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PARLIAMENTARY PARTICIPATION IN THE TREATY MAKING PROCESS

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CONTENTS

ABSTRACT

It is widely accepted that negotiating and consenting to a treaty is an Executive act. However as international treaties are growing as a source of law in importance, number, and scope, the idea of them being negotiated and accepted without any reference to the legislature must be questioned.

The objective of this paper was to look at Parliament's involvement in the treaty making process in the light of the importance of international law and to compare it with the practise followed in other countries with a view to determining whether the New Zealand practice is satisfactory or whether it is in need of improvement, and if so, how. The writer has concluded that the occasions on which the New Zealand Parliament is involved in the treaty making process are neither numerous or certain enough and that there is both need and scope for change with regard to this aspect of the treaty making process.

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 13400 words.

I. INTRODUCTION

International law is a very important part of each countries political system. However despite this fact, the power to negotiate and conclude international treaties is an exclusively Executive power. Parliament has no constitutional right to be consulted.

The purpose of this paper is to look in depth at what part Parliament does play in the treaty making process and to decide whether the situation with regard to treaty making in New Zealand and Parliaments position should stay as it is or whether changes should be put in place.

II. THE USE AND LAW OF TREATIES

A. *The Growing Importance of International Law*

The basic constitutional doctrine of the traditional law of nations is that of sovereignty. The traditional meaning of sovereignty presupposes supremacy or superiority and independence of the sovereign in both its internal and external conduct.[1]

The world is passing through a transformation. This is largely due to technological and scientific developments. There has been a huge development in the area of travel both by air and over land, millions of people and tons of goods now move from country to country.[2] Telecommunications have grown and created a worldwide network.[3] The discovery of nuclear energy has led to the development of weapons that can have an awesome worldwide effect.[4] Humans and instruments are now entering outer space which is not within the jurisdiction of any one state. More and more discoveries are being made in respect of the environment which cannot be confined to territorial boundaries. The basic concept of property has now expanded to encompass intellectual property,[5] the use of which can extend well beyond the boundaries of one state. The transformation is also due to shifts in values and attitudes in areas such as human rights and the environment.

All these developments mean that states do not operate solely within their own jurisdictions. There is a growing interdependence between states and a recognition that the world must act and operate as a whole. In 1958 Robert Jennings stated that the growing interdependence of states was to make a traditional international law built round the idea of the individuality of states, an increasingly inapt instrument.[6]

The law, therefore, has had to develop in order to keep pace with these changes.

> Many new chapters of an ever growing international law indicate the way: ever closer cooperation of the states, leading to integrated efforts in

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[1] Christopher Osakwe (1988) 82 AJIL 640
[2] Manfred Lachs "Thoughts on Science, Technology, and World Law" 86 (October '92) AJIL 673,687
[3] Ibid 687
[4] Ibid 683
[5] Ibid
[6] Robert Y Jennings "The progress of International Law" 1958 British Yearbook of International Law 334,336

> controlling the giant energies released, so that what may have been viewed as an artificial link gradually can be revealed to be a profound common interest, to be protected by many states or the whole international community. Thus by extending its protective wings, laws grow, new solutions are opened and multiply thousands of rules are agreed upon, and new institutions come into being while others (like national autonomy) erode.... This becomes inevitable. "I believe" a distinguished politician recently suggested, "sovereignty is not some predefined absolute, but a flexible adaptable organic notion that evolves and adjusts with circumstances."[7]

Therefore international law in being called upon to meet the challenges of scientific and technological development, and the shifts in values and attitudes, and to assist in resolving the conflicts which arise through greater interaction has grown both in size and scope and has increased in importance

B. Treaties as a Source of Law

Treaties are one of the primary sources of international law. As such, the growth in importance, size and scope of international law has a direct and similar effect on treaties. Consequently treaties are now being used more often than before and in more areas than before.

1. Character and purpose of treaties

The internal laws of a State provide its members with different legal instruments in order to regulate their lives. In the international arena several of these different legal instruments are provided for by the treaty.[8] Treaties serve the function of conveyancing documents, constitutions or incorporation documents, legislation, and contracts.

The areas regulated by treaties is also very wide ranging. States can form an agreement on any area they want to. Once again subject matter increases as developments are made in science and technology, as trade increases, and as values and attitudes change. Because of this there will never be an exhaustive list of what may be governed by treaties, however the New Zealand Law Commission has

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[7] Above n2, 697

[8] Lord McNair *The Law of Treaties* (Oxford at the Clarendon Press 1961) 739

listed the main areas which are the subject of treaties today.[9] These include war and peace, disarmament and arms control, international trade, international fiance, international commercial transactions, the law of international spaces, such as the sea, air and outer space, the law relating to the environment, human rights and related matters, labour conditions and relations, and other areas of international economic and social cooperation.

2. *The conclusion and entry into force of treaties*

It is the job of the Executive to enter into treaties on behalf of a State. Those who may enter into treaties on behalf of a State by virtue of their status and function are heads of State, heads of Government, Ministers of Foreign Affairs, heads of Diplomatic Missions and representatives accredited by states to an international conference or organization.[10] Others may also be considered a representative of a State if they produce full powers[11] which signifies an authority to negotiate and sign a treaty.

Once a treaty has been negotiated the text must be adopted. This is provided for by article 9 of the Vienna Convention on the Law of Treaties. However the adoption of a text does not make the binding on the parties, it only recognises the text as the agreed one.

An expression of consent to be bound by the treaty can be given in a number of ways. That is by signature, exchange of instruments, ratification, acceptance, approval, or accession.[12]

Consent by signature is a one step process and once signed a party is bound by the treaty.

Consent by ratification on the other hand is a two step process. It requires both signature and then ratification. The purpose or need for something such as ratification, as opposed to just signature, is that for various reasons states need time, after agreement has been reached on a definitive text of treaty, before they feel able to commit themselves to it. For example a state may wish to re examine the affect of the treaty upon its interests. The internal law of the state may need to

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[9] Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Revised ed 1991) 77 - 78

[10] The Vienna Convention on the Law of Treaties, Article 7(2)

[11] Ibid art 7(1)

[12] Ibid art 11

be changed and time is needed to enact the necessary legislation. In some situations the Executive may have to obtain consent on the part of Parliament.[13] At times it was maintained that ratification could only lawfully be refused if the representatives had exceeded their powers or violated their secret institutions. In practice this is not the situation. A state may choose not to ratify. Generally, partial ratification is not allowed. Three exceptions to this are where the treaty permits partial ratification, the other states agree that the ratifying states need not be bound by certain provisions,[14] or the State makes a lawful reservation pursuant to article 19 of the Vienna Convention on the Law of Treaties excluding certain articles of the treaty from its ratification. Sometimes a state may try to modify a treaty while ratifying it, however this is equivalent to refusal of ratification coupled with a fresh offer which may or may not be accepted.[15] The other parties may choose to enter into fresh negotiations with respect to these modifications, but there is no obligation on them to do so. A treaty which has not been ratified is not binding on the parties but if it has been signed, that signature does have some effect. Pending ratification states must still refrain from acts which would defeat the object and purpose of the treaty. This is by virtue of article 18 of the Vienna Convention on the Law of Treaties. Therefore a state cannot treat a signed treaty as though it were of no concern.[16]

Consent to be bound by exchange of instruments is expressed by the exchange either if the instruments so provide or if the states have agreed that will be the effect of the exchange.

In some situations, signature to treaties may be declared to be subject to acceptance or approval. These terms are refereed to in article 14(2) of the Vienna Convention which is also the article that deals with ratification. Shaw describes acceptance and approval as similar to ratification but in a simpler form.[17] Oppenheim describes them similarly but also adds that the primary purpose for this form of consent is to help states to avoid certain internal difficulties which they might experience if they had to go through their constitutional procedures for parliamentary ratification.[18]

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[13] Sir Robert Jennings and Sir Arthur Watts (ed) *Oppenheim's International Law* (Vol 1, 9 ed, Longman 1993) 1227
[14] Ibid 1233
[15] Ibid 1232
[16] Ibid 1230 - 1231
[17] Shaw *International Law* 569
[18] Above n 13, 1236

Accession can occur in two situations. Firstly it is the procedure whereby a state agrees to be bound by a treaty in which it took no part in the drawing up and adoption but still wishes to become a party to it and either the treaty provides for accession or the other negotiating states agree. Secondly a State may accede to a treaty where it was involved in the drawing up and adoption but did not sign it at the appropriate time.

