Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament

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Treaties are a significant source of law on a wide range of subjects, but traditionally do not become domestic law without national implementation. Nevertheless, the legal character of treaty rules does place pressure on a state's domestic institutions to ensure compliance. Given the influence of treaty law, several Commonwealth states provide a role for Parliament in treaty making even though at common law, the decision to make a treaty clearly rests with a government's executive branch. Such reforms to the treaty-making process attempt to address complaints that a "democratic deficit" exists, including an additional "federal democratic deficit" in federal states arising from the absence of a requirement for consultation between the central and regional bodies. A review of the experiences in Canada, the United Kingdom, and Australia leads to several suggested reforms to secure greater legislative scrutiny, enhance public awareness, and improve democratic accountability in the field of treaty making.

Les traités sont une importante source de droit dans bien des domaines, mais ne s'intègrent traditionnellement pas au système juridique intérieur sans une mise en œuvre nationale. Quoi qu'il en soit, le caractère juridique des règles issues d'un traité exerce une certaine pression sur les institutions nationales afin d'en assurer le respect. Étant donné l'influence du droit des traités, plusieurs états du Commonwealth accordent au Parlement un rôle dans l'élaboration des traités, même si d'après le droit commun, la décision de rédiger un traité appartient clairement à l'exécutif du gouvernement. De telles réformes du processus d'élaboration des traités tentent de répondre aux critiques suivant lesquelles il existe un «déficit démocratique», en plus d'un «déficit démocratique fédéral» dans des états fédéraux, issu de l'absence d'une obligation de consultation entre l'état central et les gouvernements locaux. Cette revue de l'expérience en cette matière au Canada, au Royaume-Uni et en Australie conduit l'auteure à suggérer plusieurs réformes afin d'assurer un droit de regard plus étendu aux pouvoirs législatifs, de conscientiser davantage le public et de développer une responsabilité démocratique en ce qui concerne l'élaboration des traités.

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Introduction

In today's interdependent world, treaties are a significant source of law.[1] Through hundreds of agreements reached between states after months of negotiations down government corridors and through diplomatic channels, new legal rules on subjects as diverse as defence, criminal law, trade and investment, the environment, and human rights are adopted that will in many cases generate new domestic law and policy. This is certainly true for Canada, which is a party to some three thousand treaties, each of which contains various obligations.[2] Once ratified, these treaty obligations are binding on Canada under international law, and while it has become trite to state that treaty rules do not become domestic law without the passage of domestic legislation, it is clear that a treaty's legal character puts pressure on a state's domestic institutions to take steps to ensure compliance. After all, there are consequences if Canada breaks its word with its treaty partners. This pressure also extends to the courts, which assist with treaty compliance through the long-standing interpretive presumption of conformity with international law and more recently, through the judicial modification of the common law doctrine of legitimate expectation,[3] new rules on statutory interpretation,[4] and new uses for the values of an unimplemented treaty.[5]

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[1] The UN's treaty collection contains over 50,000 treaties, many of which remain in force. See the website of the UN Treaty Database, online: <http://untreaty.un.org/English/overview.asp>.

[2] See Maurice Copithorne, "Canada" in Monroe Leigh, Merritt R. Blakeslee & L. Benjamin Ederington, eds., *National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South Africa* (Washington D.C.: American Society of International Law, 2003) 1 at 13. Canada's treaty collection is now available on the Canada Treaty Information website, online: <http://www.treaty-accord.gc.ca>.

[3] See *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273 (H.C.A.) [*Teoh*] and the resulting criticism in Michael Taggart, "Legitimate Expectation and Treaties in the High Court of Australia" (1996) 112 Law Q. Rev. 50. See also Margaret Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh*'s Case and the Internationalisation of Administrative Law" (1995) 17 Sydney L. Rev. 204. But see Wendy Lacey, "In the Wake of *Teoh*: Finding an Appropriate Government Response" (2001) 29 Fed. L. Rev. 219 [Lacey, "In the Wake of *Teoh*"]; Wendy Lacey, "Prelude to the Demise of *Teoh*: The High Court Decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam" (2004) 26 Sydney L. Rev. 131.

[4] See *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (N.Z.C.A.), where dicta suggested that ratified but unincorporated treaty obligations are mandatory relevant considerations. Subsequent cases, however, suggest a less enthusiastic approach: see *Puli'uvea v. Removal Review Authority* (1996), 2 H.R.N.Z. 510 (C.A.). See also Claudia Geiringer, "*Tavita* and All That: Confronting the Confusion surrounding Unincorporated Treaties and Administrative Law" (2004) 21 N.Z.U.L. Rev. 66.

[5] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.]. See also Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 357.

Nevertheless, in Commonwealth states, the decision to make a treaty clearly rests at common law with the executive branch of the government that represents the state abroad. The common law imposes no legal obligation on the executive to secure the consent or approval of Parliament prior to treaty ratification, despite the fact that Parliament is the ultimate law-making authority in a Westminster-style democracy. There may, of course, be practical or political reasons that compel an executive to seek parliamentary approval for treaty actions prior to ratification, but the lack of a legal requirement for such consultation supports complaints that a "democratic deficit" exists in the treaty-making process given the executive's ability to engage the nation in legal commitments without involving the institution responsible for making law. Moreover, law making by treaty, unlike law making by Parliament, is untrammelled by the principle of parliamentary sovereignty, which ensures that one parliament cannot bind another, and some treaties, by their very nature, admit of no right of withdrawal, and as such, are permanent law made by the executive.[6]

An additional deficit can be found in federal Commonwealth states, such as Australia and Canada, and quasi-federal states such as the United Kingdom since 1998, where there is also no legal requirement for the executive branch of the central government to involve the elected regional assemblies, or their executive bodies, in the treaty-making process. This is so even when the subject matter of the treaty falls within the legislative competence of the regional body—a position not without controversy, as evidenced by the provincial opposition to Canada's ratification of the *Kyoto Protocol*.[7] Despite the fact that many of the emissions at which this treaty is aimed are caused by energy-related processes that fall within the regulatory jurisdiction of the provinces,[8] the ratification took place without prior provincial agreement,[9] and in the face of a united call for a first ministers' conference to take

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[6] The *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), for example, contains no provision on termination, nor can a right to withdraw be implied given that the treaty's purpose is to codify universal rights.

