the Commonwealth and elsewhere) to undertake an important technical role of providing advice and assistance for states on how best to implement international treaty obligations in domestic legislation. This is in the hope that standard practice may then develop. The ILC may be able to give “a general push in that direction” although is not set up to give such assistance itself.¹⁸⁷

¹⁸⁴ *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders Committee*, 1996 AJHR I.18B, annex D. For further detail see paras 172–174 of this report.

¹⁸⁵ As suggested by Palmer, correspondence, 30 September 1997.

¹⁸⁶ The ILC internet website address is <http://www.un.org/law/lindex.htm> – see appendix B.

¹⁸⁷ Keith, correspondence, 14 October 1997. See article 26 of the Statute of the International Law Commission concerning opportunities for consultation between the ILC and national law reform bodies. Also note the discussion by the American Society of International Law on the need for a hard look at the treaty making process, with plans for a “Forum Geneva” in 1998 to discuss

recent experience . . . suggests two relevant concrete developments to which the ILC [International Law Commission] and its secretariat might be able to contribute. One is to examine again facilitating access to the sources of international law, a matter emphasised in article 24 of the Statute. . . . The second matter, to be related to the work on the greater acceptance of multilateral treaties and the multilateral lawmaking process, concerns the methods of implementation of multilateral treaties through national legal systems. While there are important differences between constitutional systems, many common threads exist. A great deal can be learnt by studying different methods of implementation.¹⁸⁸

COURTS

204 We note that there are three possible options in relation to the role of the courts. The first is a rule that forbids the courts from taking into account treaties not legislated into New Zealand law. This solution has support in Australia but is impracticable for the reasons stated in [para 91](#).¹⁸⁹ The second option is that treaties are not entered into until approved by the legislature but become part of the law upon execution, as in the United States of America,¹⁹⁰ removing issues surrounding as yet unimplemented treaty obligations. The third option is that Parliament be involved in the treaty making process at an earlier stage. This would remove the possibility that courts are looking to international treaty obligations that have a potential to run contrary to later enacted legislation. For the reasons that accompany the above recommendations, the Commission prefers the third approach.

“Multilateral Treaty-Making: The Current Status of Challenges to, and Reforms Needed in, the International Legislative Process” (ASIL Newsletter, “Notes From the President Charles N Bower”, September–October 1997, 1, 8, 21).

¹⁸⁸ Keith, “The International Law Commission’s Work and the Shaping of International Law”, paper for Colloquium on Progressive Development and Codification of International Law, October 1997.

¹⁸⁹ See the proposed Australian legislation to counter *Teoh* in appendix A, [paras A25–A26](#). Contrast Perry, “At the intersection – Australian and International Law” (November 1997) 71 ALJ 841.

¹⁹⁰ See appendix A, [paras A65–A81](#), on the American practice.

CONCLUSION

205 It is important to note in conclusion that the Law Commission makes these recommendations in response to the changing nature of New Zealand lawmaking – in particular the massive impact of globalisation upon New Zealand and its law. There is no criticism implicit of the professional manner in which the treaty making process has been conducted to date, rather it is suggested that it is now timely to consider development.

Greater public awareness and involvement in foreign affairs and trade under MMP is inevitable. It is already happening. It is to be welcomed. I expect that the public service in general will find itself more exposed to scrutiny from members of Parliament, select committees, lobby groups, the media and the general public . . . I see it positively as a challenge and an opportunity.¹⁹¹

206 All change in relation to the treaty making process requires balancing the value of competing factors – including timeliness, consultation, confidentiality, public participation, parliamentary participation, access to information, available resources, and efficiency.

207 Under the current process, Parliament has the opportunity to participate in treaty making only by disapproving of treaties after they have been signed, and this only if legislation is needed. If legislation is not needed then Parliament is not involved at all. The only logical alternative – of indicating disapproval after the government has committed itself to a treaty – is inconceivable.¹⁹² There is also the converse problem that Parliament, not being privy to the crafting of the international document which preceded the introduction of domestic legislation, may risk passing legislation without considering its full consequences.¹⁹³

208 In the draft report circulated in 1995, the Law Commission suggested that to avoid breaching its international obligations New Zealand needed a more systematic practice for creating and giving

¹⁹¹ Nottage, “New Zealand’s foreign and trade policy: past and present” (1997) XXII(1) NZ Int Rev 18, 20.

¹⁹² Article 26 of the Vienna Convention requires New Zealand to fulfil a treaty in good faith once it has entered into force for this country: Small, correspondence, 29 October 1997. See also the International Law Commission’s “Draft Articles on State Responsibility with Commentaries Attached” (1997).

¹⁹³ Coll-Bassett, correspondence, 7 October 1997.

effect to its treaty obligations. That view has not changed. It is supported by the observation that “it seems inevitable that, under MMP, the Parliament will demand a greater say in the international obligations that New Zealand undertakes”.¹⁹⁴

209 As the Law Commission recommendations and those of the Foreign Affairs, Defence and Trade Select Committee indicate, consideration should now be given to improving the general practices of, and parliamentary involvement in, the treaty making process. The Ministry of Justice notes:

Strengthening the role of Parliament in the treaty-making process is likely to bolster the legitimacy of the process The main issue is the degree to which its role should be strengthened vis-à-vis the executive. Change appears inevitable. The task, therefore, is to ensure that the changes that are made will enhance the process.¹⁹⁵

210 To conclude, the Commission emphasises the need for all those involved in the making, application, interpretation, review, development and the teaching of the law, to be increasingly aware of the international or global context in which much law operates and from which it arises.

211 This report is only a snapshot of an ongoing treaty process – one which must also be able to adapt to future needs.

[W]e should be searching for the wise restraints that make us free.¹⁹⁶

¹⁹⁴ Palmer and Palmer, *Bridled Power: New Zealand Government Under MMP* (3rd ed, Oxford University Press, Auckland, 1997), 304.

¹⁹⁵ Gobbi and Barsi, ii.

¹⁹⁶ Jean-Marie Guehenno quoted in Keith, “Governance, Sovereignty and Globalisation”, paper presented at the 1997 5th Biennial Conference of the New Zealand Council of Trade Unions, 15.

APPENDIX A
Overseas practice and
experience of treaty making
and implementation¹⁹⁷

A1 **B**Y WAY OF INTRODUCTION to the differing overseas practices in treaty making, it is instructive to consider the following table: Treaty making practice in OECD countries. It shows that the majority of OECD countries require parliamentary approval of at least some categories of treaties and that this does not appear to have impeded their ability to conduct foreign policy. Also, in a significant number of those OECD countries treaties are self-executing.¹⁹⁸ It also shows, in comparison, that New Zealand has no process of parliamentary approval nor self-executing treaties. In New Zealand, however, some treaties that do not require legislation to implement them are, while not in the strict legal sense, in effect self-executing.

¹⁹⁷ Only those countries considered to be politically, culturally and constitutionally comparable to New Zealand have been examined. A number of federal states are discussed, but it should be noted that issues which arise in the context of the distribution of power between the federal and state legislatures are not included since they are not relevant to New Zealand as a unitary state. The treaty law and practices of France, Germany, India, Switzerland, Thailand and the United Kingdom have recently been collected in a valuable American Society of International Law volume: Lee and Blakeslee (eds), *National Treaty Law and Practice* (1995). The Commission acknowledges the work of Kersti Hanson, a vacation researcher, who gathered much of the material presented in this appendix.

¹⁹⁸ Australian Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (AGPS, Canberra, November 1995), 171–172. The table was prepared by the Australian Department of Foreign Affairs and Trade. The Department noted that amongst those countries classified as requiring some form of parliamentary approval, the types of treaties to which this applies vary markedly, and that the table does not cover European or Australian regional treaties.

TABLE: Treaty making practice in OECD countries

Country	Number of conventions as at 10/5/95	Parliamentary approval required for certain types of treaty?	Are treaties self-executing?
Denmark	68	Yes	No
France	66	Yes	Yes
Netherlands	66	Yes	Yes
Finland	65	–	–
Germany	65	Yes	Yes
Spain	64	Yes	Yes
Sweden	63	Yes	No
Austria	62	Yes	Yes
Italy	62	Yes	No
Norway	62	Yes	No
United Kingdom	61	No	No
Australia	59	No	No
Greece	55	Yes	Yes
Mexico	55	–	Yes
Switzerland	54	Yes	Yes
Luxembourg	53	Yes	Yes
Belgium	52	Yes	Yes
Portugal	48	Yes	Yes
Japan	47	Yes	Yes
Canada	47	No	No
Ireland	46	Yes	No
United States	46	Yes	Yes
New Zealand	44	No	No
Turkey	31	Yes	Yes

AUSTRALIA

- A2 Unlike New Zealand, Australia is a federal state: the Commonwealth of Australia Constitution Act 1900 establishes the distribution of powers in the federation and creates central and State governments.¹⁹⁹ The power to enter into treaties is an executive power within section 61 of the constitution. Section 51(xxix) provides for the “foreign affairs power” or the legislative power to implement treaties in domestic law.²⁰⁰

¹⁹⁹ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 106–117.

²⁰⁰ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 3.

A3 In Australia in 1961 the Prime Minister, the Rt Hon Mr Robert Menzies, announced a new practice to the Commonwealth Parliament:

Except in cases where a treaty will otherwise be brought to the attention of the Parliament, for example, where a bill or motion relating to the treaty is to be introduced, the Government as from the next parliamentary session proposes as a general rule to lay on the tables of both Houses, for the information of honourable members and senators, the text of treaties signed for Australia, whether or not ratification is required, as well as the texts of treaties to which the Government is contemplating accession. Unless there be particular circumstances which in the Government's opinion require that urgent attention be given to the matter – for example, at a time when Parliament is not in session – the Government will moreover as a general rule not proceed to ratify or accede to a treaty until it has lain on the table of both Houses for at least twelve sitting days.

By this means honourable members and senators will be kept informed of treaties which have been signed for Australia and, in cases where ratification or accession is contemplated, it will be possible for them, if they so desire, to draw attention to any relevant consideration prior to ratification or accession.²⁰¹

A4 We understand that practice has not always complied with this statement. Prior to recent reforms, treaties were tabled in bulk every 6 months in the House of Representatives, but a process of deemed procedure meant that there was no provision for parliamentary debate of the tabling of treaties. Bilateral treaties, due to reasons of confidentiality, were not tabled at all. A recent report of the Senate Committee on treaty making processes noted that the Senate was not provided with adequate time to consider tabled treaties.²⁰²

A5 Where legislation is necessary to give effect to treaty obligations, it was “official” policy that Australia would not ratify a treaty and accept obligations under the treaty until the appropriate domestic legislation was in place. In the past, Parliament had passed legislation to approve the ratification of treaties. For example, the Racial Discrimination Act 1975 contained a provision whereby Parliament approved the ratification of the Convention on the Elimination of All Forms of Racial Discrimination. The failure of the Bill to pass through Parliament meant that the executive did not ratify the Covenant at that time. However, the Senate

²⁰¹ Australian Federal Parliamentary Debates (Reps) 23rd Plt, 3rd session, vol 11 of R 31 1693; see similarly Senator Gorton in the Senate, vol S8, 857–858.

²⁰² *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 98–99.