3. *The distinction between the creation of a treaty obligations and the performance of treaty obligations*

In constitutions like the one we have in New Zealand the Executive has the power to accept treaty obligations, however the Executive does not have the power to change internal law if, in order to carry out the treaty obligations, such a change is needed. This point was settled by the Privy Council in *AG for Canada* v *AG for Ontario*[19] in which Lord Atkin said:

> 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 stipulation's of a treaty duly ratified do not within the empire, by virtue of the treaty alone, have the force of law. If the national Executive, the Government of the day, decide to incur the obligations of a treaty which involve the alteration of the law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. 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 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

[19] [1937] AC 326, 347-348

> leave the state in default. In a unitary state whose legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not the 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.

This statement is till true in respect of the situation in New Zealand today.

4. *The binding force of treaties*

Article 26 of the Vienna Convention provides that treaties are binding on the parties and must be performed by them in good faith. This duty to abide by the obligations of a treaty means that a party cannot liberate itself from the obligations of a treaty otherwise than on proper grounds.[20] There are certain limited circumstances where a treaty may be withdrawn from, terminated, or suspended.

By virtue of article 54, termination or withdrawal from a treaty is allowed if the treaty provides for it. Termination or withdrawal is also allowed even if the treaty doesn't provide for it but all the parties consent. There may also be an implied right to denounce or withdraw. This is provided for by article 56(1). It is necessary to establish that the parties intended to admit such an option or that the nature of the treaty implies that such an option exists.

One party may terminate the treaty in response to a material breach by the other.[21] Article 60(3) states that a material breach is either a repudiation not sanctioned by the convention or a violation essential to the accomplishment of the object of the treaty. However material breach does not justify termination where the provisions relate to the protection of the human persons contained in treaties of a humanitarian character.[22]

A treaty may also come to an end where it becomes impossible to perform. Article 61 provides that impossibility of performance must arise "from the permanent disappearance or destruction of an object indispensable for the execution of the treaty."

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[20] Above n 13, 1249
[21] Article 60(1)
[22] Article 60(4)

A party is not bound to perform a treaty if there has been a fundamental change of circumstances since the treaty was concluded. The modern approach to this ground is to restrict its scope severely. In the *Fisheries Jurisdiction Case* [23] the court stated:[24]

> In order that a change of circumstances may give rise to a ground for invoking the term of the treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.

If any new peremptory norm[25] emerges, any treaty in conflict with that norm becomes void and terminates.[26]

If all the parties to a treaty conclude another treaty, then the earlier treaty may not either being expressly or impliedly terminated.

Treaties are binding on contracting *States*. Therefore changes in the government or even in the form of government do not affect the binding force of a treaty. No state can avoid the obligations of a treaty simply because it was concluded under a previous government.[27]

A state cannot use as a defence for breach the fact that provisions in its internal law are inconsistent with the treaty and must be complied with. This is by virtue of article 46 of the Vienna Convention on the Law of Treaties and has been determined by the Permanent Court of International Justice, the International Court of Justice and the Permanent Court of Arbitration.[28]

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[23] ICJ Rep (1973), p3
[24] Ibid 21
[25] Article 53 defines a peremptory norm as a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character
[26] Article 64
[27] Above n 13, 1253
[28] Ian Brownlie Principles of Public International Law (4 ed, Clarendon Press, Oxford, 1990)

III. TREATY PRACTISE

A. New Zealand Treaty Practise

1. The treaty making process[29]

a) Bilateral Treaties

A bilateral treaty is initiated either when it comes to the Ministry of Foreign Affairs and Trade's attention that there is a need for the agreement, or when New Zealand is approached by another country wishing to enter into an agreement. At this stage Ministry of Foreign Affairs and Trade consults with the other departments who have an interest in the agreement as is required by chapter 3B2 of the Cabinet Office Manual which states:

> Almost all policy proposals have implications for other Government agencies. The onus is on the initiating department and the responsible Minister to ensure that all other organisations affected by a proposal are consulted at the earliest possible stage, and that their views are reflected accurately in the submission

As all treaties must be submitted to cabinet this consultation must take place. A mechanism is included in the manual to ensure it takes place. Chapter 4/A/14 provides for a special form[30] to be completed by the initiating department stating, to the satisfaction of their Minister, that they have consulted all Government agencies that have an interest in the issue and that their views are reflected properly.

Depending on the importance of the treaty and whether it encroaches on new policy ground or not the Minister of Foreign Affairs and Trade or other relevant Ministers might be approached at this stage. There is also an increasing tendency to consult with non-governmental groups at this stage. This seems to occur mainly with trade and economic agreements. One example is a wine agreement currently being negotiated with the EEC. The wine industry in New Zealand was consulted before negotiation. Negotiations are now being carried out using a brief which has been cleared with the industry and there are industry members present at the negotiations. There is also consultation with regard to ongoing GATT negotiations.

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[29] The information for this part of the paper was gathered at an interview with Mr Tony Small of the Legal Division at the Ministry of Foreign Affairs and Trade

[30] form (CAB 100/91)

Once a text has been agreed upon the matter is put to Cabinet by the Minister who is principally concerned with the treaty. Chapter 3/B/4 of the Cabinet Office Manual requires that any action to sign, ratify or accede to a treaty must be submitted to Cabinet for approval. Therefore a decision to become bound by a treaty is for cabinet to make, not just the relevant Ministers.

If the treaty requires a change in legislation then before cabinet is approached the legislation is usually prepared and ready to be put in place. The legislation is usually passed before final consent is given however in some situations the treaty may be signed with its coming into force contingent on it being implemented into domestic law. A treaty is never signed in reliance on the fact that the Government has a majority in the House and consequently is highly likely to pass the legislation through as unforseen circumstances might occur which prevent the legislation from being passed and it may not be possible for New Zealand to be released from the obligations it has accepted and therefore the country will be in breach of the treaty.

Once Cabinet has been approved the treaty and any necessary legislation has been passed New Zealand can give its final consent to be bound by the treaty.

b) Multilateral Treaties

If New Zealand is involved in the treaty from its initiation then more often than not it has a part to play in the negotiation of the text. For example treaties are negotiated in a multilateral forum and New Zealand might be in the forum, or if there is a conference on the treaty New Zealand might be invited. If New Zealand is involved in negotiating the text, then by the time the text is settled the Ministry of Foreign Affairs and Trade normally knows enough about the treaty to be able to form a judgement on whether to become a party or not.

At this stage other departments might be consulted as might other outside interest groups. If the treaty is principally related to another departments area then that department may be responsible for the consultation and the Ministry of Foreign Affairs and Trade may play a monitoring role.

As with bilateral treaties, multilateral treaties must be submitted to cabinet and the submissions must contain details of the consultation which has taken place. The treaty must be examined in order to establish whether a change in New Zealand law is needed. Once again New Zealand will not give its final consent to a treaty until the necessary law is in place or sufficiently advanced so as to be absolutely sure it will come into force.

Once cabinet has approved the treaty and the domestic implementation is taken care of New Zealand can become bound by the agreement.

c) General

Treaties are normally printed once they have come into force. They are printed in the Treaty Series and tabled as an A paper. Both of these things are essentially the same.

It is not always the Ministry of Foreign Affairs and Trade that initiates the treaty or that is involved from the beginning. Sometimes other departments may initiate the treaty however the Ministry of Foreign Affairs and Trade must still ensure that the contents are considered with sufficient seriousness and therefore are in contact with the other department at some stage.

2. *Parliamentary participation*

The quote from Lord Aitken in Part I of the paper is accepted as a reflection of the true position in New Zealand : entering into an international agreement and accepting the obligations within it are acts which the Executive can do alone, Parliament has no constitutional right to be consulted. Does, this mean however that just because Parliament has no right to have a say, the New Zealand legislature is never consulted? Such a question can only be answered by examining what has occurred and does occur in practice in New Zealand.