[7] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, UN Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22 (entered into force 16 February 2005) [*Kyoto Protocol*]. Canada ratified the *Kyoto Protocol* on 17 December 2002, after a motion calling on the government to ratify the treaty was passed by the federal parliament by a vote of 196 to 77: *House of Commons Debates* (10 December 2002) at 2524-25. Parliament did not, however, examine the text of the *Kyoto Protocol* prior to adopting the call to ratify. Some have argued that a constitutional convention was breached in ratifying the *Kyoto Protocol* without provincial support: Allan Gotlieb & Eli Lederman "Ignoring the provinces is not Canada's way" *National Post* (3 January 2003) A14.

[8] Examples include mining, energy production and use, manufacturing, and most aspects of natural resources.

[9] Canada has now reached "Memoranda of Understanding for Cooperation on Addressing Climate Change" with four of the ten provinces (Prince Edward Island, Manitoba, Ontario, and Newfoundland and Labrador) and one of the three territories (Nunavut). The texts of these memoranda are available online: Climate Change, Government of Canada <http://www.climatechange.gc.ca/english/canada/provter.asp>. The province of Alberta, however, remains strongly opposed to the *Kyoto Protocol* and has proposed its own climate change strategy: *Albertans &*

place before a decision was made to ratify.[10] While some have argued that "greenhouse gas emissions" are a discrete subject matter suitable for unilateral federal jurisdiction as a matter of "national concern" under Canada's "peace, order and good government" clause,[11] federal-provincial co-operation remains the more practical route for achieving the treaty's implementation. Thus, the legal ability of the central government to "go-it-alone" with respect to the Protocol's ratification, albeit with the support of environmentalists,[12] illustrates a "federal democratic deficit" in the treaty-making process.

In some Commonwealth jurisdictions, these concerns about the democratic credentials of the treaty-making process have motivated various reforms, including the adoption in Australia of a dedicated committee procedure to ensure the parliamentary scrutiny, at least at the federal level, of all treaty actions after signature but before ratification. Britain has also modified its process by requiring the tabling of both treaties and explanatory memoranda in Parliament in order to draw the attention of parliamentary committees to the opportunity to scrutinize. In Canada, however, no such dedicated committee process exists and while treaties may be subject to scrutiny on an ad hoc basis, such as through the House of Commons Standing Committee on Foreign Affairs and International Trade,[13] there is little required parliamentary involvement,[14] let alone provincial parliamentary involvement, in the Canadian treaty-

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Climate Change: A Strategy for Managing Environmental & Economic Risks (Government of Alberta, 2002), online: Government of Alberta <http://www3.gov.ab.ca/env/climate/docs/climate_change_strategy.pdf>. See also Nigel D. Bankes & Alastair R. Lucas, "*Kyoto*, Constitutional Law and Alberta's Proposals" (2004) 42 Alta. L. Rev. 355.

[10] See Steven Chase, "Chrétien refuses to delay ratifying Kyoto" *Globe and Mail* (30 October 2002) A1. See also Jack Stilborn, *The Kyoto Protocol: Intergovernmental Issues* (Ottawa: Library of Parliament, 2002).

[11] Donald M. McRae & John H. Currie, "Treaty-Making and Treaty Implementation: The Kyoto Protocol" (2003) 29:2 *CCIL Bulletin*, online: Canadian Council on International Law <http://www.ccil-ccdi.ca/bulletin/kyoto.html>. But see Philip Barton, "Economic Instruments and the *Kyoto Protocol*: Can Parliament Implement Emissions Trading Without Provincial Co-operation" (2002) 40 Alta. L. Rev. 417; Mollie Dunsmuir, *The Kyoto Protocol: Overview of Federal Legal Mechanisms for Implementation* (Ottawa: Library of Parliament, 2002) at 10-11; Elisabeth DeMarco, Robert Routliffe & Heather Landymore, "Canadian Challenges in Implementing the *Kyoto Protocol*: A Cause for Harmonization" (2004) 42 Alta. L. Rev. 209.

[12] Retiring Prime Minister Jean Chrétien was awarded the Sierra Club of Canada's highest honour "for pursuing the ratification of the *Kyoto Protocol*": Sierra Club, Press Release, "PM Receives John Fraser Award for Environmental Achievement" (12 December 2002), online: Sierra Club of Canada <http://www.sierraclub.ca/national/media/jf-award-02-12-12.html>.

[13] This is usually done, however, in relation to the passage of legislation to implement a treaty to which Canada has already agreed to become bound, rather than for the specific purpose of reviewing a proposed treaty action prior to any commitment to ratify having been made. Treaty scrutiny must also compete with the many other items on the committee's (and its members') agenda.

[14] Social security treaties brought into force by regulation may be the one exception. Section 42 of the *Old Age Security Act*, R.S.C. 1985, c. O-9, requires such regulations to be laid before Parliament and enables Parliament, if it so desires, to prevent the treaty from coming into force through a negative resolution procedure.

making process. There is also no mechanism in place to ensure that all treaties affecting provincial and territorial interests are subject to consultation at the intergovernmental level, although certain kinds of treaties, such as those in the fields of private international law and environmental law, have benefited in the past from some pre-ratification consultation among federal, provincial, and territorial ministers and government officials.[15] The newly formed Council of the Federation has identified the need to develop better means "for the involvement of provincial and territorial governments in international negotiations and agreements that affect their responsibilities" as a future task.[16]

And yet, if one looks back at the Westminster model for treaty making, as it developed in the "Mother of Parliaments", it is evident that a desire to provide for an enhanced parliamentary role is long-standing. A review of the historical record shows that this desire originated with the efforts of British anti-war MPs in the late 1910s, who sought to secure greater parliamentary control over foreign affairs following the human cost of World War I. The purpose of this article is to acknowledge this history, as well as the more recent reforms that have taken place to address the democratic deficit in treaty law making, through a re-examination of the pre-ratification roles of the executive and legislature in the making of treaties. The chosen states of focus are Canada, the UK, and Australia,[17] and the goal is to recommend several reforms to enhance the pre-ratification role of parliaments, both federal and provincial, in Canadian treaty making.