Committee noted in its report that the practice of seeking parliamentary approval for the signing and ratification of significant or controversial treaties appeared to have lapsed.²⁰³

- A6 The practice is, however, evolving and future changes can be expected, in part as a result of a widespread public and parliamentary debate in Australia on the matter of treaty making. The Senate Legal and Constitutional References Committee's comprehensive review of powers exercised by the Commonwealth Government in making and implementing treaties, as seen in its report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, forms part of that debate.²⁰⁴ The Committee raised concerns in relation to the impact of international treaties on the Australian federal system and the sovereignty of the nation. It also considered the degree of consultation prior to joining international treaties and the respective roles that Parliament and the government should fulfil in regard to the decision to enter into treaties.
- A7 A significant part of the Senate Committee's 11 recommendations dealt with increasing government efforts to identify and consult groups which may be affected by a treaty. The key groups identified included trade unions, industry and environmental groups, as well as many other non-governmental organisations. A "whole of Government" approach was advocated to ensure all relevant government departments and interest groups are consulted during the development of a treaty. Concern was also expressed about the lack of transparency in the treaty process from the viewpoint of community groups and individuals. The Senate Committee recommended that the Department of Foreign Affairs and Trade (DFAT) prepare a publication providing information on the treaties under consideration by the government and make it available, free of charge, to all public libraries.²⁰⁵ (This recommendation was later accepted by the Australian Government – see the DFAT internet website listed in [appendix B](#).)
- A8 Submissions to the Senate Committee extended to six volumes. They indicated a growing understanding about the effects of globalisation and internationalisation, a range of concerns about

²⁰³ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 101.

²⁰⁴ The Australian Department of Foreign Affairs and Trade has also contributed to the debate by publishing *Australia and Treaty Making: Information Kit* (AGPS, Canberra, 1994) which, among other things, shows a lower treaty acceptance rate by New Zealand compared with other OECD countries.

²⁰⁵ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 186–199.

the way the treaty making power is exercised, and a range of proposals for making the treaty process more transparent, accountable and democratic.²⁰⁶ Concerns relate to the processes of agenda setting and negotiations as well as to acceptance. For instance, the National Farmers Federation, in its submission to the Senate Committee, proposed reforms in relation to multilateral treaties along these lines:

- Federal Cabinet should clearly determine and indicate to both officials and the Parliament Australia's objectives for engaging in treaty negotiations, and for considering signature and ratification.
- Parliament and relevant industry sectors should be given the opportunity through timely briefings to influence the position to be taken by Australian delegations at forthcoming treaty negotiating conferences, that is, *well before* the finalisation of treaty texts.
- Tabling by the government in Parliament of the text of proposed treaties upon their adoption at international conferences and *well before the deadline for signature*.
- The concurrent tabling of a government statement (copied to relevant industry associations) summarising:
 - the terms of the treaty, including Australia's obligations if we became a party;
 - how it will further Australian national interests; including the expected economic, social and environmental impacts of both the treaty and of *not* becoming party to it; also including (where the treaty will have economic impacts) a detailed cost-benefit analysis economy-wide and for affected industry sectors, estimating production, income and employment impacts; such analysis should also show how Australia will be affected relative to its trade partners and competitors;
 - the relevance to, and likely impact on, Australia of any subsequent protocols then expected;
 - the extent of any consultation already held with Parliament, the States, industry and the wider community (with a brief summary of any positions expressed by them).

²⁰⁶ Sir Ninian Stephen, a former member of the High Court of Australia and Governor-General, has also addressed the issues in a March 1995 public lecture, "Making Rules for the World" (30(2) *Australian Lawyer* 13 – extracts from his Sir Earle Page Memorial Trust Lecture).

- The referral by the Senate or by each House of particular treaties and tabling statements, at least in the case of treaties with perceived national or contentious impacts, to the relevant parliamentary committee(s) for public inquiry and report to government:
 - to test the government’s own impact statement with relevant industry and community sectors; and
 - to lead to recommendations for (or against) signing and becoming party, and for any conditions that should be placed on treaty action (eg, drafting changes).
- The repeating of these processes before a formal international review of the treaty is to take place (multilateral treaties and their operation are commonly reviewed say 5 years after their commencement) and before a “protocol” is to be negotiated and signed.
- The relevant parliamentary committee(s) should retain a watching brief on the treaty’s impact on and value to Australia, and should publish periodic reports.
- Full and frank participation of government officials and industry representatives in these parliamentary review processes.
- Regular opportunity for full participation of industry representatives on delegations; with opportunity for participation by Members of Parliament and community representatives with significant interests at stake.

A9 In 1995 the Australian High Court held, in the controversial decision *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, that there was a legitimate expectation that government administrative decision-makers would take into account treaties ratified by Australia but not yet directly incorporated into Australian law when making their decisions. Initial debate over the decision was on whether it altered the traditional position where the executive act of entering into a treaty which creates obligations does not become part of Australian law until legislative action is taken to implement those obligations. It seems clear, however, that the decision leaves the basic position unaltered.²⁰⁷

²⁰⁷ For a more recent discussion of *Teoh* and the developing role of international law in the Australian judicial process see Perry, “At the intersection – Australian and International Law” (1997) 71 ALJ 841.

A10 In response to *Teoh*, the Australian Government issued a press release and introduced the Administrative Decisions (Effect of International Instruments) Bill 1994. The Bill and press release were intended to restore the position as it was understood to have existed prior to the *Teoh* decision. More specifically, the Government wished to make clear that the ratification of a treaty does not give rise to a legitimate expectation that an administrative decision will be made in conformity with a treaty.²⁰⁸ The Bill was referred to the Senate Legal and Constitutional Legislation Committee who recommended by majority that it be enacted.²⁰⁹ The Bill lapsed at that time, however it has been revived in the latest round of reforms. It was (re)introduced into the House of Representatives on the 18 June 1997 and referred to the Senate Legal and Constitutional Legislation Committee on 26 June. The Committee reported back to the House on 20 October 1997 and (again) recommended by majority that the Bill be enacted (with the Labour and Democrat Committee members holding the minority opinion).²¹⁰ (See the provisions of the Bill in [paras A25–A26](#) below, detailing the reforms to the treaty making process.)

Reforms to the treaty making process

A11 On 2 May 1996 the then Minister for Foreign Affairs, the Hon Alexander Downer MP, made a statement to the House of Representatives which outlined reforms to the treaty making process. Changes made to the process include the introduction of a new tabling arrangement, where treaties will be tabled for at least 15 sitting days after signature to allow for parliamentary scrutiny before binding treaty action is taken. This arrangement applies to both bilateral and multilateral treaties and to all actions which amend a treaty if the amendment would alter obligations with a legally binding impact on Australia, including termination or denunciation of a treaty.²¹¹

²⁰⁸ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 5.

²⁰⁹ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 92.

²¹⁰ Australian Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee “Administrative Decisions (Effect of International Instruments) Bill 1997”* (AGPS, Canberra, 1997).

²¹¹ House of Representatives, *Hansard*, 2 May 1996, 231–235; Joint Standing Committee on Treaties, *The Parliament of the Commonwealth of Australia, First Report* (AGPS, Canberra, 1996), 2.

- A12 The Government also indicated that special procedures will exist when it needs to take treaty action urgently. Where tabling in advance of such binding action is not possible, the documents will be tabled as soon as possible with an explanation of the reasons for urgent action. The Government undertook to use such procedures sparingly and only where necessary to safeguard Australia's national interests, be they commercial, strategic or foreign policy.²¹²
- A13 In addition the Government agreed to table a list of Commonwealth legislation which specifically implements Australia's treaty obligations, as well as the comprehensive, periodic implementation and update reports prepared in compliance with Australia's reporting obligations under various treaties.²¹³
- A14 In June 1996 the Council of Australian Governments (COAG) agreed to revise Principles for consultation between the Commonwealth, States and Territories in relation to treaties. These principles have existed in one form or another since 1977, although they have been updated periodically in accordance with changing federal relations, international legal developments, and government policy. The new principles reflect the recommendations made in the Senate Committee's 1995 report (many based upon Senator Vicki Bourne's Private Member's Parliamentary Approval of Treaties Bill 1995).
- A15 Information on treaty negotiations will be provided in various ways: information about treaty discussions will be forwarded to Premiers' and Chief Ministers' Departments regularly by the Department of Prime Minister and Cabinet and DFAT. Every 6 months the Commonwealth will provide states and territories with a list of current and forthcoming negotiations (forecasting 12 months ahead) and matters under consideration for ratification. States and territories will be consulted on the preparation of National Interest Analysis (NIA) for treaties in which they have an interest. The Commonwealth will provide states and territories, on a confidential basis, with reports of international negotiating sessions of concern to them.²¹⁴

²¹² Joint Standing Committee on Treaties, *First Report*, 2.

²¹³ The Government Response to the Senate Legal Constitutional References Committee Report, 13 May 1996.

²¹⁴ Joint Standing Committee on Treaties, *First Report*, 2; COAG Communique, 14 June 1996, 4, attachment C, 24–31.

- A16 A review of the current consultation process is being undertaken as a result. The value of treaty-specific consultation and formal meetings with representatives of interested organisations will be considered. The review will also consider the nature and form of the information provided to private sector groups on treaty issues. Due to the delivery of an increasingly large volume of information through the electronic media, it has been suggested that the government should fulfil the role of provider of analysis rather than raw information for consultation purposes. This would be at least where interested organisations and specialist groups are concerned. Access to information is important if consultation is to be effective.²¹⁵
- A17 The revised principles introduce a further number of reforms including: the completion of an NIA, as mentioned above, for each treaty; the establishment of a Joint Standing Committee on Treaties for the purpose of scrutinising important treaties; the establishment of an advisory treaties council comprised of the heads of government of the Commonwealth, states and territories; and the establishment of a treaties database.²¹⁶

National Interest Analysis

- A18 In response to a suggestion in Senator Bourne's Bill that treaty impact statements be prepared for every treaty tabled in Parliament, the government agreed to prepare and table an NIA for each treaty. The NIA is to be made available to the states and territories and the general public. It was noted that the detail of each NIA would depend upon the nature of each treaty. A standard form, simplified NIA would be prepared for "template treaties" or bilateral treaties which follow an approved model text such as double taxation agreements, investment promotion and protection agreements, and social security agreements.
- A19 The NIA should include:
- the reasons for and against Australia becoming a party to the treaty – a discussion of the economic, environmental, social and cultural effects of the treaty where relevant;
 - the obligations imposed;
 - its direct financial cost to Australia;

²¹⁵ The Government Response to the Senate Legal Constitutional References Committee Report, 13 May 1996.

²¹⁶ Council of Australian Governments, Editor's Note, "Principles and Procedures for Commonwealth-State Consultation on Treaties" (1997) 8 Public LR 116.