This paper looks in detail at the practice from 1965 onwards. In 1964 a study on the practise up to that point was conducted by Sir K.J Keith[31] who concluded that parliamentary involvement in the treaty process took place when legislation was needed to implement the obligations. Parliament was also involved when there was a house resolution approving the governments actions, when there was a debate in the House on the relevant subject matter, and when statements were made to the House by a Minister and possibly responded to by an opposition spokesperson.[32] For a full discussion of these findings see "New Zealand Treaty Practice: the Executive and the Legislature" (1964)1 NZULR 272.

The practise from 1964 onwards shows that Parliament is included in the treaty making process on some occasions. Sometimes it is the Government that initiates

[31]K.J Keith "New Zealand Treaty Practice: the Executive and the Legislature" (1964) 1 NZULR 272

[32]Law Commission "The making and implementation of treaties: three isssues for consideration" August 1993

the involvement and other times it is Parliament. The extent of the involvement varies greatly.

a) Government Initiated Involvement

The main situation in which the Government initiates Parliamentary involvement is where legislation is required to change domestic law so that the treaty obligations can be fulfilled. The legislation is introduced before New Zealand is bound fully by the agreement, therefore if, for some unforseen reason, the legislation is not passed the Government is still in a position where it can decline to give final consent to be bound..

Over the past thirty years many of the Acts implementing treaties before final consent were supported by the whole House because the opposition also believed that the treaty should be entered into.

In 1971 when the Consular Privileges and Immunities Bill was read a second time in the House the opposition responded favourably with a statement by Mr Hunt[33]

> I am very happy to agree with the Prime Minister that the Consular Privileges and Immunities Bill is one which should pass through the House without opposition. I feel that the Bill reflects changes that are occurring in international law throughout the world, ... During the nineteenth century international law could probably be said to be European Law. Although the European powers by and large agreed to coexist on certain bases, such as having diplomatic posts with each other, nevertheless these customary rules of international law have become outdated since the countries outside Europe started to become of International importance. I feel it is a reflection on the Government of this country that it is willing to participate in this agreement.

The Race Relations Bill, which was introduced in 1971 to enact the provisions of the United Nations Convention on the Elimination of all forms of Racial Discrimination, was similarly supported even though it was a conscience vote. The leader of the Opposition responded to the Bills introduction[34]

> I am sure this Bill will be welcome because of its declarations so far as it is possible for a law to establish good race relations or to remove the causes of bad race relations, I believe it will be welcome by every thinking person in the country

[33]NZPD vol 373, 1971: 1690
[34]Mr Kirk MP(Leader of the Opposition) NZPD vol 373, 1971: 1704

Similarly in 1974 the Niue Constitution Bill was supported. New Zealand had given undertakings to the United Nations and to Niue itself with regards to the granting of full self government to Niue. This Bill was required in order for the Government to be able to honour some of those undertakings. The opposition responded very favourably.[35]

> It is a welcome Bill .... The Bill is the result of years of evolution, planning, consultation, and so on ... I am very pleased, as I am sure is everybody who knows anything about the matter.

Opposition support was also given for the Marine Pollution Bill in 1974, however this support was inevitable as the opposition had been responsible for the Bills introduction as was explained in the House[36]

> The Bill was the product of the previous National Administration, it was about ready for introduction on the change of Government, and it was one of the first Bills introduced by the labour Government after assuming office. Obviously there is a considerable measure of unanimity about the Bill because it is a product of the National Government introduced by the Labour Government.

Also in 1986 when the Heath Benefits (Reciprocity with Australia) Bill which gave effect to an agreement on reciprocal health benefits between the Governments of New Zealand and Australia was introduced the opposition demonstrated its support for the provisions of the treaty and what it purported to do.[37]

> The opposition is please to support the introduction of the Bill. I hope it will be passed as quickly as possible, because as soon as it is passed New Zealanders travelling to Australia will receive free medical treatment in that country. That is a fair arrangement. We have all heard horror stories about our citizens who have fallen ill in other countries and been required to meet enormous hospital costs - particularly in North America, although this arrangement is restricted to Australia, which is a popular destination for New Zealand travellers. This is a worthwhile arrangement whereby this country will accept responsibility for New Zealanders in Australia.

In some situations the Opposition response to Bills introduced in order to implement treaty obligations, although not negative, were not as supportive as the

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[35]Sir Keith Holyoake NZPD vol 391, 1974: 2672
[36]Mr Gair MP NZPD vol 389, 1974: 736
[37]Mr East MP NZPD vol 471, 1986: 1634

previous examples. The opposition members did not appear to be as enthusiastic for the substance of the treaty.

After the second reading of the Arbitration (International Investment Disputes) Bill the Opposition responded "On behalf of the Opposition I do not intend to debate the measure"[38]

The Opposition replied to the introduction of the Arbitration (Foreign Agreements and Awards) Bill simply by stating that it did not oppose the Bill but wanted to ask some questions.[39]

Similarly when the International Energy Agreement Bill was read a second time the opposition responded by stating that it was in agreement with the Bill and then made one or two statements which indicated that the importance of the Bill was recognised.[40]

In other instances it appeared that the Opposition was only supporting the Bill because it was necessary to allow the Government to fulfil its international obligations.

One example of this was the oppositions response to the introduction of the Crimes (Internationally Protected Persons and Hostages) Bill after its second reading:[41]

> The Bill is legally an intricate document, and the Opposition, while not widely keen about it when it was introduced, came to recognise, after listening to submissions before the statues Revision Committee, the need for this sort of legislation. It gives effect to two international conventions, the 1973 Convention on the prevention of Punishment for Crimes against the Internationally Protected Persons, including Diplomatic Agents; and the 1979 Convention against the taking of Hostages. Unless this legislation is passed it will not be possible for New Zealand to become a party to those conventions. It is necessary for the Bill to be passed for us to become a party.
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> As the Government wants to become a party to both those conventions to keep faith with its international obligations, it must make some changes to its municipal laws, and that is what the Bill does

[38]Mr Prebble MP NZPD vol 426, 1979: 3726
[39]Mr Palmer MP NZPD vol 443, 1982: 152
[40]T J Young MP NZPD, 1976: 4660
[41]Mr Palmer MP NZPD vol 434, 1980: 4552

In other instances, the Opposition expressed clear disagreement with the treaty. One example of this:
the response by the opposition to the second reading of the Health Benefits (Reciprocity with the United Kingdom) Bill was one of disappointment.[42]

> The Opposition does not oppose the Bill which, in effect, validates an agreement that has already been signed between the New Zealand Government and the Government of the United Kingdom .... [but] there are more citizens of the United Kingdom who will benefit in New Zealand form the arrangement than there are New Zealand citizens who will receive comparable reciprocity in the United Kingdom. We have been told that at present, about 40,000 citizens of the United Kingdom will avail themselves of treatment here, whereas only about 29,600 New Zealand citizens will do so in the United Kingdom. The problems arising from the arrangement will lead to inefficiency and the greater use of clerical staff and accounting in billing those citizens of the United Kingdom who will now be required to pay for medical services. History of billing for medical services in New Zealand has never been efficient. The Opposition believes that New Zealand should, at the earliest opportunity seek to renegotiate full medical rights with the Government of the United Kingdom.

In other situations legislation was introduced but the treaty was not mentioned.

One example of this is the Abolition of the Death Penalty Bill. New Zealand had already voted for resolution 2857 of 20 December 1971 "by which the General Assembly of the United Nations affirmed the desirability of abolishing capital punishment in all countries"[43] In the international Covenant on Civil and Political Rights capital punishment was referred to in relation to the right to life, however capital punishment was accepted as an exception. In introducing the legislation the Government referred to these earlier two instruments. However the Government did not refer Parliament to the protocol that was being drafted on capital punishment at the time. This was a conscience vote and therefore there would have been no party whips involved. There appeared to be general support for the measure[44] however members did not realise that they were voting on a statute which was intended to open the way for the Government to agree to a protocol which had no express power of withdrawal.

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[42]Peter Tapsell MP NZPD vol 449, 1982: 5638 - 5639
[43]Bill Dillon MP NZPD vol 496, 1989: 9217
[44]NZPD vol 496, 1989: 9216; NZPD vol 502, 1989: 13120

Another situation in which the Government initiates Parliamentary involvement in a proposed treaty is when the relevant Minister makes a statement in the House concerning the treaty or an aspect of it.