I. Treaties and Treaty Making in Commonwealth States

It is sensible to begin with a general overview of the law on treaties and treaty making in Commonwealth states. Simply put, a treaty is like a contract. It is an express agreement between states, between states and international organizations, or between international organizations, that creates legally binding rights and obligations for its parties and is governed by international law on such matters as its validity, application, interpretation, and enforceability. Many names are given to treaties, including "Convention", "Charter", "Covenant", "Protocol", "Pact", "Act", "Statute",

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[15] See Rosemary Rayfuse, "Treaty Practice: The Canadian Perspective" in Philip Alston & Madelaine Chiam, eds., *Treaty-Making and Australia: Globalisation versus Sovereignty?* (Sydney: Federation Press, 1995) 253. For the pre-ratification consultation that takes place in relation to human rights treaties, see Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 U.B.C. L. Rev. 113 at 126-27.

[16] The Council of the Federation is a new institution, comprising all thirteen of Canada's premiers and territorial leaders, but not the government of Canada. It was established in December 2003 at a premiers' meeting in Charlottetown. Further details are available on the Council of the Federation's website, online: <http://www.councilofthefederation.ca>.

[17] For the practice in other states, see Stefan A. Riesenfeld & Frederick M. Abbott, eds., *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Martinus Nijhoff, 1994). See also the results of a Symposium on Parliamentary Participation in the Making and Operation of Treaties published in (1991) 67:2 Chicago-Kent L. Rev.

and "Agreement". But whatever the name given, all are treaties if they reflect the will of the parties to be bound by their terms under international law.[18] A treaty can be made on any subject matter, including crime, trade promotion, human rights, national security, and environmental protection, and can involve as few as two, or as many as all states in the world. Treaties can also be used to create normative regimes to govern the future conduct of states, and are the principal method by which states can formalize and realize their foreign policy objectives.

Treaties are also an important source of the rules of international law, especially those treaties that are drafted with an intention to codify or further develop substantive areas of the law, including the very rules governing such agreements.[19] Treaties are in essence "a form of substitute legislation"[20] undertaken by states that, while similar to contracts, have a nature of their own that reflects the character of the international system.[21] By binding states to each other, treaties constitute a significant component of the international legal order and the faithful observance of treaty obligations is considered vital to securing international co-operation. International law supports this role for treaties by the rule expressed in the Latin maxim *pacta sunt servanda*, and now codified in article 26 of the *Vienna Convention on the Law of Treaties*,[22] that every treaty in force is binding upon the parties to it and must be performed by them in good faith—a rule that has been described as "perhaps the most important principle of international law."[23]

As for the making of treaties at the international level, the methods used can be as varied as the parties desire, ranging from the simple exchange of diplomatic notes to the convening of a formal international conference of government ministers and diplomats. International law leaves the procedures by which a treaty is negotiated to the will of the state parties, although there is typically little or no opportunity for parliamentary or public input at such a level.[24] However, once the terms of a treaty are

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[18] See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 19-24, 333; Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed. (London: Longman, 1992) at 1208 [Oppenheim]; Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 88.

[19] These rules are found in the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980) [*Treaties Convention*]. For the law applicable to agreements with international organizations, see the *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, UN Doc. A/CONF.129/15, 25 I.L.M. 543 (not yet in force) and P.K. Menon, *The Law of Treaties Between States and International Organizations* (Lewiston, NY: Edwin Mellen Press, 1992).

[20] Shaw, *supra* note 18 at 89.

[21] See *ibid.*

[22] *Supra* note 19.

[23] *Restatement (Third) of the Foreign Relations Law* § 321 (1986) [*Third Restatement*].

[24] The high degree of involvement of non-governmental organizations in the negotiation of the *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90, (1998) 37 I.L.M. 1002 (entered into force 1 July 2002) [*Rome Statute*], may set an example for the future. See also William R. Pace & Mark Thieroff, "Participation of Non-

agreed upon, international law does require the treaty text to be adopted,[25] authenticated as correct and final[26] (usually by signature or initials), and then made available to be accepted as binding by the parties (although there is no prescribed procedure by which to accomplish these three tasks).[27] With bilateral treaties, these tasks are often collapsed into a single procedure, whereas with multilateral treaties, there is usually a clear distinction between each task, particularly since adoption (usually by a vote or resolution of the states participating in the negotiations) may have no legal significance other than to indicate the end of negotiations.[28]

In any event, the most important stage for treaty making at the international level is when the state parties express their consent to be bound. This can be done by a variety of methods, including signature,[29] so long as the method chosen clearly signifies a state's intention to assume the legal obligations in the treaty. In the case of multilateral treaties, a state usually expresses its consent to be bound through ratification[30] (or accession).[31] This is typically accomplished by the deposit with a designated institution of a formal written declaration of consent known as an "instrument of ratification" some time after the treaty's adoption. The passage of time between adoption and ratification enables a state to take whatever steps are necessary domestically to seek any required approvals for the treaty and to enact any legislative changes needed to comply with the treaty.[32] It also gives a state time to gauge public opinion about the new treaty commitments if it so desires, with the possibility that a strong negative reaction might lead a state to decide against ratification.

Governmental Organizations" in Roy S. Lee, ed., *The International Criminal Court: The Making of the* Rome Statute*: Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) 391.

[25] "Adoption" is the formal act by which the form and content of a proposed treaty text are established. See the United Nations Treaty Collection's "Treaty Reference Guide", available from its website, online: <http://untreaty.un.org/English/guide.asp>. See also *Treaties Convention*, *supra* note 19, art. 9.

[26] *Treaties Convention*, *ibid.*, art. 10.

[27] *Treaties Convention*, *ibid.*, art. 11.

[28] See John H. Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 117.

[29] See *Treaties Convention*, *supra* note 19, art. 12; Shaw, *supra* note 18 at 817-18; Aust, *supra* note 18 at 75-76.