- how it will be implemented domestically;
- what consultation has occurred (including specific details of organisations and individuals consulted; and
- whether the treaty provides for withdrawal or denunciation.²¹⁷

Joint Standing Committee on Treaties

- A20 A Joint Standing Committee on Treaties was also established²¹⁸ consisting of senior Commonwealth and state and territory officers who meet at least twice a year. The Committee considers and reports on tabled treaties, their NIA (particularly in relation to treaties of sensitivity and importance to the states and territories), and any other question relating to a treaty or international instrument that is referred to it by either House of Parliament or a Minister. In appropriate cases, state and territory representatives may be included in delegations to international conferences.²¹⁹
- A21 In relation to urgent or sensitive treaties, it was decided that in the interests of national security and observance of international comity, *in camera* hearings (that is, behind closed doors) and restricted circulation of documentation were necessary. It was noted that these considerations applied in particular to bilateral treaties, which international convention requires to be confidential between negotiating states during negotiation and until signed.²²⁰
- A22 Once details of treaty actions are tabled, the Standing Committee on Treaties promptly reviews them by seeking further information and/or taking evidence from Commonwealth departments and agencies, state and territory governments and interested

²¹⁷ The Joint Standing Committee on Treaties considers that the NIA should also include a discussion of the legal effects and potential areas of conflict with state and territory laws, and should identify the Commonwealth department or agency with primary carriage for a particular treaty along with relevant contact details: Joint Standing Committee on Treaties, *First Report*, 3.

²¹⁸ By resolutions in both Houses in the 38th Parliament on 17 June 1996: Joint Standing Committee on Treaties, *Treaties Tabled on 10 & 11 September 1996*, *Second Report* (AGPS, Canberra, 1996), v.

²¹⁹ “Reform of the Treaty Making Process”, statement delivered by the Hon Alexander Downer, Minister for Foreign Affairs, 2 May 1996; Council of Australian Governments, Editor’s Note, “Principles and Procedures for Commonwealth-State Consultation on Treaties” (1997) 8 Public LR 116.

²²⁰ The Government Response to the Senate Legal Constitutional References Committee Report, 13 May 1996.

organisations and individuals where appropriate. It reports its findings to both Houses.²²¹

Treaties Council

- A23 The Australian Commonwealth Government also supported the creation of a Treaties Council as an adjunct to the Council of Australian Governments. The Council, consisting of the Prime Minister, Premiers and Chief Ministers, meets at least once a year. It has an advisory function, as well as providing a forum for consultation between the states and the Commonwealth in relation to treaty making.²²²

Treaties database

- A24 Also, in accordance with the Senate Committee's recommendation, a treaties database has been established to facilitate the dissemination of treaty information. The database is available both in hard copy form, free of charge from the agent responsible or DFAT, and is now available on the internet. The importance of advertising the availability of such information has been recognised. It is also proposed that consultation on particular treaties could be conducted with electronic news groups as the vehicle for community consultation and will provide immediate advice of treaty developments to anyone who wants to be linked to the system.

Administrative Decisions (Effect of International Instruments) Bill 1997

- A25 This Bill, with a long title of "A Bill for an Act relating to the effect of international instruments on the making of administrative decisions", had its second reading in July 1997 and was reported back from Committee in October 1997. The Bill was reintroduced (after lapsing in 1994) as a measure to secure the Government's

²²¹ Joint Standing Committee on Treaties, *First Report*, 3–4. By June 1997, the Joint Standing Committee had published its eighth report.

²²² "Reform of the Treaty Making Process", statement delivered by the Hon Alexander Downer, Minister for Foreign Affairs, 2 May 1996; Council of Australian Governments, Editor's Note "Principles and Procedures for Commonwealth-State Consultation on Treaties" (1997) 8 Public LR 117; COAG Communique, 14 June 1996, 4, attachment C, 26–27.

position in response to *Teoh*. The preamble sets out the reasoning for the proposed enactment.

Preamble

This Preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 a majority of the High Court held that the act of entering into an international instrument gives rise to a legitimate expectation at law that could form the basis for challenging an administrative decision. It also held that such a legitimate expectation could be set aside by an executive or legislative indication to the contrary.

There is a need for certainty in making administrative decisions. Uncertainty is created by allowing decisions to be challenged on the ground that decision makers did not properly give effect to such legitimate expectations.

Australia is fully committed to observing its obligations under international instruments.

However, international instruments by which Australia is bound or to which Australia is a party do not form a part of Australian law unless those instruments have been validly incorporated into Australian law by legislation. It is the role of Commonwealth, State and Territory legislatures to pass legislation in order to give effect to international instruments by which Australia is bound or to which Australia is a party.

On 10 May 1995, the then Minister for Foreign Affairs and the then Attorney-General issued a joint statement concerning legitimate expectations and international instruments. On 25 February 1997, the present Minister for Foreign Affairs and present Attorney-General issued a further joint statement. Both statements said, on behalf of the Commonwealth, that the act of entering into an international instrument should not give rise to such legitimate expectations, and that legislation would be introduced to set aside any such legitimate expectations.

The Parliament of Australia therefore enacts:

1 Short title

This Act may be cited as the Administrative Decisions (Effect of International Instruments) Act 1997.

2 Commencement

This Act commences on the day on which it received the Royal Assent.

3 Application to external Territories

This Act extends to all the external Territories.

4 Definitions

In this Act, unless the contrary intention appears:

administrative decision means:

- (a) a decision by or on behalf of the Commonwealth, a State or a Territory; or
 - (b) a decision by or on behalf of an authority of, or office holder of, the Commonwealth, a State or a Territory;
- that is a decision of an administrative character (whether or not the decision is made under an enactment), and includes such a decision reviewing, or determining an appeal in respect of, a decision made before the commencement of this Act.

enactment means:

- (a) an Act passed by the Parliament, by the Parliament of a State or by a Legislative Assembly of a Territory; or
- (b) an instrument of a legislative character made under such an Act.

international instrument means:

- (a) any treaty, convention, protocol, agreement or other instrument that is binding in international law; and
- (b) a part of such a treaty, convention, protocol, agreement or other instrument.

5 International instruments do not give rise to legitimate expectations at law

The fact that:

- (a) Australia is bound by, or a party to, a particular international instrument; or
- (b) an enactment reproduces or refers to a particular international instrument;

does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision.

6 Exclusion where State or Territory coverage

Section 5 does not apply to an administrative decision by or on behalf of:

- (a) a State or Territory; or
- (b) an authority of, or office holder of, a State or Territory;

if provision having the same effect as, or similar effect to that which, section 5 would otherwise have in relation to the decision is made by an Act passed by the Parliament of the State or Legislative Assembly of the Territory.

7 Other operation etc. of international instruments not affected

To avoid doubt, section 5 does not affect any other operation or effect, or use that may be made, of an international instrument in Australian law.

A26 The proposed legislation has attracted some criticism.

If the Government sees fit to enter into an international agreement, perhaps one in which it undertakes to secure certain basic human rights, it seems peculiar, almost hypocritical, to assert that such agreements have no effect (in the *Teoh* sense) unless legislation is passed to give effect to the treaty. Western countries, including Australia, have been very vocal in criticising other States for failing to live up to their international obligations towards their citizens, yet in cases like this a real risk arises that Australia may be cast in the same light, even if there may be sound constitutional reasons for adopting such a posture. Of course, one remedy in such a situation is simply to enact appropriate legislation.

The High Court made a telling comment that ratification of a convention is “a positive statement . . . to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention”. Ultimately, it seems that ratification may really be only a statement to the rest of the world.²²³

THE UNITED KINGDOM²²⁴

A27 In the United Kingdom the power to negotiate and conclude treaties is the exclusive preserve of the executive branch of the government, which, acting on advice, can bind the United Kingdom on an international level.²²⁵ This is (theoretically) balanced by the dualist approach to international law whereby a treaty has no effect on a domestic level until incorporated into legislation. Thus should the terms of the treaty require alteration of domestic law, these obligations cannot be performed without legislative action.

²²³ Piotrowicz, “Unincorporated treaties in Australian law: the official response to the *Teoh* decision” (1997) 71 ALJ 506.

²²⁴ The United Kingdom is a constitutional monarchy with a parliamentary system of government. The constitution is unwritten. The Parliament consists of the House of Commons, with 650 members, and the House of Lords, with 1200 members. The House of Commons is elected by universal suffrage. Most of the legislative power is vested in the House of Commons, while the House of Lords has limited power, but can review, amend, or temporarily delay any bill, except those relating to the budget. After referendums in 1997 limited Scottish and Welsh directly elected Parliaments are to be assembled.

²²⁵ Templeman, “Treaty Making and the British Parliament” (1991) 67 Chicago-Kent LR 459, 461.

A28 As a matter of long-standing practice the government lays before Parliament as Command Papers all treaties signed by the United Kingdom, but only after their entry into force.²²⁶ Treaties may also be tabled in accordance with the Ponsonby Rule which was introduced in 1924 by the British Under-Secretary of State for Foreign Affairs. This convention

obliges the British Government to let treaties lie on the table of the Parliament for 21 days after signature and before ratification and to submit important treaties to the House of Commons for discussion. It applies only where a treaty places “continuing obligations” on the United Kingdom, where a further formal act to signify commitment is required after signature and where the matter is not one of “urgency”. In 1990–91, the Select Committee on the European Communities of the House of Lords estimated that approximately one quarter of the United Kingdom treaties were subject to the Ponsonby Rule.²²⁷

A29 However, the Ponsonby Rule can be described as ineffectual for a number of reasons. First, the voluntary nature of the rule has meant it has fallen into disuse: recent governments’ statements have made it clear that the rule is not regarded as a binding convention and departures are made from it on grounds of expediency.²²⁸ This demonstrates that for a tabling procedure to be effective it should be established on a more formal basis.

A30 Further, where a treaty is tabled in accordance with the Ponsonby Rule, the text is tabled without explanation of its meaning, purpose or reasons for its ratification. This significantly detracts from the effectiveness of Parliament’s involvement in treaty making. In addition,

[t]he Government is not bound to find parliamentary time to devote to a motion deploring the Government’s intention to ratify a treaty. If time were found it is unlikely that the Government would be defeated in the House of Commons. The Government might in the face of parliamentary disapproval change its mind but this is unlikely.²²⁹

²²⁶ Hudson, “Treaties and Parliament” (1996) 146 *NLJ* 341, 341.

²²⁷ Saunders, “Articles of Faith or Lucky Breaks?” (1995) 17 *Sydney LR* 150, 170.

²²⁸ Hudson, 341.

²²⁹ Hudson, 466.

A31 Interestingly, although the Westminster Parliament has traditionally played a very limited role in treaty making and implementation, it does possess the power to limit the executive in its capacity to enter into certain treaties. However, this power does not seem to be invoked often. An example of the exercise of this power is section 6(1)–(2) of the European Parliamentary Elections Act 1978 (UK) which provides:

- (1) No treaty which provides for an increase in the powers of the European Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament.
- (2) In this section "treaty" includes any international agreement, and any protocol or annex to a treaty or international agreement.²³⁰

A32 The United Kingdom's membership, since 1973, of the European Economic Community (now the European Union or EU) has had a significant effect upon the traditional supremacy of Parliament which is now overshadowed to a great extent by EU law. The Treaty of Rome established the Community (or Union as it now is) with a written constitution and provided that the United Kingdom Parliament has accepted that the Treaty and Community legislation shall prevail in cases of inconsistency between Community law and domestic law or practice.²³¹ Enactment of EU legislation is preceded by rigorous scrutiny and consultation involving the European Council, Commission and Parliament.²³²

A33 Since the United Kingdom's accession to the EU the government has deposited proposals in both the House of Lords and the House of Commons, which are subjected to extensive scrutiny by select committees in both chambers. After investigation, reports are made

²³⁰ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 103.

²³¹ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 72–73.