In 1970 the Minister of Trade addressed the House on his overseas visit to London for the renegotiation of the United Kingdom- New Zealand Trade Agreement. There had been a recent change of Government in England and the Minister of Trade discussed the importance of ensuring that the Ministers of the new Government in England were sympathetic with New Zealands cause. This was followed by a debate in the House concerning which parts of the agreement were most important and what New Zealand should be seeking to achieve in renegotiation.[45]

In February of 1971 the Governor General made a speech in the House concerning the Five Power Defence Arrangement between Australia, Malaysia, New Zealand, Singapore, and the United Kingdom. The Governor General stated that Asia remained an area of opportunity and obligation for New Zealand and therefore New Zealand was continuing to cooperate with other commonwealth partners in working out defence arrangements in Malaysia and Singapore which will help to maintain regional security. No details of the proposed agreement were given however the Governor General did state that in view of the improved defensive capacity of the forces of the Republic of Vietnam the level of military assistance from New Zealand in that country could be reduced.[46] No debate followed the statement.

On the 4th of November of that same year a ministerial statement was made concerning the defence arrangement. The minister informed the House of the background to the agreement including why it was needed and what its effect was. He also told the House that the arrangement had come into force on the first of November and that the documents relating to New Zealand would be tabled in the House as soon as possible.[47]

A ministerial statement was also made informing Parliament that the South Pacific Nuclear Free Zone Treaty had been signed. The Minister stated the importance of the treaty and layed it on the table. The Leader of the Opposition responded by thanking the Prime Minister for advising him earlier that the treaty was going to be

[45]NZPD vol 366, 1970: 1434
[46]NZPD vol 371, 1971: 4
[47]NZPD vol 376, 1971: 4321

presented to the House and stated that it had been endorsed by all New Zealand political parties.[48] .

In December of 1984 the Minister of Foreign Affairs made a statement in the House informing that the Convention on the Elimination of all forms of Discrimination against Women had been signed. The Opposition who when they were the Government had refused to sign, expressed disapproval as they believed the convention had not been discussed properly with women.[49]

The Government initiated parliamentary involvement in general foreign affairs in 1984 by organising the Foreign Affairs Debate. In starting the debate the recently elected Labour Government stated that the debate was being held for three reasons -more open Government; the House is an appropriate forum for discussion; it was time for disciplined and rational debate to put an end to mischief making. The Government then went on to discuss its policy on foreign affairs and the opposition responded with its view point and gave reasons for why it agreed or disagreed with certain aspects.[50]

In 1986 a general debate on foreign affairs, under the title of Achievements in Foreign Affairs was held. The Government spoke on what it had done during its term and what else it intended to do. There was no response from the Opposition.[51]

General and specific debate on foreign affairs also occurs during the debate on Appropriation Bills.

Parliament is also informed of conventions adopted by the International Labour Organisation. Delegates to the International Labour Conference are required by the International Labour Organisation to present the text of new conventions to Parliament in a yearly report.[52]

b) Parliament Initiated Debate

In many situations the Opposition has sought involvement itself as opposed to hearing statements or being invited to debate by the Government.

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[48]NZPD vol465, 1985: 6642
[49]David Lange MP NZPD vol 460, 1984: 2814 - 2815
[50]NZPD vol 458, 1984: 926
[51]NZPD 1986: 2351 - 2352
[52]Telephone conversation with Margaret Richards of the Department of Labour

This occurred with the 1965 Free Trade Agreement. In this instance the Opposition asked outright if it could have some input into the agreement. The Government agreed but made it clear that ultimately the decision was one for the Government to make . A debate followed in which the Opposition expressed its views on the agreement[53] On the 17th of August a statement was made by the Minister of Overseas Trade. The Minister informed the House that agreement had been reached and a general oral outline of what had been agreed was given. The House was told the text would be available in two weeks. In the Oppositions response they asked that there be an opportunity to ask questions once the draft agreement was made available, that there be full discussion of the agreement, and that, in order to facilitate these discussions the documents be printed as quickly as possible.[54]

The Opposition also sought its own involvement with regard to the Gleneagles agreement. After the meeting in which heads of Government discussed sporting links with countries who practised discrimination in sport and reached the Gleneagles agreement the Opposition moved that the house record its pleasure at the outcome of the meeting. In the end the motion lapsed as it also included a call to congratulate the Government on adopting Labour Party policy , something which the Government denied. However the Opposition Labour party's full support for the agreement was obvious despite the motion lapsing.[55]

The Opposition has also initiated debate under Standing Order 92 of the current Standing Orders of the House of Representations (or its equivalent in earlier years).

This standing order provides:

> 92. Members may move that the House take note of a definite matter of urgent public importance -(1) A motion that the House take note of a definite matter of urgent public importance may be moved at the time appointed by Standing Order 70 or by Standing Order 71.
>
> (2) A member proposing to move such a motion shall submit to the Speaker at least one hour (or such less time as may be allowed by the Speaker) before the time fixed for the meeting of the House a written statement of the matter proposed to be debated.

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[53]NZPD vol 343, 1965: 1734

[54]J R Marshall MP NZPD vol 343, 1965: 1958 - 1960

[55]NZPD vol 411, 1977: 855

(3) If the Speaker is of the opinion that the matter proposed to be debated is one contemplated by this Standing Order, the Speaker shall read the statement to the House and then call on the member to move the motion.

(4) The statement of the matter proposed to be debated on a motion under this so shall not be framed in general terms but shall deal with a particular case of recent occurrence which requires the immediate attention of the House and the Government and which involves the administrative or ministerial responsibility of the Government.

In 1978 a motion was moved in accordance with the standing order to discuss the signing of the Japanese Fishing Agreement. It had been announced over the weekend that agreement had been reached and would be initialled during the week for ratification by both countries. It was submitted that Parliament needed clarification relating to many points of the agreement before the final initialling. The motion was allowed because it did relate to an issue of recent occurrence - the weekend announcement that agreement has been reached and because it involved the administrative responsibility of the Government.

The Standing Order was also used in relation to the Antarctic Mineral Resource activities in 1990. The Government had intended to ratify this convention until an announcement was made by the Minister for the Environment that the Government would set aside ratification of the convention. The Speaker decided that the matter did require the immediate attention of the House and decide to accept the application.

Another situation in which the Opposition achieved its own involvement was in relation to closer economic relations. In order to implement certain provisions of closer economic relations the Government introduced the Customs Amendment Bill. On introducing the Bill the Minister of Customs stated that it was not concerned with the wider question of closer economic relations with Australia or with the intentions behind the agreement. The Leader of the Opposition agreed that the Bill was fairly narrow in content but stated that he hoped "the Government will agree that it should form a proper vehicle for the discussion of closer economic relations at the appropriate part of the debate".[56] The Prime Minister agreed that closer economic relations should be discussed and suggested that the second reading of the Bill would be a good time to open the debate. Mr Speaker then stated that he would be happy to have the debate opened now, that is during the first reading if that was desirable. The Prime Minister responded:[57]

[56]NZPD vol 448, 1982: 4593
[57]NZPD vol 448, 1982: 4594

> The closer economic relations agreement is a matter of great public interest, and the Government brought in the Bill as quickly as it could after the announcement. It would be appropriate at this early stage to permit the debate to range as widely as members wish, rather than try to limit it and have constant interruptions and so on. I believe the public would like to hear views from both sides of the House

A motion was moved to this effect and it was decided that at least the first and second readings of the Bill should be treated as a vehicle for debate on closer economic relations.

Another way in which the Opposition initiated debate was through asking written and oral questions which lead to debate. One example of this was in 1967 where the opposition questioned whether bilateral trade agreements generally had merit or not. This lead to debate where both Government and opposition members spoke on the advantages and disadvantages of selling New Zealand products through bilateral agreements as apposed to continuing with the existing auctioning system.[58]

In many situations the Opposition became involved, to varying degrees, in treaties through asking both oral and written questions which, although they did not lead to debate, still required the Government to address the issues in the House.