[30] *Treaties Convention*, *supra* note 19, arts. 2(1)(b), 14, 16. I refer here to "ratification" in the international law sense and not in the sense of a domestic procedure required in some states.

[31] Accession has the same legal effect as ratification, but is the term used when a state becomes bound to a treaty already negotiated and signed by other states (Aust, *supra* note 18 at 81, 88; Shaw, *supra* note 18 at 820-21). See also *Treaties Convention*, *supra* note 19, arts. 2(1)(b), 15.

[32] Since a state cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty obligation (*Treaties Convention*, *ibid.*, art. 27), it is common practice for states to insist that any necessary legislative changes be in place before a treaty is ratified. See for example the guidance given to British civil servants in U.K., Foreign & Commonwealth Office, Treaty Section, *Treaties and MOUs: Guidance on Practice and Procedures*, 2d ed. (London: Foreign and Commonwealth Office, 2000) (Revised May 2004) at 7, online: Foreign & Commonwealth Office <http://www.fco.gov.uk/Files/KFile/TreatiesandMOUsFinal,0.pdf> [*Treaties and MOUs*].

As for where the power to make treaties resides within a state, this is determined by the constitutional law of the particular state, and varies from state to state. For states that follow the constitutional traditions of the UK, the power to conduct foreign relations, including the power to make treaties, is one of the royal prerogatives[33] retained by the Crown and carried out by the executive branch of government, usually through the minister responsible for foreign affairs.[34] Since prerogative powers, by definition, provide the executive with the power to act without the consent of Parliament,[35] treaty making, including treaty ratification, is legally a wholly executive act within the UK[36] and most Commonwealth states.[37]

Treaty implementation, however, is a different matter. Because Commonwealth states typically embrace a dualist approach with respect to the relationship between treaty law and domestic law, the two legal systems are said to coexist, but function separately.[38] Consequently, a treaty that purports to change existing domestic law has no domestic legal effect unless and until the treaty obligations are "incorporated"[39] or "transformed"[40] into domestic law by the enactment of domestic legislation.[41] As a result, while Parliament has no formal role in treaty making, it does, as the supreme lawmaker, have a role in treaty implementation, although some may argue that this distinction is lost in practice given the degree of executive control over Parliament. Minority governments, however, as currently experienced in Canada, test the strength of this argument. Moreover, whether moot or not, the separation of powers between the executive and Parliament in treaty making and treaty implementation remains part

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[33] Munro defines the royal prerogative as "comprising those attributes peculiar to the Crown which are derived from common law, not statute, and which still survive" (Colin R. Munro, *Studies in Constitutional Law* (London: Butterworths, 1987) at 159). Dicey describes the prerogatives as a set of common law powers comprising "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" (A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1959) at 424 [footnotes omitted]).

[34] See F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986) at 1-22.

[35] See Dicey, *supra* note 33 at 425; A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 13th ed. (London: Longman, 2003) at 246-50, 309.

[36] Parliament may play an indirect role in the sense that a treaty that lacks majority support could bring down the government through a non-confidence motion or at the ballot box.

[37] Antigua and Barbuda is an exception since it has passed legislation to give its parliament a role in ratification: *Ratification of Treaties Act 1987*, No. 1 of 1987. See Winston Anderson, "Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation" (1998) 8 Carib. L. Rev. 75.

[38] See Bradley & Ewing, *supra* note 35 at 310. See also Oppenheim, *supra* note 18 at 53.

[39] This is the term used in the UK. See Aust, *supra* note 18 at 150-51.

[40] This is the term used in Canada, with incorporation being one of the means of transformation. See Currie, *supra* note 28 at 205; Hugh M. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 188-89. But see Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 41-45 for the somewhat interchangeable use of both terms.

[41] *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 at 347, 1 D.L.R. 673 (P.C.) [*Labour Conventions* case cited to A.C.].

of the British constitutional tradition, and is the legal approach embraced by most[42] of the former British colonies, including Canada.[43]

II. Treaty Making and the Parliament of Canada

Although Canada's written constitution does not contain a provision on the subject of treaty making directly,[44] it is generally recognized under Canadian constitutional law that the power to make treaties resides with the executive branch of the government that represents Canada as a whole, namely the federal government based in Ottawa.[45] While claims have been made that the provinces also possess a treaty-making capacity,[46] and certainly one province in particular has entered into

[42] The United States being the principal exception. Under article II, section 2 of the United States constitution, the president may ratify a treaty only with the "advice and consent" of a two-thirds vote of Senate. But, as noted in Aust, *supra* note 18 at 158, most treaties entered into by the United States are considered "executive agreements" rather than "treaties" and, as such, do not need Senate approval. See also Laurence H. Tribe, *American Constitutional Law*, 3d ed. (New York: Foundation Press, 2000) at § 4-4 and *Third Restatement*, *supra* note 23 at § 303. The Senate itself is aware of its diminishing role. See U.S., Congressional Research Service, Library of Congress, *Treaties and Other International Agreements: The Role of the United States Senate: A Study Prepared for the Committee on Foreign Relations, United States Senate* (S. Prt. 106-71) (Washington, D.C.: US Government Printing Office, 2001) at 2).

[43] See generally J.E.S. Fawcett, *The British Commonwealth in International Law* (London: Stevens & Sons, 1963) at 16-32.

[44] The closest provision on point is section 132 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, concerning the federal power to perform what are termed "Empire treaties". Although some have argued that the "broad intention was plainly to enable the Canadian Parliament to give internal effect in Canada to treaties binding upon it" (Fawcett, *ibid*. at 20-21), the courts have ruled that section 132 does not extend to treaties entered into by an independent Canada: *Labour Conventions* case, *supra* note 41 at 350. The provision is now viewed as obsolete.

[45] See A.E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 27, and Copithorne, *supra* note 2 at 1. See also Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) at para. 11.2.