²³² The Parliament consists of delegates elected by each Member State and can be considered a democratic body. It is, however, the least powerful of the Union's institutions. The Council, which has no formal legislative powers, is made up of ministerial representatives of the governments of the Member States. Its actual composition varies according to the business under consideration. The Council does play an important advisory role and exercises influence over Union policy. The Commission is the executive institution of the Union, and is made up of appointed Commissioners who are bound to be completely independent in the performance of their duties. The Commission initiates policy proposals and puts legislative proposals before the Council.

for debate on the floor of both Houses. The role of the United Kingdom Parliament in the consideration of and debate about EU legislation is a direct contrast to the lack of effective parliamentary involvement in treaty making with non-Member States.²³³

- A34 It is perhaps the binding nature and far-reaching implications of the EU law which has prompted the comprehensive scrutiny of proposals. The supremacy of EU legislation is illustrated by the House of Lords decision in *R v Secretary of State ex p Factortame No 2* [1991] 1 AC 603 where it effectively held that the provisions of an English statute were not conclusive in a case of conflict with Community law.²³⁴ Arguably the *Factortame* judgment signals the need for principles of constitutional law to better reflect the reality in which they operate.
- A35 In 1996 Lord Lester QC introduced the Treaties (Parliamentary Approval) Bill (HL) 1995/96. The Bill was passed through all stages in the House of Lords, receiving its second reading on 28 February 1996 after substantial debate. Although the Bill has now lapsed, it is still useful to note the Bill's proposed reforms. In relation to the ratification process, the Bill proposed introducing a requirement that concluded treaties subject to ratification be approved by Parliament before they are ratified. In effect the Bill would apply to about a dozen, mostly multilateral treaties, each year which require ratification before coming into force.²³⁵
- A36 The proposed procedure would have been to require the tabling of the treaties in Parliament, along with an explanation of the object and purpose of the treaty, the reasons for the proposed ratification, and the likely benefits and disadvantages of becoming party to the treaty.²³⁶ Approval of both Houses of Parliament would have been required before the government could ratify the treaty.²³⁷ If either House objected to ratifying a treaty, a resolution confirming this

²³³ Hudson, 472–480.

²³⁴ Downey, “Sovereignty, the Common Law, and the Treaty of Rome” (1992) NZLJ 185, 186.

²³⁵ Hudson, 341.

²³⁶ Clause 2 of the Treaties (Parliamentary Approval) Bill 1995/96.

²³⁷ Clause 3 of the Treaties (Parliamentary Approval) Bill 1995/96.

must be passed within 21 sitting days of the treaty being tabled.²³⁸ The Bill also provided for an exception in the case of urgent treaties.²³⁹ In that situation the Secretary of State was to notify both Houses of Parliament of the decision and the reasons for it.

A37 A proposal in the Bill which has been implemented is the use of explanatory memoranda to improve the information about treaty matters which is provided to Parliament by the executive. All international agreements signed after 1 January 1997 and laid for 21 sitting days under the Ponsonby Rule, namely those agreements concluded subject to ratification, accession, acceptance or approval, are to be accompanied by an explanatory memorandum.²⁴⁰ As the Guidelines on Explanatory Memoranda for Treaties, created by the Foreign and Commonwealth Office, explain, the explanatory memoranda will bring to the attention of Parliament the main features of the treaty with which it is laid, including:

- general principle,
- subject matter,
- Ministerial responsibility,
- benefits and burdens from becoming a party to the treaty,
- financial implications,
- reservations and declarations,
- means of implementation, and
- consultation undertaken.²⁴¹

Preparation of explanatory memoranda is the responsibility of the department which has the main policy interest in a particular treaty.

²³⁸ Clause 3 (2) of the Treaties (Parliamentary Approval) Bill 1995/96.

²³⁹ Clause 4 of the Treaties (Parliamentary Approval) Bill 1995/96.

²⁴⁰ Minister of State, Foreign and Commonwealth Office (Baroness Chalker of Wallasey), Written Answers, *Hansard*, House of Lords, 16 December 1996.

²⁴¹ An explanatory memorandum is not required for treaties which enter into force upon signature nor for Double Taxation Conventions. Guidelines for Explanatory Memoranda for Treaties Note by the Foreign and Commonwealth Office, December 1996.

FRANCE²⁴²

- A38 In France, the power to conclude treaties is in the hands of the President of the Republic who negotiates and ratifies treaties.²⁴³ The French Parliament plays a greatly restricted role in the area of treaty making, with international relations always having been considered the exclusive preserve of the executive. This is accentuated by the present 1958 Constitution, which provides that Parliament is only to be involved after the terms of a treaty have been decided upon, and can only approve or reject its ratification. There is no parliamentary power to amend a treaty.²⁴⁴
- A39 Article 52 of the Constitution lists a number of categories of treaties which must be submitted to Parliament. These include:
- peace treaties,
 - trade treaties,
 - treaties referring to international organisations,
 - human rights treaties,
 - treaties ceding, exchanging or adding territory, and
 - in more general terms, those treaties which require legislative action.²⁴⁵

²⁴² France is a constitutional republic with a parliamentary system of government. The President is the head of state and the Prime Minister is the head of government. The executive branch consists of the President and the Council of Ministers, which is headed by the Prime Minister. The President is the dominant element in the French system of government, ensuring regular functioning of the public powers and the continuity of the state. The President appoints the Prime Minister and, on the advice of the Prime Minister, appoints the other members of the government (Council of Ministers). The Council of Ministers, presided over by the President, determines the policy of the nation and controls the agenda of Parliament. The Prime Minister is responsible for the operation of the government, the execution of laws and national defence. The legislative branch consists of a bicameral Parliament: the Senate and the National Assembly. Parliament's legislative power is restricted to specified questions which constitute the domain of law. Parliament has authority to establish fairly detailed rules in the following areas: civil rights, the determination of crimes and misdemeanours, taxes, electoral laws, and the nationalisation of industries. On other questions, such as the general organisation of national defence, the administration of local communities, education, property rights, and national economic planning, Parliament may only establish the "fundamental principles", leaving the details to be filled in by executive decrees.

²⁴³ Article 52 of the Constitution. Luchaire, "The Participation of Parliament in the Elaboration and Application of Treaties" (1991) 67 *Chicago-Kent LR* 341, 342.

²⁴⁴ Luchaire, 341.

²⁴⁵ Luchaire, 342–347.

- A40 Since Parliament can only pronounce on a treaty as a whole, it cannot modify its terms or attach either reservations or interpretations. The rules of the Assembly further limit the power of Parliament in this respect, stipulating that a government Bill which authorises ratification must be voted on as a whole. As a result the passage of legislation authorising the ratification of a treaty is accorded little time and is no more than a simple formality.²⁴⁶
- A41 There is no obligation to carry out ratification once parliamentary authority has been obtained. Although an authorising Bill must be promulgated and published in the Official Journal within 15 days of its adoption, the treaty itself is not published until the President has proceeded with the ratification. Even if the treaty commits France with respect to other states, it is not challengeable in the French courts until its publication.²⁴⁷
- A42 The government does seek to involve Parliament in its foreign policy in several ways, communicating to the Foreign Affairs Commissions of both Houses the list of treaties or agreements that France has concluded. The texts of treaties can be requested by Parliament and more recently the proposed reservations to be attached to the ratification have been made available. In addition, at the time of the debates over the authorising legislation, members of Parliament can “advise” the government to attach certain specific reservations to the ratification. This advice can be acted on for political advantage in rallying support, sometimes resulting in the formulation of reservations proposed by members of Parliament.
- A43 In some circumstances, Article 49 of the Constitution is invoked in order to gain the approval of a “declaration of general policy”.²⁴⁸ But even the extent of parliamentary participation in more serious decisions is determined wholly by the government which goes to great lengths to ensure it is not considered as precedent.²⁴⁹ In sum, the role of the French Parliament in treaty making and foreign relations is minimal.

²⁴⁶ Luchaire, 342–343.

²⁴⁷ Luchaire, 344.

²⁴⁸ Examples include the decision to participate in the military operations to liberate Kuwait in 1991 and the France-Germany Treaty of 1963.

²⁴⁹ Luchaire, 355–356.

A44 In direct and notable contrast to those states with Westminster-derived constitutions, concluded treaties do not require implementing legislation in order to be enforceable at a domestic level. Article 55 of the Constitution provides that once a treaty has come into force it overrides any conflicting domestic legislation, even if that legislation is passed subsequent to the treaty's ratification. The Constitutional Council also considers that this primacy extends to rules promulgated by international bodies in compliance with the treaties that established them.²⁵⁰

THE NETHERLANDS²⁵¹

A45 Both the law relating to the approval of treaties and the Dutch Constitution itself have been relatively recently revised. A new Dutch Constitution was enacted in 1983²⁵² and while the Constitution itself had previously governed treaty making and implementation, Article 91 of the 1983 Constitution provides that this process is now to be regulated by an Act of Parliament. The *Rijkswet goedkeuring en bekendmaking verdragen* or State Law on the Approval and Promulgation of Treaties came into force on 20 August 1994.²⁵³

A46 The power to conclude treaties is not expressly provided for by the Constitution, but Article 90 does provide that the government shall promote the development of the international legal order.

²⁵⁰ The Constitutional Council decides jurisdictional disputes between Parliament and the government: Luchaire, 350–351.

²⁵¹ The Kingdom of the Netherlands comprises two territories in the Caribbean, the Netherlands Antilles and Aruba as well as the territory in Europe. Only the kingdom has legal capacity in international law and therefore the power to conclude and become party to treaties. The Charter which unites and determines the relations between the separate parts of the kingdom is the highest national legal instrument in the kingdom, and the Constitution of the Netherlands is subordinate to it. Due to slight differences in constitutional arrangements, the discussion here is restricted to the treaty making practice of the European territory of the Kingdom of the Netherlands. The Netherlands Parliament or “States-General” (*Staten-Generaal*) comprises two chambers: the Lower House with 150 members elected by universal suffrage, and the Upper House or Senate with 75 members elected by directly elected members of the Provincial Councils: van Dijk and Tahzib, “Parliamentary Participation in the Treaty Making Process of the Netherlands” (1991) 67 *Chicago-Kent LR* 413, 413 and 425.

²⁵² Klabbers, “New Dutch Law on the Approval of Treaties” (1995) 44 *International and Comparative LQ* 629, 629.

²⁵³ Klabbers, 629.

All policy decisions, including foreign policy, are the collective responsibility of the government in conjunction with Parliament. Treaties are concluded with or by the authority of the Crown. After parliamentary approval of the treaty in question, consent to be bound by the treaty (in the case of ratification) is given by the Head of State or the Minister of Foreign Affairs or authorised agent of the Minister. In practice, the Minister of Foreign Affairs often fulfils the role of foreign policy co-ordinator rather than policy maker, since other ministers are increasingly involved in foreign affairs as a function of their ministries.²⁵⁴

- A47 The general principle regarding treaty making in the Netherlands is contained in Article 91 of the Constitution and requires the approval of Parliament to be given before consent to be bound by a treaty can be given.²⁵⁵ Article 1 of the new State Law is significant in that it provides that Parliament is to be periodically informed about treaties which are being negotiated. Parliament is to be given a list of ongoing negotiations containing indications of the object and purpose of the negotiations, the prospective treaty partners, any international organisations involved in the negotiation, and the ministries concerned.²⁵⁶
- A48 The purpose of this requirement is to keep Parliament generally informed of treaties under negotiation, allowing comment or directives to be made before the text is settled or the treaty submitted for approval, that is, before it is too late to object. In sum, although parliamentary approval in the Netherlands is not sought until after changes to the actual text of the treaty can be made, the provision contained in Article 1 of the State Law ensures that Parliament is effectively involved in the treaty making process even at the preliminary but most important stage of negotiation.
- A49 Article 1 is also complemented by the role of the Council of State. The Council is the highest general advisory body in the Dutch government and fulfils a vital supervisory role prior to the treaty being submitted for parliamentary approval. It is not until after the treaty text has been adopted and signed, and all other advisory bodies consulted, that the Council of State considers the treaty in question. Although it is not feasible for the Council to recommend

²⁵⁴ van Dijk and Tahzib, 424–425.