In some instances the questions were quite broad and general. For example in 1965 the Opposition quested the Minister of Industries and Commerce on the Sugar Prices International Agreement. The Opposition wanted to know whether New Zealand was represented, by whom was New Zealand represented, and what the general effects of the agreement were for New Zealand. All these questions were answered briefly.[59]

In regards to the Tonga Trade and Defence treaties of 1967 the Opposition questioned the Government on what it was going to do in this area and then gave its opinion on what it thought should be done.[60]

In 1978 the Opposition asked whether a public statement would be issued or a summary issued of the Governments policy towards and the stand it will take at the

[58]NZPD 1967: 480 - 481, 545, 1534, 1615, 3257
[59]NZPD 1965: 3575
[60]NZPD vol 343, 1967: 1177

UN special session on disarmament. The Minister of Foreign Affairs responded that a press statement had been issued.[61]

In 1981 the Opposition questioned the Government on the steps it had taken to help achieve a comprehensive Test Ban Treaty. The Government explained that the issue was mainly being considered in the UN committee of Disarmament but the Government was continuing to promote the treaty in every available forum. The Government also stated that New Zealand was involved in the scientific and industrial research necessary for negotiating a comprehensive test ban treaty.[62]

Several of the general questions asked were whether the Government had signed or ratified or intended to sign or ratify a particular agreement, and the reasons for the decision.[63] In some cases the opposition made known their opinion as to whether New Zealand should become a party or not.

In other instances the questions asked about proposed treaties were more specific in the they were about a particular aspect of the proposed treaty.[64]

B. The Practise Followed by Other States[65]

The purpose of looking at the practise followed by other states is to determine what other options could be used in New Zealand and whether they could successfully be transformed into the New Zealand situation taking into account the constitutional structure of each state and other relevant surrounding circumstances.

1. France

In France it is the President who has the power to "negotiate and ratify treaties."[66] However, Parliament does play a role in approving the ratification of the treaty.

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[61]NZPD vol 417, 1978: 401

[62]NZPD vol 439, 1981: 1654

[63]Optional Protocol on Civil and Political Rights Conventant giving people access to the Human Rights Committeen Geneva; UN Convention on the Elimination of Discrimination Against Women; Genera Convention; Protocols to the Geneva Convention; UN Convention on Inhumane Weapons; UN Convention on Law of the Sea; Convention on Drug Traffiking 1991; Antarctic Protocol 1992 ;Trans-Tasman Services Agreement

[64] Some examples where this occured were with the Japanese Fishing Agreement of 1978 ; The Antarctic Minerals Convention 1988; Iranian Lamb Exports Agreement 1990; Air Service Agreements 1989 ; ANZAC ship Agreements 1991 ; EC sheepmeat Agreement 1989

[65]The source of this comparative material is Stefan A Reisenfeld and Frederick M Abbot (ed) "Symposium on Parliamentary Participation in the Making and Operation of Treaties" (1991) 67 Chicago-Kent Law Review 293 - 704

This approval is limited to voting on the Government Bill which authorises the ratification, it cannot vote on the actual articles of the treaty.[67] Nor can Parliament attach reservations to the treaty through the authorising legislation. There is an argument that even if parliament cannot amend the actual treaty when authorising its ratification it can amend the authorising legislation as this is not forbidden by the constitution.[68] However the French Government disagrees and the Constitutional Court backs this view.[69]

Not all treaties require authorising legislation. Those that must be submitted to Parliament for authorisation are peace treaties, trade treaties, treaties referring to international organisations, treaties which commit the states finances, treaties referring to the condition of people, treaties which include ceding, exchanging, or adding territory, and treaties which alter arrangements of the legislative type[70].

The President is not obliged to hand down authorising legislation within a certain period of time after signing the treaty. Therefore a lot of time can pass between signing the treaty and Parliament having the chance to vote on it. No member of Parliament can take the initiative and propose a law to ratify the treaty. It is up to the Executive to decide when the treaty should be submitted for public discussion.[71] Once Parliament has given authority to the President to ratify, the President is not obliged to carry out the ratification.

Parliament cannot enact legislation stating how the treaty should be interpreted. It used to be that a judge who was unsure how a treaty should be interpreted would consult the Minister of Foreign Affairs. However this practise is no longer followed. The discontinuance of this practise is largely due to European Community law which requires the interpretation to be carried out by an independent and impartial tribunal. Neither the Government or Parliament can be considered independent or impartial. Therefore the courts now interpret treaties themselves.[72]

A treaty forms part of French law automatically, it in not necessary that it be implemented separately. Treaties also have superior force to legislation[73] and

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[66]Article 52 of the Constitution
[67]Rules of the French National Assembly article 47
[68]Francois Luchaire "The Participation of Parliament in the Elaboration and Application of Treaties" (1991) 67 Chicago - Kent Law Review 341, 343
[69]Ibid 344
[70]Article 53 of the Constitution
[71]Above n 69, 345
[72]Ibid 348 - 349
[73]Article 55 of the Constitution

Parliament cannot pass inconsistent legislation once a treaty has been ratified and published.[74] One exception to this is where the other party to the treaty does not follow it. In that situation the French Parliament can pass a law which is inconsistent with the treaty.[75] However the finding that a treaty is not being complied with by the other party cannot be made by Parliament, the power belongs to the Executive.[76]

Parliament does not have any say in the denunciation of a treaty.[77]

In addition to the formal power exercised by the Parliament in France, there are a number of informal practises through which Parliament has some influence. The Government has a practise of informing Parliament of treaties and agreements and also the reservations it proposes to attach. Although Parliament has no power to suggest reservations it often advises Government of reservations that should be attached. When a particularly serious decision is being taken the Government may include parliament in the decision making process. However none of these rules are binding on the Executive as the French Constitution is written and no customary rule can bind the Executive.

2. *Germany*

The constitutional power in Germany is made up of The Federal Parliament, the Federal Government, the Council of Constituent States, and the Constitutional Court. There are two houses in the Federal Parliament. The Federal Government consists of the Federal Chancellor and the Federal Ministers most of whom have been members of Parliament. The Executive branch of Government is made up of the Federal Government and the President whose position is more of a representative nature. The powers of all these organs is provided for by the Basic Law.[78]

The President represents Germany in its international relations and concludes treaties on its behalf.[79] However this function is representative only. General

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[74]Above n 69, 350
[75]Article 55 of the Constitution; Ibid 351
[76]Abpove n 69, 352
[77]Ibid 353
[78]Jochen Abr. Frowein and Michael J Hahn "The Participation of Parliament in the Treaty Process in the Federal Republic of Germany" (1991) 67 Chicago - Kent Law Review 361
[79]Article 59 paragraph 1 of the Basic Law

policy guidelines are determined by the Federal Chancellor and the majority of foreign relations are conducted by the Minister of Foreign Affairs.[80]

The Council of Constituent States may also enter into treaties with foreign states as long as it has the consent of the Federation and the treaty concerns subjects which are within the legislative competence of the Council of Constituent States.[81]

Both houses in Parliament have a role to play in the treaty making process. Parliament must approve treaties which regulate the "political relations of the Federation" and those which relate "to matters of federal legislation" before they can be ratified by the President.[82] The Constitutional Court has held that in order to fall within the category of political relations the survival of the Federal Republic, her territory and independence, her position and relative weight within the international community must be concerned and the object of the treaty must be directed towards governing political relations.[83] Those relating to matters of legislation are "only those treaties, the contents of which, if it were a question not of international agreement, but of municipal regulation, would be matters of legislation and not administration."[84] Therefore when a treaty obligation can only be fulfilled by an Act of Parliament, the Executive cannot accept the international obligation until parliament has consented.[85]

Parliament must vote on the treaty as a whole, it cannot amend or alter articles of the agreement.[86] Even though the Basic Law does not state whether or not Parliament can give its consent only if certain reservations are attached, however, in practise this does happen.[87] If the Government wants to make a reservation it must inform Parliament[88] Also if new circumstances arise and the Government wishes to change its position Parliament must be informed of the development.[89]

Bills to approve treaties can be introduced into Parliament by the Government, or by either house of Parliament. Despite this provision in the Basic Law the Government believes that foreign affairs are its exclusive domain and as such only they have the power to introduce legislation approving treaties.[90]

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[80]Above n 79, 362
[81]Ibid 364
[82]Article 59 paragraph 2 of the Basic Law
[83]Above n 79, 367
[84]Ibid 368
[85]Ibid
[86]Rules of the House of the Bundestag Article 82 paragraph 2
[87]Above n 79, 371
[88]Ibid 372
[89]Ibid 373
[90]Ibid 371

Once a treaty has been approved the Executive is not obliged to go ahead with its ratification. However if Parliament initiates the consenting legislation it places pressure on the Executive to carry out the ratification.