[46] Such claims were particularly prevalent in the second half of the 1960s, bolstering claims then made by the Quebec government that led to the creation of a Quebec Department of Intergovernmental Affairs in 1967. Quebec, however, is not the only province with a department dedicated to international affairs, nor the only province with missions abroad. Ontario, Alberta, and British Columbia are also active "internationalists", although all Canadian provinces at one time or another have made agreements with foreign states to serve their interests. See Jacques-Yvan Morin, "La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé" (1965) 3 Can. Y.B. Int'l Law 126, and his Comment (in English) in (1967) 45 Can. Bar Rev. 160. See also Ivan L. Head, "The 'New Federalism' in Canada: Some Thoughts on the International Legal Consequences" (1966) 4 Alta. L. Rev. 389; Bora Laskin, "The Provinces and International Agreements" in Ontario Advisory Committee on Confederation, *Background Papers and Reports*, vol. 1 (Toronto: Queen's Printer, 1967) 101; R.J. Delisle, "Treaty-Making Power in Canada" in *ibid.*, 115; Edward McWhinney, "The Constitutional Competence Within Federal Systems as to International Agreements" in *ibid.*, 149; Gerald L. Morris, "The Treaty-Making Power:

many treaty-like arrangements in the areas of education, economic development, and cultural co-operation,[47] such claims have never been accepted by the federal government[48] and are not borne out by state practice.[49] Moreover, with the possible exception of France,[50] no other state in the international system recognizes any competence on the part of Canada's provinces to conclude treaties.

Federal executive responsibility for treaty making emerged gradually, much like Canada's full independence. Although Confederation marked the beginning of Canada's domestic self-governance, it was not envisaged at that time that Canada would make treaties independently from Britain. The *Constitution Act, 1867*[51] therefore included no explicit treaty-making provision since the British executive retained the prerogative power to make treaties for the Empire as a whole.[52] However, as the countries within the Empire gradually acquired their full independence, so did they acquire their portion of the treaty-making power once held by the British executive. In Canada's case, it is said that the confirmation of such delegation can be found in the 1947 *Letters Patent Constituting the Office of the Governor General of Canada*,[53] clause 2 of which authorizes the Governor General "to exercise all powers and authorities lawfully belonging to [the King] in respect of Canada." According to Professor Hogg, "[t]his language undoubtedly delegates to the federal government of Canada the power to enter into treaties binding Canada."[54]

Within the federal government, the minister responsible for the conduct of foreign relations is the former secretary of state for external affairs, now known as the

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A Canadian Dilemma" (1967) 45 Can. Bar Rev. 478; Michael C. Rand, "International Agreements Between Canadian Provinces and Foreign States" (1967) 25 U.T. Fac. L. Rev. 75; Lorne Giroux, "La capacité internationale des provinces en droit constitutionnel canadien" (1967-68) C. de D. 241; Ronald G. Atkey, "Provincial Transnational Activity: An Approach to a Current Issue in Canadian Federalism" in Ontario Advisory Committee on Confederation, *Background Papers and Reports*, vol. 2 (Toronto: Queen's Printer, 1970) at 153. For recent commentary, see Gibran van Ert, "The Legal Character of Provincial Agreements with Foreign Governments" (2001) 42 C. de D. 1093.

[47] The province of Quebec has entered into over 550 such arrangements since 1964. Three hundred agreements remain in force, the details of which are available from the website of the Quebec Ministry of International Relations, online: <http://www.mri.gouv.qc.ca/en/action_internationale/ententes/index.asp>.

[48] In 1968, the then secretary of state for external affairs, Paul Martin Sr., issued a background paper entitled *Federalism and International Relations* (Ottawa: Queen's Printer, 1968) disputing and opposing all claims to any provincial treaty-making capacity.

[49] Hogg, *supra* note 45 at paras. 11.2 and 11.6; Currie, *supra* note 28 at 208-10. For arguments for a provincial treaty-making capacity based on constitutional law, see Gibran van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 74-92.

[50] See also van Ert, *ibid.* at 87, n. 163.

[51] *Supra* note 44.

[52] See Hogg, *supra* note 45 at para. 11.2. See also Gotlieb, *supra* note 45 at 6-10.

[53] Reproduced in R.S.C. 1985, App. II, No. 31.

[54] Hogg, *supra* note 45 at para. 11.2.

"minister of foreign affairs",[55] and it is the minister's department that takes the lead role in the making of treaties. The federal parliament has no formal role, apart from being the body to which all ministers are accountable in a system of responsible government.

It was not always the case, however, that the federal parliament had no formal role. From 1926 to 1966, it was the practice in Canada for all important treaties to be submitted to Parliament for approval prior to ratification, a practice that began at the initiation of Prime Minister (and Secretary of State for External Affairs) William Lyon Mackenzie King. In 1926, Prime Minister Mackenzie King moved a two-part motion to improve the treaty-making process, the second part of which read: "This House ... considers further that before His Majesty's Canadian ministers advise ratification of a treaty or convention affecting Canada, or signify acceptance of any treaty, convention or agreement involving military or economic sanctions, the approval of the parliament of Canada should be secured."[56] While Mackenzie King acknowledged that the ratification of a treaty was an executive act that took place on the advice of Cabinet, he also stated that "parliament should feel assured in regard to all these great obligations of an international character which involve military and economic sanctions that a government should not have the opportunity of binding parliament in advance of its own knowledge to the obligations incurred thereby."[57] The House adopted the motion, and for the next forty years, according to Allan Gotlieb's authoritative[58] but now dated account in *Canadian Treaty-Making*, a practice developed of submitting to Parliament all treaties involving: "(1) military or economic sanctions; (2) large expenditures of public funds or important financial or economic implications; (3) political considerations of a far-reaching character; [and] (4) obligations the performance of which will affect private rights in Canada."[59] Since the initiation of this practice took place in the same year that Canada achieved its autonomy from Britain with respect to the exercise of the treaty-making power,[60] the practice can be rightly described as being part of the Canadian treaty-making process since the beginning.

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[55] *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, s. 10, as am. by S.C. 1995, c. 5, s. 7.

[56] *House of Commons Debates* (21 June 1926) at 4758-59 (W.L. Mackenzie King). The debate on the motion can be found at 4758-4800. See also Gotlieb, *supra* note 45 at 15-16.

[57] *House of Commons Debates*, *ibid.* at 4762.