²⁵⁵ Klabbers, 629.

²⁵⁶ Where a submission of this information would be against the interests of the kingdom, this requirement is relaxed, ie, where a prospective treaty partner is adamant that negotiations are to be kept secret: Klabbers, 631.

alterations to the text of the treaty, it having been agreed upon already, the Council still has an important influence.²⁵⁷

A50 The role of the Council has been described as follows:

The Council . . . has an influence upon the type of parliamentary approval (tacit or explicit), the Explanatory Memorandum or Note published with the treaty, the approving Act and the implementing legislation. As far as the Act is concerned it could, for example, influence the decision whether to enter reservations or to make declarations on becoming a party to the treaty and the content and formulation of such reservations or declarations. It is in the area of implementing legislation (the need for it and its form and content) that the Council is able to do full justice to its role as legislative adviser. In general the Council's recommendations show that it examines proposals to Parliament in the light of the Constitution, existing Acts of Parliament, general principles of law and aspects of public interest. The Council does not attempt to exercise any political influence.²⁵⁸

A51 Under the State Law parliamentary approval can be given expressly or tacitly.

Express approval

A52 Parliament can only give its express approval of a treaty and any reservations in the form of legislation. In this case the Head of State sends a Royal Message to the Second Chamber containing the Bill and the explanatory memorandum which explains the treaty and any reservations, and states the government's reasons for becoming party to it. It is at this point that the report of the Council of State becomes public and the normal legislative procedure applies.²⁵⁹

Tacit approval

A53 This procedure was introduced by the 1953 Constitution when it was decided that the parliamentary workload was becoming excessive. It is now the more usual means of gaining parliamentary approval.²⁶⁰ A treaty is introduced for tacit approval by the Minister

²⁵⁷ van Dijk and Tahzib, 425.

²⁵⁸ van Dijk and Tahzib, 424–425.

²⁵⁹ van Dijk and Tahzib, 426.

²⁶⁰ More than 75% of treaties to which the kingdom is a party have been approved under the tacit procedure: Klabbers, 634.

of Foreign Affairs to the chairpersons of both chambers of the States-General accompanied by an explanatory note setting out the substance of the treaty and the government's reasons for becoming party to the treaty. The report of the Council of State is also made public at this point. Tacit approval is considered granted 30 days after the treaty's submission, unless a statement has been made by either chamber requesting that the treaty be subject to express approval. In this case the treaty is subject to the procedure for express approval.²⁶¹

- A54 The Council of Ministers or the executive usually decides whether or not to become a party to a treaty and also in what form parliamentary approval will be sought. This decision is carefully considered so that time is not wasted where an agreement submitted for tacit approval must be subjected to express approval. Hence, the government will initiate the procedure for express approval when it anticipates that Parliament may consider a particular treaty controversial or politically important.²⁶²
- A55 After the government is given an opportunity to comment upon a report of the Council of State, the Head of State submits the treaty to Parliament for express approval or authorises the Minister of Foreign Affairs to submit the treaty to Parliament for tacit approval. In exceptional circumstances the Council of State may advise the Head of State not to submit the treaty to Parliament for approval and the government may decide to act on this advice.²⁶³
- A56 Legally Parliament can withhold approval of a treaty or postpone the decision as to approval, and in this situation the Crown has no right to ratify a treaty. Where approval has been granted, the Crown has the freedom but no ensuing obligation to proceed with ratification.²⁶⁴

Exceptions

- A57 There are six exceptions from the basic principle requiring parliamentary approval provided for in Article 7 of the State Law. The most straightforward is where the exemption has been provided for by legislation. For example, the Act of Approval of the

²⁶¹ van Dijk and Tahzib, 428.

²⁶² van Dijk and Tahzib, 428.

²⁶³ van Dijk and Tahzib, 424–425.

²⁶⁴ van Dijk and Tahzib, 425–426.

agreement on the privileges and immunities of the United Nations provides that the government has the right to enter into similar agreements concerning other organisations without having to submit such agreements for parliamentary approval.²⁶⁵

- A58 Treaties considered to exclusively concern the execution of treaties approved earlier are also excepted from the requirement of parliamentary approval.²⁶⁶ Short-term treaties, which do not impose considerable financial obligations and have been concluded for a period not exceeding one year, do not require parliamentary approval either. In exceptional cases of a compelling nature, the kingdom may require a treaty to remain secret or confidential and thus exempt from parliamentary scrutiny. But as soon as the secret or confidential nature of the treaty evaporates it must be submitted for approval without delay. If Parliament withholds approval, the government is under an obligation to terminate the treaty as soon as is legally possible.²⁶⁷
- A59 In addition, treaties which merely renew an expiring treaty or changes to execution annexes which are integral parts of approved treaties are also exempted, unless Parliament has made a reservation to that effect in its Act of Approval.²⁶⁸
- A60 In very limited circumstances, it is possible for treaties to enter into force before approval. Article 10 provides that this can occur in exceptional cases of a compelling nature, in which the kingdom's interests would be prejudiced if the treaty were first submitted to Parliament. As is the case with secret or confidential treaties, parliamentary approval must be sought without delay and where approval is withheld, the treaty must be terminated as soon as possible. Article 10 requires the government to include a reservation concerning the possibility that parliamentary approval may not be granted, ensuring that Article 10 is not employed as an exception to the general rule in the event that termination is not possible after a reasonable time.²⁶⁹
- A61 Before a treaty can be approved by the Dutch Parliament it must be translated into Dutch. The text of all treaties signed by the

²⁶⁵ This exemption is contained in paragraph (a) of Article 7: Klabbers, 630.

²⁶⁶ Parliament still has the option of requiring a treaty to be subjected to parliamentary approval by virtue of Article 8 of the State Law: Klabbers, 631.

²⁶⁷ Klabbers, 632–633.

²⁶⁸ Klabbers, 632–633.

²⁶⁹ Klabbers, 635.

Kingdom of the Netherlands and of treaties to which the kingdom intends to accede, and the translation of the treaties into Dutch are officially published in the Treaty Series of the Kingdom of the Netherlands (*Tractatenblad van het Koninkrijk der Nederlanden*). This official publication of the government also includes other information such as the dates on which other states became parties and the date on which the treaty enters into force.²⁷⁰

The effect of treaties

- A62 The status of treaties in domestic law has been expressly incorporated in the Constitution since its revision in 1953. Article 93 of the Constitution provides that the terms of self-executing treaties entered into and the decisions of international organisations are binding in effect from the time of their official publication. Non-self-executing treaties are binding “on all branches of the central and local legislative and executive authorities, which also have to enforce the resulting obligations within the scope of their powers”.²⁷¹
- A63 Article 94 of the Constitution provides that municipal legislation is overridden if incompatible with the terms of self-executing treaties or decisions of international organisations. Further, domestic courts must give precedence to a self-executing treaty provision over all national law (including constitutional law) which is inconsistent with treaty obligations. Although legislation which is incompatible with non-self-executing treaties will not be overridden, it will be repealed or amended at the first opportunity. The impact of this provision is obviously great and illustrates the importance the Dutch ascribe to their international obligations.²⁷²
- A64 In summary, the treaty making arrangements operating in the Kingdom of the Netherlands contrast markedly with those currently in place in Commonwealth countries, where the balance of power between the executive and Parliament is distributed differently. In the Netherlands, the aim of allowing the executive sufficient freedom to conduct foreign affairs effectively and

²⁷⁰ Schemers, “Netherlands” in Jacobs and Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet and Maxwell, London, 1987), 109.

²⁷¹ van Dijk and Tahzib, 419.

²⁷² Some commentators have noted that the State Law neglects to define exactly what a treaty is, and predict problems as a result. Whether clear distinctions can be drawn between treaties and policy and administrative agreements is yet to be established: van Dijk and Tahzib, 422.

efficiently is achieved while at the same time allowing Parliament to exercise supervision over foreign policy and, importantly, to be effective in this supervisory role. Concerns regarding the possible limitation of sovereignty are not given priority, being overridden by an emphasis on democratic decision making and on giving full binding force in law to international agreements once they are concluded.

THE UNITED STATES²⁷³

A65 The United States (US) Constitution expressly provides for the treaty making power, albeit in bare outline. Article II, section 2, empowers the President, “by and with the Advice and Consent of the Senate, to Make Treaties, provided two-thirds of the Senators present concur . . .”.²⁷⁴ It is accepted practice that the President initiates and conducts the negotiation of treaties, bringing a signed or otherwise final draft to the Senate for its advice and consent. But members of Senate make suggestions to the President about possible treaty making, are consulted by executive branch representatives during the negotiating process, and act as members of or advisers to the US delegation negotiating a treaty.²⁷⁵

“Circular 175 Procedure”

A66 The “Circular 175 Procedure” forms part of the US Department of State instructions issued to the Foreign Service, with regard to the negotiation and conclusion of treaties and other international agreements. The procedure provides criteria for determining

²⁷³ The United States of America is a constitutional republic with a democratic system of government. Powers are divided between the federal and state governments. The President is the head of state and together with the Cabinet constitutes the federal executive branch. The federal legislature consists of a bicameral Congress: the Senate, with 100 members and the House of Representatives, with 435 members.

²⁷⁴ Fisher, “Congressional Participation in the Treaty Process” (1989) 137 *Univ of Penn LR* 1511, 1511–1512.

²⁷⁵ Although this has been a long standing practice, it was increasingly employed after the Second World War because among other reasons, the Senate’s attachment of conditions to ratification unacceptable to President Wilson and the subsequent failure of the US to ratify the Treaty of Versailles were partially attributed to the absence of Senators on the American delegation: Reisenfeld and Abbott, “The Scope of the US Senate Control Over the Conclusion and Operation of Treaties” in Reisenfeld and Abbott (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Martinus Nijhoff, Dordrecht, 1994), 266.

whether the advice and consent of the Senate should be sought and requires that “due consideration is given to the following factors”, none of which are determinative, in addition to those referred to in the Constitution itself:

- (a) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- (b) Whether the agreement is intended to affect State laws;
- (c) Whether the agreement can be given effect without the enactment of subsequent legislation by Congress;
- (d) Past US practice as to a particular type of agreement;
- (e) The preference of the Congress as to a particular type of agreement;
- (f) The degree of formality desired for an agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- (g) The general international practice as to similar agreements – in determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.