There is argument in Germany over whether implementing legislation is needed in order for the treaty to become binding internally. The Constitutional Court follows the theory that the act of consent permits the internal application of the treaty.[91] Therefore an act of consent has two effects. Firstly it enables the President to ratify the treaty and it introduces the treaty into internal German law. The treaty therefore has the rank of a federal statute. However it is open to the Legislature to determine the rank and future effect of the treaty.[92] That is they can state what legislation the treaty is inferior and superior to.[93] The Legislature can enact statutes which are expressly or impliedly incompatible with an earlier treaty. However as this may have serious consequences for international relations the courts will interpret legislation in accordance with the treaty to the greatest extent possible.

Parliament has no right to participate in the treaty termination process as this is not provided for by the Basic Law.

3. *Italy*

The Government in Italy concludes treaties on behalf of the country. However the Constitution provides that "The Houses of Parliament authorise by statute the ratification of the treaties that are by nature political, or provide for arbitration or judicial settlements of disputes, or involve variations in the state territory or burdens on the state finances or modifications in the statutory law"[94]. The constitution also provides that "the President of the Republic....ratifies the international treaties, after they have been authorised by the houses if the Constitution so requires."[95] Treaties "by nature political" is generally confined to agreements that are of some sort of serious importance to the State. Therefore parliamentary authorisation is not always required and the Government has some discretion to choose to continue without involving Parliament.[96] However this has

[91]Ibid 373
[92]Ibid 374
[93]Ibid 376
[94]Article80 0f the Coinstitution
[95]Article 80 of the Constitution
[96]Giovanni Bognetti "The Role of Italian Parliament in the Treaty-Making Process" (1991) 67 Chicago-Kent Law Review 391, 398

led to problems as the Government has often concluded binding agreements which deal with matters which undoubtedly fall within those categories within article 80.[97] It is probably not open to the Italian Parliament to invoke articles 80 and 87 of the constitution and claim that agreements concluded by its government without prior consent of Parliament are invalid. The interpretation of the articles is controversial and Parliament has never formally objected to the conclusion of the treaties by the Government without statutory authorisation. Often approval is given after the act of ratification. The constitutional court has validated this process and therefore the rules of article 80 cannot be considered binding to the letter.[98]

There is argument over whether only the Government can introduce authorising legislation or whether Parliament can introduce legislation as well.

There is also argument over whether parliament can attach conditions to its consent or whether it must only choose between ratification or not.Argument also existsover whether Parliament can formulate its own reservations and over whether parliament must expressly consent to the reservations finally ratified by the government.

In practise the role of Parliament is reason limited in comparison to other countries. The President has stated that Parliament must vote on the authorising legislation as introduced by Government. It may not amend it or attach conditions.[99] In only one situation has the Government included the reservations it intended to attach in the authorising Bill and even when the treaty was finally ratified further reservations were added which did not have the consent of Parliament.[100]

Despite all this, the desire of Parliament to have a greater say is increasing and Parliament is seeking more informal involvement such as gaining information at an early stage about the governments intentions with respect to treaties and using means of control such as interrogations, interpolations, hearings, inquiries, and motions to direct or control the Governments behaviour.

Even though treaties bind Italy internationally they must still be implemented through legislation in order to become justiciable in the Italian court. Treaty rules

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[97]Ibid 399
[98]Ibid 411
[99]Ibid 403
[100]Ibid 403-404

have the same rank as the statute that introduces them. Therefore a superior statute or governmental decree may override them. It is open to the Italian Parliament to enact subsequent legislation that is inconsistent with the treaty however the courts follow the presumption that Parliament would not wish to do this and interpret the legislation consistently with the treaty unless the statute is worded so clearly that such an interpretation is not possible.

It has been suggested that in the context of Italian power a weaker[101] role for Parliament in the treaty making process is desirable. The reasons behind this suggestion are that the Italian Government already has a very difficult task as it is weak and exposed to all possible forms of blackmail. To give Parliament a greater formal role, especially one which would allow it to stop Governments actions in advance, would make Governments job even harder.

4. The Netherlands

Article 90 of the Constitution states that the Government shall promote the development of the international legal order. However it is a constitutional principle that all policy, including foreign policy, is the collective responsibility of the Government in conjunction with Parliament.

Generally consent to be bound by a treaty cannot be given unless the treaty has been approved by Parliament. In practise a balance is sought between the governments need to conduct an efficient and effective foreign policy and Parliament's need to exercise proper supervision over that policy.[102]

The Council of Ministers decides, as a rule, on the desirability of becoming a party to a treaty and whether the approval of Parliament will be sought. Once the text has been adopted and the treaty signed, the Head of State consults the Council of State on whether the treaty should be submitted to Parliament for approval. The Council of State is the general and highest advisory body to the Government. The Constitution requires that the Council of State be consulted on proposals for the approval of treaties before the proposals are submitted to parliament. The Council of State cannot, however, propose any amendments to the text of the treaty.

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[101]To use the word of Giovanni Bognetti. The power of the Italian Parliament in comparison with that of the NewZealand parliament is not weak

[102]Pieter Van Dijk and Bahiyyih G Tahzib "Parliamentary Participation in the Treaty Making Process of the Netherlands" (1991) 67 Chicago-Kent Law Review 413, 423

The Netherlands parliament is made up of two chambers. They can approve treaties in one of two ways. They can either give their express approval which requires a statute or they can give tacit approval.[103] The idea of tacit approval was introduced because the States-General were dealing with 200 treaties a year and this was proving to be a very heavy burden. Once a treaty has been submitted for tacit approval, if within 30 days, a statement is not made by at least one fifth of the membership of either Chamber expressing the wish that the treaty be subjected to express approval, tacit approval is considered to have been given.[104]

A system of provisional application has also been introduced. This was introduced because the preparation of bills concerning approval and the approval procedure are often time consuming. Under this system a treaty can apply to the extent necessary for the government to carry out its obligations as long as this does not require the cooperation of parliament even though it has not been approved.[105]

Once approval has been given the Government is under no obligation to ratify the treaty, it merely has the option to do so.

Generally the Government decides whether reservations should be added to a treaty or not. But where express approval is given Parliament may amend or delete these. Parliament can also add its own reservations. This power, however, belongs only to the second chamber. The first chamber may only reject or adopt legislation passed by the second chamber, it has no power of amendment.[106] If the Government does not agree with the reservations attached it cannot delete them but it may still choose not to ratify the treaty.

The Government decides whether to object to reservations made by other States and although it informs Parliament of these, Parliament has no say in whether to object to them or not.

Declarations as to the interpretation of the treaty are made by the Government in the explanatory note accompanying the Bill. The first chamber can adopt, amend, delete, or include new interpretations.

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[103]Ibid 427
[104]Ibid 428
[105]Ibid 431
[106]Ibid 432

Once a treaty has entered into force in international law and has been published in the Netherlands, it automatically becomes part of Dutch law. It may be however that a treaty requires internal legislation in order to interpret it.[107]

The Constitution provides that legislation which is inconsistent with treaty provisions shall not apply.[108] This applies whether the inconsistent internal law was made either before or after the treaty.

5. Switzerland

By virtue of Article 85(5) and (6) of the Constitution the Legislature has the power to deal with "alliances and treaties with foreign states" and with "measures for external security for the preservation of the independence and neutrality of Switzerland, declarations of war and conclusions of peace." By virtue of Article 102(8) and (9) of the Constitution the Executive "watches over external security, the assertion of independence and neutrality of Switzerland" as well as over "the foreign interests of the Confederation" and it is "generally in charge of external affairs."[109]

Therefore the purpose of the Constitution is to assign interdependent and overlapping powers to the legislature and the Executive in the field of foreign policy and treaty making.

The Government (the Federal Council) negotiates and signs treaties. It decides on when to begin negotiations, and nominates and instructs the negotiating delegation. It can decide not to continue with negotiations without consulting Parliament. Once a treaty has been negotiated and signed there are four possible procedures that may be gone through:

1. The agreement may be in simplified form, in which case, it may be concluded by the Executive alone. The agreements which fall within this category are those 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.[110]
2. The agreement may require approval by Parliament.