[58] Gotlieb was, at the time of authorship, the assistant under-secretary of state for external affairs and legal adviser to the department. He would later serve as under-secretary of state for external affairs (1977-1981) and ambassador of Canada to the United States (1981-1989).

[59] Gotlieb, *supra* note 45 at 16-17 [footnotes omitted].

[60] The Balfour Declaration issued at the Imperial Conference of 1926 confirmed that no autonomous dominion could be bound by commitments incurred by the imperial government without its consent. The question of treaty making was specifically addressed, with the conference confirming that each dominion government had the power to negotiate, sign, and ratify treaties on its own behalf. See Maurice Ollivier, ed., *The Colonial and Imperial Conferences from 1887 to 1937*, vol. 3 (Ottawa: Queen's Printer, 1954) at 150-55.

This practice, however, applied to only a small proportion of all the treaties entered into by Canada during this period since many of Canada's treaties were concluded by way of an exchange of notes or letters and as such, were not subject to ratification.[61] Nevertheless, for those treaties that were submitted, the practice did give Parliament a voice in relation to some treaties of significance, such as the Canada-US *Auto Pact* of 1966,[62] and the pre-ratification timing was crucial because it meant that Parliament had a say before Canada became bound under international law. The practice, however, waned in the late 1960s, coinciding with the debate then taking place about Canada's role in North American Air Defense Command ("NORAD"),[63] and by 1974, it was the view of the Department of External Affairs (as it was then called) that it was up to the government of the day to decide whether parliamentary approval would be sought for a proposed treaty action.[64] This continues to be the department's view[65] and as time has passed, the practice of submitting treaties to Parliament for approval has been either forgotten or abandoned,[66] prompting the

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[61] See Gotlieb, *supra* note 45 at 18. See also A. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975) at 126 and 130.

[62] *Agreement concerning Automotive Products between the Government of Canada and the Government of the United States of America*, 16 January 1965, Can. T.S. 1966 No. 14 [*Auto Pact*]. The *Auto Pact* was approved by the House of Commons on 6 May 1966 (*House of Commons Debates* (6 May 1966) at 4795-4820) and by the Senate on 30 June 1966 (*Senate Debates* (30 June 1966) at 853).

[63] The 1958 Canada-US treaty establishing NORAD (*Agreement between the Government of Canada and the Government of the United States concerning the Organization and Operation of the North American Air Defence Command (NORAD)*, 12 May 1958, 316 U.N.T.S. 151, Can. T.S. 1958 No. 9) is subject to renewal every five years. During the 1960s, the threat of intercontinental ballistic missiles prompted the expansion of NORAD's mandate from air to aerospace defence and the creation of an extensive defence network. When questioned in Parliament about such changes, Prime Minister Pearson replied that "[i]f a situation were to develop requiring such an important change in Canadian defence policy ... if parliament was sitting parliament would be consulted first" (*House of Commons Debates* (25 September 1967) at 2428). The NORAD agreement was renewed in 1968 during Parliament's dissolution.

[64] See the excerpt from a memorandum of 11 June 1974 by the department's Bureau of Legal Affairs reprinted in (1975) 13 Can. Y.B. Int'l Law 366.

[65] See the excerpts from department memoranda reprinted in (1982) 20 Can. Y.B. Int'l Law 289; (1986) 24 Can Y.B. Int'l Law 397; and (2002) 40 Can. Y.B. Int'l Law 490.

[66] According to research undertaken by Professor Turp, then serving as a member of Parliament for the Bloc Québécois, the practice stopped in the late 1960s: Daniel Turp, "Un nouveau défi démocratique: l'accentuation du rôle du parlement dans la conclusion et la mise en oeuvre des traités internationaux" in *The Impact of International Law on the Practice of Law in Canada: Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa, October 15-17, 1998* (The Hague: Kluwer Law International, 1999) at 118. As noted by both Turp, *ibid.* at 119, and van Ert, *supra* note 49 at 68-69, commentary suggesting that the practice continues is suspect because of a reliance on the out-of-date texts of Gotlieb, *supra* note 45, and Jacomy-Millette, *supra* note 61.

introduction of a series of private member's bills since 1999 to encourage, among other things, its reinstatement.[67]

The continued absence of a parliamentary role in the making of important treaties is supported by current government action, as illustrated by the announcement that there would be no parliamentary role in the conclusion of a Canada-US treaty on missile defence.[68] But, according to Professor Maurice Copithorne, a former legal adviser to the Department of External Affairs, "the role of Parliament as a body with which the executive consults is evolving."[69] He notes that "[c]onsultations on Canada's most important treaties now take place regularly prior to the Government taking binding action."[70] Copithorne points to the work of the House of Commons Standing Committee on Foreign Affairs and International Trade ("SCFAIT"),[71] and in particular its examination of the proposed *Multilateral Agreement on Investment* in 1997[72] and the *Canada-US Preclearance Agreement* in 1999,[73] as well as Canada's practice of passing enabling legislation prior to ratifying a treaty.[74] But while there are instances where SCFAIT has examined a treaty currently under negotiation,[75] albeit

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[67] Six bills were introduced by Professor Turp in his role as an MP, one in May 1999 and five in October 1999. See *House of Commons Debates* (3 May 1999) at 14601 and (14 October 1999) at 113. One of these bills, Bill C-214, *An Act to Provide for the Participation of the House of Commons When Treaties Are Concluded*, proceeded to second reading, garnering support from all but the Liberal Party (*House of Commons Debates* (1 December 1999) at 2018-26, (13 April 2000) at 6127-31, and (8 June 2000) at 7725-31), with defeat occurring by a vote of 110-151 (*House of Commons Debates* (13 June 2000) at 7956-57). The proposed legislation was reintroduced in the following session by Francine Lalonde, the Bloc Québécois critic for foreign affairs (*House of Commons Debates* (28 March 2001) at 2440-41). The latest version was introduced as Bill C-260, *An Act respecting the Negotiation, Approval, Tabling, and Publication of Treaties*, 1st Sess., 38th Parl., 2004 (by Jean-Yves Roy, MP for the Bloc Québécois).