A67 The procedure is intended to ensure that the Senate (or Congress as a whole in some cases) is adequately consulted in relation to impending, ongoing and concluded treaty negotiations. A diplomat’s request for authorisation to negotiate or sign a treaty must indicate what arrangements have been made for congressional consultation and public submissions. With regard to negotiations, congressional leaders and committees are to be kept informed and consulted, “including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement”.²⁷⁶

A68 The Case Act²⁷⁷ requires international agreements, other than treaties, to which the US is a party, to be submitted to Congress within 60 days after entry into force. However, where national security interests dictate, the agreement will be submitted to the Senate Foreign Relations Committee and the Foreign Affairs Committee of the House of Representatives under an appropriate injunction of secrecy.²⁷⁸

²⁷⁶ Reisenfeld and Abbott, 266.

²⁷⁷ (1972) 11 ILM, 1117 as noted in Jennings and Watts (eds), *Oppenheim’s International Law*, vol 1, Parts 1–4 (9th ed, Longman, London, 1992), 77.

²⁷⁸ Reisenfeld and Abbott, 266.

- A69 After a treaty has been negotiated by the executive, it is submitted to the Senate for its advice and consent. In the Senate, treaties are referred to the Foreign Relations Committee which has exclusive jurisdiction over treaties, and conducts hearings which include testimony from executive branch witnesses. The Committee then reports on the treaty and votes on whether or not to recommend a resolution of ratification to the full Senate.
- A70 The recommendations of the Committee may contain proposed amendments and conditions, namely, reservations, understandings, declarations or provisos. The Senate then considers the treaty under Rule 30 of the Senate Rules. In its unabbreviated form, the treaty is considered article by article, proposed amendments being examined by the Senate first sitting as a Committee of the Whole; the Senate thereafter sitting as the Senate must vote again on each proposed amendment. After voting on the amendments, the Senate is then to consider conditions to the resolution of ratification, which will at the final stage set out any agreed amendments and conditions.
- A71 Where the Rule 30 procedure is abbreviated, which is usual, the Senate first considers the treaty as a whole, voting on any proposed amendments. The Senate then considers the resolution of ratification reported by the Foreign Relations Committee (including any proposed conditions) and any additional conditions suggested. The Senate lastly votes on the resolution of ratification, which requires a two-thirds majority of members present. All other votes are by a simple majority. Following a favourable vote by the Senate, the President may proceed to ratify the treaty, provided that conditions properly attached to the resolution of ratification are fulfilled (eg, by their incorporation in the instrument of ratification). The President then proclaims the treaty.²⁷⁹
- A72 The Senate does not have the power to compel the President to ratify a treaty or modify its terms. However, the Senate can refuse to pass a resolution or alternatively give its consent subject to conditions which require the making of reservations at the time of ratification.²⁸⁰
- A73 The requirement that a two-thirds majority of the Senate approve a treaty appears at first sight the ultimate in parliamentary

²⁷⁹ Reisenfeld and Abbott, 267.

²⁸⁰ The Senate may also give its consent subject to an “understanding” or “declaration” as to the interpretation of certain treaty provisions, or subject to a proviso concerning the internal implementation of the treaty: Reisenfeld and Abbott, 268.

involvement and mandate. However, objection has been made to the fact that Senators representing as little as 7% of the population (the 17 least populous states) are able to defeat a treaty or to impose a condition on their consent.²⁸¹

Executive agreements

A74 An exception to the requirement of consent by the Senate is the executive agreement. An executive agreement is made by the President under his or her own executive power and, while it is not considered a “treaty” within Article II section 2(2) of the Constitution, it is considered a valid treaty at international law. This type of agreement usually relates to foreign relations or military matters, which do not tend to affect the rights and obligations of citizens. However, by virtue of the Case Act mentioned previously an executive agreement must be transmitted to Congress within 60 days of its entry into force.²⁸²

The Congressional-executive agreement process

A75 The Congressional-executive agreement process is another means of entering into treaties. The process involves the Congress passing a joint resolution of both Houses, or passing legislation, which authorises or approves the conclusion of an international agreement by the President. In contrast to the Article II procedure, there is no requirement to obtain a two-thirds approval of the Senate. A simple majority in each House is all that is required to authorise the ratification of a treaty. Although human rights and arms control treaties have not yet been the subject of the Congressional-executive agreement process, it is often employed for trade agreements, since Congress has the constitutional authority to regulate commerce with foreign nations under Article I of the Constitution.²⁸³

A76 Recently, a “fast-track” procedure, which is a modified form of bicameral congressional approval, has been developed to

²⁸¹ Glennon, “The Constitutional Power of the United States Senate to Condition its Consent to Treaties” (1991) 67 *Chicago-Kent LR* 533, 569–570.

²⁸² Between 1932 and 1982 the United States entered into 608 treaties pursuant to the advice and consent of the Senate and 9548 executive agreements: Reisenfeld and Abbott, 302.

²⁸³ Reisenfeld and Abbott, 302.

implement international trade agreements. Here Congress agrees to impose limits upon itself in exchange for commitments from the President. When the President signals his intention to negotiate an international trade agreement under the fast-track procedure, the President commits the executive to consultation with Congress concerning the agreement and implementing legislation. In exchange, Congress commits to certain internal rule changes which are designed to guarantee an expeditious consideration of a completed agreement and proposed implementing legislation. Further, Congress agrees to vote on the agreement and legislation without amendment. It has been noted that this procedure has enhanced congressional input in the treaty making process, an example being the North American Free Trade Agreement, in which Congress played an active role in the arrangements in respect of the environment.²⁸⁴

A77 In relation to the status of treaties in domestic law, Article VI Section 2 of the Constitution Act states:

[A]ll treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.²⁸⁵

However, the United States has a mixed or partly dualist legal system with respect to international treaties.²⁸⁶

A78 A distinction is drawn between self-executing and non-self-executing treaties. Self-executing treaties do not require implementing legislation and are directly cognisable by municipal courts. In contrast, non-self-executing treaties require further legislative or administrative action before effect can be given in municipal law to the treaty provision. Whether a treaty is directly effective is usually determined by the courts and depends upon the nature of the treaty itself. Treaties which require substantial expenditure of public funds generally require enabling legislation before they can take effect in domestic law. In some cases the Senate will qualify its consent to the ratification of a treaty with a declaration that the treaty shall not be self-executing.²⁸⁷

²⁸⁴ Reisenfeld and Abbott, 302.

²⁸⁵ Fisher, 1511–1512.

²⁸⁶ Jackson, “United States”, in Jacobs and Roberts (eds), *The Effect of Treaties in Domestic Law*, (Sweet and Maxwell, London, 1987).

²⁸⁷ This was done in the case of the International Covenant on Civil and Political Rights: Reisenfeld and Abbott, 205, 263.

- A79 In summary it can be noted that both Argentina and Mexico have based their treaty making practice upon the United States system, which perhaps is a reflection of its success.²⁸⁸ Treaty making in the United States is governed by a network of inter-related legislation, Department of State instructions, Senate Rules and the Constitution itself. This arrangement ensures that the various bodies involved in treaty making such as the Department of State, as well as the Senate and House of Representatives are kept well-informed and have adequate opportunity to effectively participate in the scrutiny of proposed agreements at all stages of development.
- A80 Agreements are subjected to one of various forms of Senate approval and, importantly, the Senate is adequately informed of impending, ongoing and concluded treaty negotiations. Arrangements for congressional consultation and public submissions are made before signature or negotiation. The Case Act ensures that international agreements not considered treaties be submitted to Congress after their conclusion. The procedure whereby committees of the House of Representatives and Senate consider agreements which bear upon national security interests in conditions of secrecy is a viable alternative to the practice recently adopted in Australia of excepting sensitive treaties from any sort of parliamentary scrutiny or approval.
- A81 Parliamentary approval of treaties is rigorous, with a two-thirds majority vote of the Senate required before the President can ratify a treaty. The executive agreement and the Congressional-executive agreement processes are, however, exceptions to this requirement.

SWITZERLAND²⁸⁹

- A82 Executive authority in Switzerland is exercised by the Federal Council, headed by the President, and the Federal Chancellor. The Federal Council has seven members elected by a joint meeting of the two Houses of Parliament. The electorate must vote on amendments to the Constitution, and it may vote on laws and on

²⁸⁸ Donaghue, "Balancing Sovereignty and International Law: the Domestic Impact of International Law in Australia" (1995) *Adel LR*, 213, 236.

²⁸⁹ Switzerland is a constitutional republic with a democratic system of government. Parliament consists of the Council of States, with 46 members, and a National Council, with 200 members. The two Houses have equal authority and can veto any legislation passed by the other House. All federal statutes are subject to a referendum vote, if initiated by 50 000 citizens. Also, 100 000 citizens have the right to initiate amendments to the Constitution on any subject matter as they see fit.

international treaties. The Federal Council negotiates and signs treaties and has the power to discontinue an unsatisfactory project without consulting the Federal Assembly.²⁹⁰

A83 Once a treaty has been negotiated and signed, there are four possible procedures by which treaties can be concluded, depending upon their nature.

- Agreements which Parliament has authorised in advance – those which necessitate a provisional entry into force without delay and those which relate to matters of a purely administrative or technical nature and are of minor importance – may be concluded by the executive alone.
- The agreement may require approval by Parliament.
- The agreement may be subjected to an optional referendum as provided for in Article 89(3) of the Constitution. This category includes: treaties concluded for an indefinite period and without possibility of denunciation; treaties implying multilateral unification of law; and treaties relating to the adherence to international organisations. Treaties can also be subjected ad hoc to an optional referendum by a discretionary decision of the Federal Assembly, under Article 89(4) of the Constitution. Although possible under this provision, the Assembly generally refrains from putting politically and legally sensitive treaties to referendum.
- The agreement must be approved by compulsory referendum. Article 89(5) provides that treaties which provide for the adherence to supra-national organisations and to organisations for collective security must be subjected to compulsory referendum.²⁹¹

A84 Although the Constitution provides that the Federal Assembly must approve treaties, it does not specify at which stage in the treaty making process this is to occur. The usual procedure involves specific approval by Parliament between signature and ratification, although in some cases the approval is sought earlier, in advance of negotiations. The approval of a treaty by the Federal Assembly is in effect an authorisation to the Federal Council to ratify it, by way of federal decree. Parliamentary involvement is not restricted to one point in the treaty making process: sometimes parliamentary involvement occurs at a number of stages. For example, if

²⁹⁰ Wildhaber, “Parliamentary Participation in Treaty Making, Report on Swiss Law”(1991) 67 Chicago-Kent LR 438–442.

²⁹¹ Wildhaber, 442–443.

authorisation was sought prior to negotiation the treaty may be subsequently submitted to Parliament for specific approval after ratification – ratification having been given subject to approval.²⁹²

- A85 There is basically no possibility for Parliament to influence the content of a draft treaty or to modify it. Parliament cannot amend the text of the treaty itself because in approving the treaty the chambers are acting upon federal decree. Generally it is the executive which suggests reservations and issues interpretative declarations.
- A86 However, Parliament also has the power to qualify its approval by requiring the executive to make specific reservations or declarations when ratifying a treaty. Therefore it can change the reservations and declarations formulated by the executive; it can introduce new reservations or declarations; and it can ask the executive to examine whether a specific reservation can be omitted from the treaty. Although it is the executive which has the power to decide whether or not to terminate or denounce a treaty, Parliament arguably has the power to force the executive to carry out either of these actions, and this has on occasion occurred.²⁹³ The legislature insists upon regular and timely information from its preparatory commissions, and important treaties undergo comprehensive scrutiny (particularly in relation to possible membership of the European Union).
- A87 In 1991, a preparatory commission of the National Council formulated proposals for increased parliamentary participation in treaty making. It was suggested that before negotiations took place with international organisations Parliament should be more fully and regularly informed about international developments, and that consultation should take place with the External Affairs Commissions of the Federal Assembly. It was also suggested that the External Affairs Commissions send observers to negotiations of treaties and international conferences.
- A88 The executive rejected the suggestion of obligatory consultation of parliamentary commissions before treaty negotiations and the inclusion of observers in Swiss delegations to international conferences. But a diluted version of the other proposals was accepted which will enhance parliamentary participation at an early stage, emphasising regular information and consultation.²⁹⁴

²⁹² Wildhaber, 443–444.