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[107]Ibid 418
[108]Article 94 of the Constitution
[109]Luzius Wildhaber "Parliamentary Participation in Treaty-Making, Report on Swiss Law" (1991) 67 Chicago-Kent Law Review 437, 439
[110]Ibid 440-441

3. The agreement may be subjected to an optional referendum. Article 89(3) provides which treaties may be subjected to referenda. They are treaties which are concluded for an indefinite period and without possibility of denunciation, the adherence to international organisations, treaties implying multilateral unification of law, and treaties which Parliament decides to put to referendum under article 89(4) of the Constitution.
4. The agreement must be approved by compulsory referendum. Article 89(5) provides that treaties which provide for the adherence to supranational organisations and to organisations for collective security must be subjected to compulsory referendum.[111]

The Constitution does not state when treaties must be subjected to parliamentary approval it only states that they must be. Approval has been sought at four stages in the treaty making process:
1. in advance of negotiations
2. advance authority and subsequent specific approval
3. specific approval between signature and ratification
4. subsequent approval after ratification.
The most common one is specific approval after signature and before ratification.[112]

Parliament accepts or rejects the treaty as a whole, not as articles. Parliament cannot amend the text of the treaty itself. Generally it is the Executive which suggests reservations and issues interpretive declarations. 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 dropped.[113]

It is the Executive which has the power to decide whether to terminate or denounce a treaty. It is arguable whether Parliament has the power to force the Executive to carry out either of these actions even though it has done in the past it is doubtful whether this is binding.[114]

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[111]Ibid 442
[112]Ibid 443
[113]Ibid 446-447
[114]Ibid 449

Once a treaty has been ratified it has binding force in national law without any act of transformation.[115]

6. United Kingdom

The power to negotiate and conclude treaties rests solely with the Executive. This is done through the exercise of prerogative powers. Formally parliament has no role at all in the treaty making process. Informally, however, power does exist for Parliament. There are certain situations in which Parliament will need to be involved. These include situations where taxation is imposed or where public funds are necessary to implement the treaty, and where domestic law is affected.

In other situations, although it is not necessary, it is often advisable to obtain the approval of parliament. The British Government has adopted an informal fetter known as the Ponsonby Rule. Under this rule a treaty which requires ratification will be laid before Parliament in the form of a White Paper. This treaty will not be ratified for at least 21 days after it has been tabled. If there is a formal demand for discussion then discussion will take place, if there is not then the Executive will act on the treaty as it likes.

Another form of power which Parliament has relates to treaties which require a change in domestic legislation in order to give effect to the obligations. It was well established in *AG for Canada* v *AG for Ontario* that a treaty cannot itself alter existing statute or domestic law.[116] Therefore Parliament can control the internal effect of treaties by deciding whether to pass legislation or not. This position is strengthened by the courts who will neither enforce or interpret treaties. Parliament does not have to pass the treaty as a whole into legislation. There are various options open to it. Parliament can enact the whole treaty, it can enact only part of the treaty, or it can draw up legislation in different terms but intending to give effect to the treaty. When introducing the treaty for implementation the Executive can choose whether to use primary or delegated legislation. If primary legislation is used then it will receive the detailed attention of parliament through the full legislative process. Delegated legislation will allow a Minister to put a treaty into effect by issuing a statutory instrument. This instrument will be presented to Parliament but receives no real scrutiny unless a motion is introduced to discuss it.

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[115]Ibid 450

[116]The Right Honourable Lord Templeton "Treaty Making and the British Parliament" (1991) 67 Chicago-Kent Law Review 459, 467

Another form of informal influence is that related to the pressure Government Ministers feel knowing that they must face re election. Ministers are well aware of the interests involved in the electorates. If those interests are powerful in wealth or in numbers then the Ministers will be careful in the actions they take. Parliament can take advantage of this pressure.[117]

7. *Argentina*

Argentina has both federal and provincial governments. It is the Federal Government that has the power to conclude treaties, in fact not only do they have the power to conclude treaties, the Government has an obligation to strengthen foreign relations with other states through treaties. This is provided for by article 27 of the Constitution.[118] Specifically within the Government the power to initiate, negotiate, conclude, and sign treaties lies with the President. The Argentine Legislature (Congress) has no part to play in these phases of the process, but unofficially they could have some influence.[119] The powers of the Argentine congress come into play once the treaty has been signed by the President. There are two chambers within the Argentine congress. Both Chambers of Congress have the power to reject or approve treaties with other nations pursuant to Article 67 paragraph 19 of the Constitution. Congress approves the treaties through the normal legislative process, the only difference being that the text is approved as a whole as opposed to article by article [120].

It is debateable whether once Congress receives a treaty it may only approve or disapprove it or whether it also has the power to modify it. Equally prestigious jurists have differed on this point.[121] A literal interpretation would suggest that modifications are not allowed however the power to modify can be implied .[122] In practice Congress has approved treaties with modifications however these instances are very rare.[123]

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[117]Ibid 471
[118]Jose Maria Ruda "The Role of the Argentine Congress in the Treaty-Making Process" (1991) 67 Chicago-Kent Law Review 485,487
[119]Ibid 488
[120]Ibid 490
[121]Ibid 491
[122]Ibid 492
[123]Ibid

8. Brazil

Article 84 of the Constitution provides that the president has the power to represent Brazil in foreign relations and to enter into International Treaties, Conventions, and acts. However all this is done according to the referendum of Congress .[124]

Article 49 of the Constitution provides that it is incumbent exclusively upon Congress:

1. to resolve conclusively on international acts, agreements or treaties which involve charges or commitments against the national patrimony;
2. to authorise the President of the Republic to declare war, to make peace, to allow foreign forces to go through the national territory or to remain therein temporarily, except for the cases set fourth in a supplemental law.

It is debateable whether the wording of this article has the effect of excluding some agreements from the requirement of congressional approval. Despite the fact that the point is debateable the President does conclude some agreements which are not sent to congress. These are known as Executive agreements and in the opinion of Ambassador Hildebrado Accioly the Consultant of the Ministry of Foreign Affairs of Brazil they are both constitutional and legitimate.[125] Hildebrado Accioly believes congressional approval is not needed for:

1. agreements about matters which fall with in the exclusive jurisdiction of the Executive power.
2. those concluded by agents or officers who have jurisdiction thereon, about questions of local interest or little importance.
3. those which deal with simple interpretation of the clauses of a treaty already in force.
4. those which are the logical or necessary consequences of some treaty in force and which are complimentary to it.
5. those modus vivendi when they aim at only leaving "things in the state in which they are or to establish simply a basis for the future negotiations and engagements for the prolongation of a treaty before it expires". Foreign policy is the exclusive jurisdiction of the President of the Republic. Executive agreements would thus be concluded on matters which fall upon his power, which would be a matter of simple verification due to the fact

[124]Guido F.S Soares "The Treaty Making Process under the 1988 Federal Contsiturtion of Brazil" (1991) 67 Chicago Kent Law Review 495, 499
[125]Ibid 504

that the Federal Constitution indicates what is exclusively incumbent upon each branch of Government.[126]

Where the treaty does require Congressional approval after the negotiation has been concluded, the text is sent to the House of Representatives. The House of Representatives decides whether to approve the treaty or not. If it decides not to approve the treaty then the treaty process ends there. If it decides to approve the treaty it is sent up to the Senate for approval[127] The same number of votes is required to approve a statute as are required to pass ordinary statutes.

The treaty does not have to be approved as a whole . The National Congress can choose not only to approve or reject a treaty. It can also partially approve the treaty or approve it with amendments.

Once a treaty is in force the National Congress can also override it or influence it by passing a federal statute because a later federal statue supersedes a Treaty internally.

C. Conclusion and Recommendations for New Zealand

Practice shows that unless a treaty requires a change in domestic law, it is not often that the Executive will take the initiative in informing Parliament of proposed treaties. Practice also shows that even if legislation is required, it sometimes only has full parliament support because it is recognised in Parliament that the treaty has already been agreed to and, although it is not finally binding, to refuse to give final consent at this stage is still a serious matter and may have consequences for New Zealand. It can also be the case that when legislation is introduced, Parliament is not told of its purpose, that is, the legislation is necessary to implement obligations under a treaty. Parliament may not know of the existence of the treaty.