[68] See Jeff Sallot, "Missile treaty up to Cabinet, Graham says" *Globe and Mail* (27 September 2004), A5.

[69] Copithorne, *supra* note 2 at 5.

[70] *Ibid.*

[71] The committee has recently adopted the acronym "FAAE" rather than "FAIT".

[72] Canada, House of Commons, *Canada and the Multilateral Agreement on Investment: Third Report of the Standing Committee on Foreign Affairs and International Trade: First Report of the Sub-Committee on International Trade, Trade Disputes and Investment* (Ottawa: Standing Committee on Foreign Affairs and International Trade, December 1997) (Chair: Bill Graham, MP; Chair of the Subcommittee: Bob Speller, MP).

[73] Canada, House of Commons, *Bill S-22, An Act authorizing the United States to preclear travellers and goods in Canada for entry into the United States for the purposes of customs, immigration, public health, food inspection and plant and animal health: Eighth Report of the Standing Committee on Foreign Affairs and International Trade* (Ottawa: Standing Committee on Foreign Affairs and International Trade, May 1999).

[74] Copithorne, *supra* note 2 at 5.

[75] The only example in the past eight years, apart from the *Multilateral Agreement on Investment*, concerns the proposed Free Trade Area of the Americas ("FTAA"): Canada, House of Commons, *The Free Trade Area of the Americas: Towards a Hemispheric Agreement in the Canadian Interest: First Report of the Standing Committee on Foreign Affairs and International Trade: First Report of the*

one already in the public eye, a review of the record for the past eight years suggests that when it comes to treaty scrutiny, the usual role for SCFAIT is to review the legislation implementing a treaty, rather than a future treaty action.[76] Moreover, the broad mandates of SCFAIT and other standing committees (including the Senate Committee on Human Rights, which recently examined the question of Canada's adherence to the *American Convention on Human Rights*)[77] prompt a hit-or-miss record with respect to the scrutiny of treaties given the other matters competing for the committees' attention.[78] As for the passage of enabling legislation prior to ratification, Copithorne admits that there are "rare occasions" when this is not done,[79] but for me, the central point is that such occasions can occur, and have occurred. The principled rebuttal to Copithorne's arguments is that Parliament is more than a body for "consultation", and as the ultimate lawmaker in a Westminster system, Parliament should have the opportunity to review all treaties before their ratification, whether or not enabling legislation will be required.

Parliament (and through Parliament, the public) is also not kept as well informed as it once was about the treaty-making activities of the executive branch. Beginning in 1909, when the Department of External Affairs (as it was then called) was first created, the secretary of state for external affairs (as the minister was then known) was required by statute to report annually to Parliament on the department's activities. The statutory provision read as follows: "The Secretary of State shall annually lay before

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Sub-Committee on International Trade, Trade Disputes and Investments (Ottawa: Standing Committee on Foreign Affairs and International Trade, October 1999) (Chair: Bill Graham, MP; Chair of the Subcommittee: Sarmite Bulte, MP).

[76] The most recent treaty-related reports are: Canada, House of Commons, *Dispute Settlement in the NAFTA: Fixing an Agreement Under Siege* (Ottawa: Standing Committee on Foreign Affairs and International Trade, May 2005); Canada, House of Commons, *Bill S-2, Tax Conventions Implementation Act, 2002: Second Report of the Standing Committee on Foreign Affairs and International Trade* (Ottawa: Standing Committee on Foreign Affairs and International Trade, November 2002); Canada, House of Commons, *Bill C-32, An Act to implement the Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica: Eighth Report of the Standing Committee on Foreign Affairs and International Trade* (Ottawa: Standing Committee on Foreign Affairs and International Trade, October 2001); Canada, House of Commons, *Bill C-6, An Act to amend the International Boundary Waters Treaty Act: Second Report of the Standing Committee on Foreign Affairs and International Trade* (Ottawa: Standing Committee on Foreign Affairs and International Trade, October 2001); Canada, House of Commons, *Bill C-19, An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts: Seventh Report of the Standing Committee on Foreign Affairs and International Trade* (Ottawa: Standing Committee on Foreign Affairs and International Trade, June 2000).

[77] Canada, Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights* (Ottawa: Standing Senate Committee on Human Rights, 2003) (Chair: Shirley McNeil). The author discloses that she appeared as an expert witness before the committee in relation to this inquiry.

[78] The SCFAIT has issued sixty-one reports in the past eight years and only eight of those reports concern treaties.

[79] Copithorne, *supra* note 2 at 5.

Parliament, within ten days after the meeting thereof, a report of the proceedings, transactions and affairs of the department during the year then next preceding."[80] This led to the regular deposit of annual reports, which served as a reliable source of information on Canada's foreign policy commitments, and from 1915 on,[81] the reports also contained an account of Canada's treaty-making activities, including a useful listing of all agreements concluded during the particular year under review.[82] Yet in 1995, with the passage of Bill C-47, which changed the department's name and expanded its mandate to expressly include international trade, the statutory requirement for the submission of an annual report was repealed.[83] A review of the bill's second and third reading in *Hansard*, as well as a review of the minutes of the committee stage of the bill's consideration, provides no explanation for this since not one member of Parliament queried the repeal of a reporting requirement that had existed since 1909.[84] As a result, the government is no longer legally obliged to produce an annual public record of Canada's treaty-making activities,[85] and while it may from time to time deposit a list of all the treaties concluded over a specified time period, there remains no legal rule or even a political commitment regularizing the provision of such information to Parliament.[86]

It was also "the invariable practice in Canada", at least as of 1968 when Gotlieb wrote these words, "to table in Parliament all agreements, including exchanges of notes."[87] Through tabling, Parliament was kept informed of treaty obligations assumed on Canada's behalf by the federal executive, albeit after these obligations became binding under international law. But as with the practice of submitting treaties for parliamentary approval, the practice of tabling treaties has also suffered from disuse and had in fact all but disappeared until criticism prompted the then foreign

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[80] *An Act to create a Department of External Affairs*, 8 & 9 Edw. VII, c. 13, s. 5, later amended to become s. 14.