²⁹³ Wildhaber, 445–446.

²⁹⁴ Wildhaber, 445–446.

- A89 In relation to the application of treaties in domestic law, after ratification and upon official publication, treaties are directly enforceable in law. In the monistic tradition, any self-executing treaty can be enforced by an individual in a court.
- A90 In summary, Switzerland has several different processes for the conclusion of a treaty, depending upon the nature of the treaty in question. This practical and flexible approach allows for adequate scrutiny of those agreements with significant implications but also ensures that participation in treaty making is efficient. Parliament can become involved prior to negotiation, however, guidelines specifying which treaties are to be subjected to particular procedures are required to ensure that parliamentary involvement is consistent. Once the contents of a treaty have been decided upon, Parliament does not have the ability to influence or modify its terms.
- A91 Swiss treaty making provides an alternative method of dealing with urgent or sensitive treaties, whereby ratification is subject to denunciation in the case of subsequent refusal of parliamentary consent. Unique to Swiss politics is the use of the referendum to obtain the direct consent of the electorate. In the case of agreements with onerous obligations, the use of an optional referendum is perhaps the most democratic procedure for obtaining approval. However, its successful employment may in part be due to the fact that referenda form an integral part of political participation in Switzerland.

CANADA²⁹⁵

- A92 In Canada the treaty making power is exercised by the Canadian Governor-General, on the advice of the executive branch of the federal government. The Canadian Constitution Act 1982 contains no express reference to an external affairs power. However, the Federal government claims the exclusive power to enter into treaties on behalf of Canada on the basis that Canada is one sovereign entity at international law. The Canadian provinces have argued that since they have exclusive power to implement certain treaties, they must also have the right to enter into those treaties.

²⁹⁵ Canada is a federal parliamentary democracy, modelled on the Westminster system. The bicameral Parliament is formed under the Crown. The Constitution grants certain legislative powers to the Federal Parliament and certain legislative powers to the provincial parliaments. The Canadian Constitution Act of 1867 grants the provinces specific powers, with the balance of powers exercised by the Federal Parliament.

Although this view is not accepted by the Federal government, the provinces do have the power to enter into international agreements which are not binding at international law.²⁹⁶

A93 Although not legally required, it has been the practice of the government to seek the approval of Parliament before an important treaty is ratified.²⁹⁷ In this situation, parliamentary committees may be involved in considering the treaty in question. According to the Canadian Bureau of Legal Affairs, there are four general categories of treaties for which parliamentary approval is sought prior to ratification:

- military or economic sanctions;
- large expenditures of public funds or treaties with important financial or economic implications;
- political considerations of a far-reaching character; and
- obligations the performance of which will affect private rights in Canada.²⁹⁸

A94 Approval is given in the form of resolutions passed in both Houses rather than by the passage of legislation. Between 1946 and 1966 approximately a quarter of all treaties were submitted to Parliament for approval.²⁹⁹ However, there is no parliamentary scrutiny of those treaties and agreements which do not require ratification, although treaties which have not otherwise come to the attention of Parliament are tabled once a year in both the House of Commons and the Senate. There appear to be no moves at present to enhance the role of Parliament in the treaty making process.³⁰⁰

A95 In common with other states with Westminster-derived constitutions, legislative action is required before the provisions of a treaty become law and enforceable in the courts. In addition, the Federal Canadian government cannot ensure the performance of treaties which require legislation within the legislative competence of the provinces. This is the result of the 1937 Privy Council

²⁹⁶ Hogg, *Constitutional Law of Canada* (3rd ed, Carswell, Toronto, 1992), 282–283.

²⁹⁷ Hogg, 282–283.

²⁹⁸ Lee (ed), “Canadian Practice in International Law During 1974 as Reflected in Correspondence and Statements of the Department of External Affairs”, excerpts from a memorandum of June 11, 1974, written by the Bureau of Legal Affairs (1975), reproduced in *The Canadian Yearbook of International Law*, vol XIII, 367; noted in Prowse, “New Zealand Treaty Practice: A Reappraisal”, LLB (Hons) dissertation, University of Otago, Dunedin, 1996, 45.

²⁹⁹ Hogg, 285.

³⁰⁰ Prowse, 44.

decision *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326 (PC) (the *Labour Conventions* case). In this case it was held that the Federal government did not have the power to pass legislation to implement treaties the subject-matter of which touched on matters falling within the provincial jurisdiction under the Constitution. Thus in some cases where the Federal government enters into a treaty, it can only be implemented by legislation enacted by the provincial legislatures.³⁰¹

A96 In summary, the present complex situation in Canada with regard to jurisdiction over treaty matters has perhaps meant that increased parliamentary involvement in treaty making would only represent additional complication. Canada's treaty making process involves minimal participation of Parliament and as a result is not particularly instructive to this study. The fact that implementing legislation can only be enacted by the provinces has perhaps been one incentive for adequate consultation. The four categories of treaties for which parliamentary approval is sought prior to ratification perhaps provide a possible way of distinguishing between more and less important treaties, enabling parliamentary consideration of just some of them.

³⁰¹ The approach taken by the Privy Council has been criticised and since the abolition of appeals to the Privy Council, the Supreme Court of Canada has indicated the possibility that it will reconsider the reasoning in the *Labour Conventions* case: Hogg, 294.

APPENDIX B

Internet websites relevant to treaties and treaty making

- B1 **T**HIS APPENDIX CONTAINS A LIST of internet website addresses that are relevant to treaty making and/or treaties generally. It includes addresses for less specifically “treaty” yet still useful sites, such as various United Nations websites.
- B2 The Law Commission would like to make clear that this address list of relevant websites is intended only as a starting point resource.³⁰² It is not intended as an exhaustive guide to websites concerning treaties and treaty making. There are many more sites with treaty and international law materials which can be retrieved by searching for the relevant convention name, organisation name or subject matter, or even by law journal or law school.³⁰³ However, this sample of treaty sites may, in a small way, increase interest in the resources available on the internet and the potential for its further use.
- B3 It may also serve to highlight the potential that exists in particular for the New Zealand Ministry of Foreign Affairs and Trade (MFAT) to expand its website (address noted below). Material that could be presented includes, for example, the specific treaties to which New Zealand is a party, the statutes which implement our international obligations, and the recent MFAT multilateral and bilateral treaty list publications. The material presented in the Australian Department of Foreign Affairs and Trade (DFAT) website ([address noted below](#)) provides an excellent example of how to make best use of the opportunities the medium offers.

³⁰² In 1998 the Law Commission itself will be establishing an internet website where its publications, such as *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996), and this report will be available.

³⁰³ Some of the major “treaty” website addresses were noted in a review by Mark Gobbi (1996) 19(4) *Public Sector* 26.

New Zealand

MINISTRY OF FOREIGN AFFAIRS AND TRADE

<http://www.mft.govt.nz/>

MINISTRY OF FOREIGN AFFAIRS AND TRADE:

NOTES ON MFAT'S WORK WITH TREATIES

<http://www.mft.govt.nz/Guide/part6.html#6-4>

Australia

AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE,
TREATIES LIBRARY

<http://www.austlii.edu.au/au/other/dfat>

This website provides the following information:

- Australian Treaty List (index and monthly updates);
- Australian Treaties Full Text Database;
- National Impact Statements (1996 & 1997);
- Select Documents on International Affairs;
- List of Multilateral Treaty Actions Under Negotiation (the list covers current treaties and those to be negotiated in the next 12 months and provides contact names and addresses in relevant departments for each treaty listed);
- Status Lists (of parties to the multilateral treaties for which Australia is the depositary);
- *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (the Australian Senate Legal and Constitutional References Committee Report on treaty making);
- Australia and International Treaty Making Information Kit – June 1997 (a valuable 64 page kit that covers all aspects of treaty making in Australia including discussion of current developments and major treaties);
- United Nations General Assembly Resolution – Electronic Treaties Database (the text of the resolution adopted on 16 December 1996 concerning the importance of making the text of United Nations treaties available on a database);
- List of other sites relevant to Australian treaties (including the Department of Foreign Affairs and Trade Joint Standing Committee on Treaties, and Hansard Internet Publishing Service).

TRICK OR TREATY? COMMONWEALTH POWER TO MAKE AND
IMPLEMENT TREATIES

http://senate.aph.gov.au/committee/legcon_ctte/4chapt12.html

The website contains the text of chapter 12 of the *Trick or Treaty?* report, “Consultation with Interested Groups”.

AUSTRALIAN GOVERNMENT RESPONSE TO THE RECOMMENDATIONS IN
TRICK OR TREATY?

<http://www.lib.monash.edu.au/law/govres.htm>

AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE:
HUMAN RIGHTS MANUAL

http://www.dfat.gov.au/dept/hr/hr_manual/hr_man_ch2.html

The website contains the text of chapter 2 of the *Human Rights Manual*, “The International Legal Framework”, covering basic concepts of public international law and human rights, including treaty law.

United States of America

US HOUSE OF REPRESENTATIVES INTERNET LAW LIBRARY:
TREATIES AND INTERNATIONAL LAW

<http://law.house.gov/89.htm>

This site contains links to an enormous number of international treaties. It is arranged both by subject and individual treaty name and often includes different versions of the same treaty. Some of the major treaties reproduced include: Australia-Vietnam Trade and Economic Co-operation Agreement; General Agreement of Tariffs and Trade; Maastricht Treaty of the European Union; North American Free Trade Agreement; Patent Cooperation Treaty; and the Vienna Convention. It provides connections to other sites, such as the human rights collection compiled by the University of Minnesota.

European Union

TREATIES OF THE EUROPEAN UNION

<http://www.eurunion.org/infores/resguide.htm>

This website includes information about European Union Treaties and Institutions (eg, the Maastricht Treaty).

International Law Commission

INTERNATIONAL LAW COMMISSION HOME PAGE

<http://www.un.org/law/lindex.htm>

The International Law Commission website includes material on its work, its 1996 Annual Report and information on the “Colloquium on Progressive Development and Codification of

International Law” held in October 1997 to mark the ILC’s 50th anniversary.

VIENNA CONVENTION ON THE LAW OF TREATIES

gopher://wiretap.Spies.COM/00/Gov/Treaties/Treaties/treaties.69

United Nations (UN)

UN HOME PAGE

<http://www.un.org/>

OFFICIAL WEBSITE LOCATOR FOR THE
UN SYSTEM OF ORGANISATIONS (UNO’S)

<http://www.unsystem.org/>

This site includes a world map of UN systems websites and provides entry to sites of other international organisations (not part of the UN system), for example, North Atlantic Treaty Organisation (NATO), Organisation for Economic Co-operation and Development (OECD), World Trade Organisation (WTO), and provides entry to sites for non-governmental international organisations, for example, International Committee of the Red Cross (ICRC).