The other efforts made by Government to inform the House of the proposed or recent signing of a treaty such as ministerial statements and general debates are commendable ideas. However, in the last thirty years the number of times either of these two things have occurred in comparison to the number of treaties that have been entered into is very few.

In most other situations it has been left to Parliament to learn of the treaty itself and raise any issues in the House if it wishes.

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[126]Ibid 504-505
[127]Ibid 501

It is submitted that given the growing importance of treaties as discussed in part I of this paper, New Zealand parliament is not given a great enough or certain enough role in the treaty making process. This view is further supported when one considers the amount of involvement that takes place in other counties. It is therefore necessary to consider what involvement Parliament should have in the New Zealand process.

The first issue to be considered is which Treaties should be subject to Parliamentary involvement

In the Netherlands, as the situation stand, consent to be bound by a treaty cannot be given unless the Treaty has been approved by Parliament. Therefore all treaties must be submitted for Parliamentary approval.

In these times this does not appear to be a very practical solution. Time in parliament is limited and many treaties are of a very mechanical or administrative nature. This is obviously recognised in the Netherlands as an informal practice has developed which seeks to reach a balance between the Governments need to be efficient and effective and Parliament's need to supervise the Treaties that are made.

Therefore it is necessary to distinguish between treaties that should involve Parliament and those where no Parliament input is necessary.

There appear to be two methods for prescribing which treaties are to be submitted to Parliament. Some countries list the types of treaties in definite detail. An example of this is France which limits treaties requiring authorisation to:

peace treaties
trade treaties
treaties referring to international organisations
treaties which commit state finances
treaties referring to the conditions of people
treaties that include ceding, exchanging, or adding territory
treaties which alter arrangements of the legislative type

Another example is Switzerland which prescribes in detail the treaties that must be subjected to referendum. Those are treaties which are concluded for an indefinite period and without possibility of denunciation, the adherence to international organisations, treaties implying multilateral unification of law, those which provide

for adherence to supranational organisations and to organisations for collective security.

Other countries, on the other hand, prescribe in general terms or principles which treaties should be submitted to Parliament. For example Italy usedsthe principle "by nature political" and Brazil uses the principle "Treaties which involve charges or commitments against national patrimony".

The advantage to using principles to describe the types of treaties that must be submitted for Parliament involvement are that principles are able to be adapted to changing circumstances and developments and therefore new types of treaties that should be introduced to parliament are not excluded simply because they were not contemplated when the list was devised.

This disadvantage of using more general language is that it is up to the Executive to determine whether a treaty falls within the principle or not. In Italy this has caused problems as the Government has entered into agreements that cleary fall within the category without consulting Parliament.

The best solution appears to be that which uses both a general principle and a detailed list.

The general principal should refer to treaties that are of serious importance to the state.

The detailed list should include:

peace treaties
treaties which commit or burden state finances
treaties which involve a change in territory
defence treaties
treaties which are concluded for an indefinite period without the possibility of denunciation
treaties which grant a law making power to a supranational organisation

The detailed list should also include those treaties which require legislation to implement their obligations. That is it should not only be sufficient to introduce legislation to give effect to the treaty and the whole treaty should be introduced so that Parliament is aware of its existance.

The list could also provide for types of treaties that need not be submitted to Parliament. That is :

those which have the prior authority of Parliament
treaties which are the necessary consequence of a treaty which is already in force and which is complementary to it
those treaties that deal with matters of a purely administrative or mechanical nature.

Some countries, such as Switzerland, also provide that treaties that must be enforced without delay need not be submitted to Parliament. However there is provision in the Standing Orders of the House of Representatives to discuss matters of urgent public importance and therefore such a provision may not be necessary in New Zealand.

Other treaties, such as trade treaties, which can vary in importance and effect should be left to be considered case by case under the general principle of sufficient importance.

It was stated by Mr Arthur Ponsonby in 1924 that the Government cannot take it upon itself to decide what is considered important and unimportant. This issue could be addressed by tabling a brief description of each treaty and leaving it to Parliament to decide whether it warrants formal discussion.

Another issue to be considered is when a treaty should be submitted to Parliament. In Switzerland approval has been sought at four stages:

1. in advance of negotiations
2. advance authority and subsequent specific approval
3. specific approval between signature and ratification
4. approval after ratification

There are two main problems with options one and two, that is, consulting Parliament before or during negotiations. The first problem is that of time. Often negotiations are started and move quickly, leaving very little time for consultation. The other problem is that of confidentiality. Parliament is open and any person is able to find out what occurs in the House. Often this openness may be very damaging to New Zealands negotiating position as there may be things that need to be kept confidential in order to ensure that negotiators achieve what they want to.

Option four, subsequent approval after ratification, is also an impractical option because at this stage it is too late. Even if Parliament disapproved of a Treaty at this stage, that disapproval could not be seriously considered as the State has already accepted the obligations and is bound by them.

The appropriate time to submit a treaty for discussion in New Zealand is after signature and before ratification. This way, the discussions in Parliament can still have some effect on the final treaty.

This option however doesn't provide for those treaties that become binding as soon as they are signed and do not need any subsequent act. This issue does address itself to a degree, as it is usually only unimportant treaties that become binding as soon as they signed. It could also be addressed if the Government ensured that all treaties that might be of importance were signed subject to ratification. However, once again we are faced with a problem espoused by Sir Author Ponsonby that Government cannot take it upon itself to decide what is important and what is unimportant.

It may be desirable to have as a general rule, after signature and before ratification. However this general rule could be subject to exceptions so that if the proposed treaty will have extremely important consequences then consultation at an earlier stage might be preferable. At the other extreme if, for example, pressures of time were so heavy that there simply was not the opportunity to discuss the treaty with Parliament before ratification then it may also be preferable to have an exception in this situation. However this situation would have to be extremely rare in order to justify allowing this to occur.

A third issue to be decided is what form Parliaments involvement should take. Some countries require Parliament to pass authorising legislation whereas in Britain a formal discussion takes place. Given the constitutional structure and the whipping system in the New Zealand parliament, it is submitted that formal debate in the House would be sufficient as it would give members a chance to put their views forward and have them considered by the Government, who would ultimately dominate the passing of a statute anyway. Formal discussion is also preferable to authorising legislation with regard to time. There are huge time pressures on parliamentary counsel already[128] and delay may be caused in concluding the treaty if it was necessary to wait for legislation. Also, as legislation requires three readings in the House before it can be passed, the time before the treaty could be concluded would be lengthened even further, often it is submitted to the point of being impractical.

[128]This is not an excuss for not having legislation where legislation is needed however it is a factor to consider in the situation being discussed here

Subject to these problems associated with requiring authorising legislation, legislation could be used as the form of parliamentary involvement, where in ordinary situations (that is those dealing with international obligations) the subject matter is more appropriate for a conscience vote. In that case there would be no whipping and therefore there may be greater justification in having legislation.

If parliamentary involvement is limited to formal discussion and not authorising legislation, it is not necessary to decide whether Parliament should have the authority to alter the text of the treaty or to add reservations. Nor is it necessary to decide whether Parliament must accept or reject the treaty as a whole. Members who have a point of view on any of these issues can put forward suggestions in the discussion which can be acted on or not by the Executive as it sees fit.

A final point to be noted is the practice in some countries of not requiring legislation to implement a treaty domestically and giving a treaty superior force to legislation so that legislature cannot legislate inconsistently with the treaty should be adopted in New Zealand. Apart from the constitutional arguments based on the sovereignty of Parliament, it would put more emphasis on formal discussion in the House than should be accepted.

IV. CONCLUSION

Of all the countries considered in this paper, the New Zealand Parliament has the smallest role to play in the treaty making process. The situation as it sits today is not satisfactory as Parliament's involvement is minimal and uncertain. Parliament as the law maker of New Zealand and as the scrutineer of Executive action should play a greater part in making international law that is going to bind New Zealand. The scope for implementing change does exist. The proposals recommended in the paper are not extreme nor do they involve any constitutional alterations. However they would ensure that Parliament was involved on a formal basis where it was necessary while still allowing for the Executive to retain its ultimate power of decision and conduct foreign affairs in an efficient and effective way.

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