UN INTERNATIONAL LAW PAGE

<http://www.un.org/law/>

UN TREATY COLLECTION DATABASE

<http://www.un.org/Depts/Treaty>

The UN Treaty collection, including the UN Treaty Series and the Multilateral Treaties Deposited with the Secretary-General. (This website attracts a fee). (See also the US House of Representatives and the Fletcher School of Law and Diplomacy websites.)

CHARTER OF THE UN

<http://www.umn.edu/humanrts/instreet/aunchart.htm>

UN HUMAN RIGHTS

<http://www.un.org/rights/>

UN HUMAN RIGHTS WEBSITE

<http://193.135.156.15/welcome.htm>

The site includes lists of human rights instruments.

UN TREATY BODIES

<http://www.tufts.edu/fletcher/secretariats.html>

This site provides access to the UN Treaty Secretariats and is part

of the Multilaterals Project provided by the Fletcher School of Law and Diplomacy.

<http://www.unhchr.ch/tbs/doc.nsf>

This site contains the Treaty Bodies Database – a database developed to meet the growing interest in the UN committees established to monitor the implementation of the principal international human rights treaties (also referred to as “treaty monitoring bodies” or “treaty bodies”).

UN DOCUMENTS DATABASE:

DAG HAMMARSKJOLD LIBRARY

<http://www.un.org/Depts/dhl/unique>

This new database, UN-I-QUE, available on the Dag Hammarskjold Library home page, is an electronic research tool that serves as a guide to the symbols of tens of thousands of selected documents and new publications from 1946 to the present. UN-I-QUE focuses upon documents and publications of a recurrent nature: annuals/sessional reports of committees/commissions; monographic series; journals; annual publications; reports periodically/irregularly issued; reports of major conferences; statements in the General Debate; etc. It is geared towards the UN community and librarians in UN depository libraries but its usefulness will extend to researchers worldwide who would like to find shortcuts to identifying key documentation.

Note: There are many more sites with UN materials which can be retrieved by searching for convention name, organisation name or subject matter.

International trade (sample only)

UN COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

<http://www.un.or.at/uncitral/index.html>

This website is the home page of the International Trade Law Branch of the UN Office of Legal Affairs, servicing the UN Commission on International Trade Law (UNCITRAL). The site includes the current status of Conventions and Model Law.

INTERNATIONAL TRADE LAW MATERIALS INCLUDING MULTILATERAL
TRADE AGREEMENTS

<http://ananse.irv.uit.no/trade.html>

WORLD TRADE ORGANISATION (WTO) HOME PAGE

<http://www.unicc.org/wto>

Environment (sample only)

OCEANS AND LAW OF THE SEA

<http://www.un.org/Depts/los>

ENVIRONMENTAL TREATIES AND RESOURCE INDICATORS SERVICE

<http://sedac.ciesin.org/pidb/>

This website provides a service for locating environmental treaties and resource indicators, including treaty texts and state parties, etc.

GUIDE TO THE LAWS AND INTERNATIONAL TREATIES OF THE US FOR PROTECTING MIGRATORY BIRDS

<http://www.fws.gov/~r9mbmo/intrnltr/treatlaw.html>

Intellectual property (sample only)

WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)

<http://www.wipo.org/>

WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) WEB

<http://www.uspto.gov/>

This is the site for the US Patent and Trade Mark Office which provides access to websites related to intellectual property worldwide.

WORLD INTELLECTUAL PROPERTY REPORT

http://www.bna.com/newsstand/wipr/2a06_69e.htm

This site contains a report on the negotiations of the two WIPO treaties on copyright.

WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)

TREATY ON DATABASES

<http://www.loc.gov/copyright/wipo6.html>

The site details the WIPO proposal for a treaty on intellectual property in respect of databases.

Nuclear (sample only)

NUCLEAR TEST BAN TREATIES

<http://www.acda.gov/treaties/ctbtreat.htm>

This site has the text, narrative and signatories for the Comprehensive Nuclear Test Ban Treaty.

<http://www.acda.gov/treaties/lbtt.htm>

This site has the text, narrative and signatories for the Limited Test Ban Treaty.

<http://www.acda.gov/treaties/tbtt.htm>

This site has the text, narrative and signatories for the Threshold Test Ban Treaty.

Universities and law schools

FLETCHER SCHOOL OF LAW AND DIPLOMACY

<http://www.tufts.edu/fletcher/multilaterals.html>

This website is the home of the Multilateral Project, an extensive collection. The project's purpose is to make the text of international multilateral treaties and other instruments available. It also provides access to the United Nations Treaties Database.

UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY

<http://www.umn.edu:80/humanrts>

This site is a useful resource, with international human rights instruments and information on, for example, treaty ratifications.

WASHBURN LAW SCHOOL

<http://lawlib.wuacc.edu/forint/forintmain.html>

This is the Foreign and International Law Web which provides links to primary and international legal resources research aids and useful sites, on areas such as international treaties, environment law, human rights and public international law.

CORNELL LAW SCHOOL

<gopher://gopher.law.cornell.edu:70/11/foreign/fletcher>

This website contains a large list and text of conventions including the Vienna Convention on the Law of Treaties, environmental conventions, and the International Covenant on Civil and Political Rights.

NEW YORK UNIVERSITY LAW LIBRARY

<http://www.nyu.edu:81/law/library/treaties.htm>

The site includes full text treaty sources for international treaty research and references to many other treaty sources.

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Index

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- Cabinet approval 15–16, 20–21, 111
- Cabinet Office Manual* 16, 28, 47, 101, 184, 196
- Chicago Convention 41
- Closer Economic Relations (CER) 103, 119, 166, 185
- confidentiality 108–111, 152, 160, 176, 185, 206, A4, A21, A58, A60, A68, A80, see also *secret treaties*
- consultation 7, 59, 67–68, 74–78, 99–108, 144–149, 152, 175, 183, 188, 192, A6–A8, A14–A16, A19, A37
- Convention on the Rights of the Child 30, 40, 95, 134
- courts 4, 10, 13, 37–42, 87–93, 130, 204
- cultural property see *intellectual property*
- death penalty 94–96
- delegated legislation see *implementation, subordinate instrument*
- democratic deficit 57–58, 94–98
- Department of Foreign Affairs and Trade (DFAT), Australia 145, 147, 158, A7, A15, A24, appendix B
- explanatory memoranda 180, A37, A52, see also *treaty impact statements*
- Final Act 20
- flexibility 80, 109–112
- Foreign Affairs, Defence and Trade Select Committee 72, 98, 146, 153–154, 164–166, 177, 181–182, 185, 209
- General Agreement on Tariffs and Trade (GATT) 67–68, 102, 105, 108, 120
- globalisation 1–2, 5, 43–56, 85, 93, 205 A8
- human rights 30, 40, 52, 88, 92, 108, 120, 134, 140, 148, 185, 196, A26, A39, appendix B
- implementation 9–10, 25–36, 37, 123–141, 182, 195–203, A37
- continuing implementation 140–141
- force of law 36, 129–131, 197–199
- subordinate legislation 28, 31, 36, 104, 106, 118, 125, 136–139
- information, provision of 146–147
- intellectual property 59–66, 193–194, appendix B
- International Covenant on Civil and Political Rights (ICCPR) 28, 30, 96, 196
- Optional Protocols 30, 94
- International Covenant on Economic, Social and Cultural Rights 30
- International Labour Organisation (ILO) 18, 44, 101, 141, 156
- International Law Commission (ILC) 202–203, appendix B
- internationalisation of law see *globalisation*
- internet 51, 145–147
- websites 11, 145, 202, appendix B
- webb, Smart phones 45
- Labour Conventions* case see *Attorney-General of Canada v Attorney-General of Ontario*
- Legislation Advisory Committee (LAC) 104, 119, 136
- limitation of future governments 94–98
- Māori 59–69, 76, 99, 108, 149, 183, 193–194
- Memorandum on Foreign Policy, Trade and Other Treaty Issues* 164
- Minister for Immigration and Ethnic Affairs v Teoh* 39, 88, 204, A9–A10, A25–A26

Ministry of Foreign Affairs and Trade (MFAT) 2, 11, 14–21, 26, 31, 73, 76, 102, 112, 147, 161, 170, appendix B

Ministry of Justice 26, 32, 52, 72, 93, 151, 155, 157, 163, 167, 182, 187, 209

Mixed Member Proportional electoral system (MMP) 71, 208

Multilateral Agreement on Investment (MAI) 67, 74–77

national interest analysis A18–A19, see also [treaty impact statements](#)

negotiation and acceptance stages 11–24, 79–122

New Zealand Bill of Rights Act 1990 28, 96, 124, 196

notification 7, 144–149, 153, 161, 167, 185–186

Organisation for Economic Co-operation and Development (OECD) 74, A1

Order in Council see [implementation, subordinate instrument](#)

overseas practice

- Australia 39, 102–103, 108, 158–159, 180, 204, A1–A26
- Canada 12, 82–83, A1, A92–A96
- France A1, A38–A44
- Netherlands A1, A45–A64
- Switzerland A1, A82–A91
- United Kingdom 57, 70, 180, 187, A1, A27–A37
- United States of America 38, 204, A1, A65–A81

ratification 21–22, 24, 27, 70, 115, 118, 159, 165, 190, A3, A28, A35–A36, A38, A40, A46, A71–A72, A84, A93

Regulations Review Committee 153, 175

regulations see [implementation, subordinate instrument](#)

secrecy see [confidentiality](#)

secret treaties 167, A58, A60, see also [confidentiality](#)

self-executing treaties 87, 130–131, A1, A62–A63, A78, A89

select committee 111, 151, 154, 165, 172, 174, see also [Treaty Committee of Parliament](#); [Foreign Affairs, Defence and Trade Select Committee](#)

separation of powers 8–10, 52, 88

signature 15, 19–22

sovereignty 48, 53–56, 58, A6

Standing Orders 109, 143, 160, 168, 174–175, 192

Standing Orders Committee 146

- “Treaties and the House of Representatives” (paper prepared by the Clerk of the House of Representatives) 72, 90, 154, 172–174, 176, 200

tabling of treaties 7, 32, 114, 143, 154, 162–177, 185, 187, 192, A3–A4

tāonga 59–68, 194

Tavita v Minister of Immigration 40, 91

timing 80, 109–112

treaties database A24

Treaty Committee of Parliament 111, 143, 149–160, 168, 175, A20–A22

treaty impact statements 7, 179–187, 193

Treaty of Waitangi 2, 38, 59, 65, 99, 168, 183, 193

treaty type/definition/subject matter 113–122, 168

United Nations 1, 45, 51, 54, 139, 167, 197, [appendix B](#)

- Convention on Contracts for the International Sale of Goods 197
- draft Declaration on the Rights of Indigenous Peoples 61, 62, 148
- Secretary-General 48
- treaty committees 140, 196

urgency 80, 109–112, 176–177, A28

Vienna Convention for the Protection of the Ozone Layer 121

Vienna Convention on the Law of Treaties 11, 22, 24, 33, 46, 96, 196–197, [appendix B](#)

World Trade Organisation (WTO) 102, 108, 120, [appendix B](#)