[81] See Gotlieb, *supra* note 45 at 7. The National Library of Canada record indicates that the annual reports ceased after the 1991-1992 issue.

[82] See Gotlieb, *ibid.* at 66.

[83] Clause 10 of Bill C-47, which became section 10 of *An Act to amend the Department of External Affairs Act and to make related amendments to other Acts*, S.C. 1995, c. 5, simply states: "Section 14 of the Act and the heading before it are repealed." The annual reporting requirements imposed on the department by acts such as the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Export and Import Permits Act*, R.S.C. 1985, c. E-19, remain in place.

[84] See *House of Commons Debates* (4 October 1994) at 6500-505, and (8 February 1995) at 9339-48. See also issue no. 14 of the *Minutes of Proceedings and Evidence of the Standing Committee on Foreign Affairs and International Trade* (14-15 December 1995).

[85] An annual listing of Canadian treaty activity can be found in the *Canadian Yearbook of International Law*. While useful for the yearbook's readers, this listing does not absolve the government of its responsibility to apprise Parliament and the general public of its law-making activities.

[86] See Turp, *supra* note 66 at 120, 128.

[87] Gotlieb, *supra* note 45 at 18. According to Jacomy-Millette, however, tabling was "not an invariable rule" (*supra* note 61 at 130).

minister Lloyd Axworthy to table dozens of ratified treaties in 1999,[88] including treaties that were required by law to be deposited in Parliament.[89] Tabling now occurs on an ad hoc basis at the prerogative of the executive, but often without even the most basic details, such as the treaty's name or a précis of its subject matter, being read into the record. The usual wording is "Mr. Speaker, pursuant to Standing Order 32(2) I have the honour to table, in both official languages, five multilateral treaties and one bilateral treaty that were entered into force for Canada in 2001," followed by an indication that a CD-ROM containing the treaty texts has been deposited with the Library of Parliament.[90] On only one occasion has this prompted a member of Parliament to ask immediately for the treaty details to be tabled, but that was in 1980.[91]

To make matters worse, the practice of promptly publishing all treaty texts in the *Canada Treaty Series*, an authoritative source of Canadian treaty law published by the Department since 1928,[92] has also been on the decline. To the frustration of law librarians everywhere, the *Canada Treaty Series* is often incomplete, and in many libraries its various parts remain loose and unbound while the library waits for the missing treaties that will complete the consecutively numbered series. The reason given for these delays is budget cuts. Even the Treaty Secretariat, a helpful unit within the Department of Foreign Affairs that used to answer treaty queries from the public, has been disbanded as a cost-cutting measure,[93] and the Treaty Section no longer prepares a general guide to treaty making which, Copithorne notes, used to be part of

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[88] See Turp, *supra* note 66 at 128; van Ert, *supra* note 49 at 70. Treaties that entered into force for the years 1993-1997 were tabled on four occasions in 1999: *House of Commons Debates* (13 April 1999) at 13715, (12 May 1999) at 15072, (9 June 1999) at 16098, and (10 June 1999) at 16149.

[89] Section 7 of the *Extradition Act*, R.S.C. 1985, c. E-23, used to require all extradition arrangements to be laid as soon as possible before both Houses of Parliament. On 8 January 1999, Foreign Minister Axworthy belatedly deposited seven extradition treaties, acknowledging the breach of the above law. Such a breach, however, will not occur again since the requirement has now been removed, as evident by comparing the former section 7 to the new section 8 of the *Extradition Act*, S.C. 1999, c. 18.

[90] See *e.g. House of Commons Debates* (13 December 2002) at 2686 (Bill Graham). The delay of almost a full calendar year between treaty conclusion and tabling is also typical.

[91] *House of Commons Debates* (17 July 1980) at 2999. The details were then appended to the day's *Hansard*.

[92] Originally, there were two series, one in English and one in French. In 1947, the two series were combined into one in which both the English and French texts appear. See Gotlieb, *supra* note 45 at 66.

[93] The UK Foreign Office offers a free "Treaty Enquiry Service" to the public, which provides very prompt replies to email enquiries, even from academics based in Canada. Further details are available on the Foreign & Commonwealth Office's website, online: <http://www.fco.gov.uk>.

the *Departmental Procedures Manual*.[94] Such guides can be found in Britain[95] and Australia[96] (and Quebec![97]).

The department is, however, at long last, delivering on its promise to put Canada's treaties online, thereby enhancing public access to the treaty texts and Canada's ratification record.[98] While a welcome start, not all treaty texts are as yet available and the search capacity is limited.[99] But of much greater disappointment is the complete absence of any memoranda or guidance on the legal effect of the treaties in the database, and the lack of any future plans to include such valuable information. The database is also annoying with respect to an ironic welcome note that explains how the Treaty Section of the Department of Foreign Affairs is "responsible for publishing on an annual basis in the *Canada Treaty Series* the texts of those agreements that have come into force for Canada" and "... for ensuring the tabling in Parliament of those agreements that have not otherwise been brought to the attention of Parliament ...", but then expressly states that this note "... is based on material drawn from an article that appeared in *External Affairs*, vol 19 (1967) at 369."[100] It is disgraceful that the department has not seen fit to provide an up-to-date account of its own practices for the public that it serves.

III. Treaty Implementation and the Parliament of Canada

Although it no longer has a role in treaty making, nor much of a role in the scrutiny of new treaty obligations, Canada's Parliament still plays a role in treaty implementation, given the common law rule that any treaty that entails the alteration of domestic law requires the passage of legislation to gain domestic legal effect.[101] But

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[94] Copithorne, *supra* note 2 at 4.

[95] *Treaties and MOUs*, *supra* note 32.

[96] Austl., Commonwealth, Department of Foreign Affairs and Trade, Treaty Secretariat, *Signed, Sealed and Delivered: Treaties and Treaty Making: An Officials' Handbook*, 5th ed. (Canberra: Department of Foreign Affairs and Trade, 2004) online: Department of Foreign Affairs and Trade <http://www.dfat.gov.au/treaties/treaties_handbook.pdf>. Australia also publishes a Treaty Information Kit for the general public, which is made available online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/other/dfat/reports/infokit.html>.

[97] A *Guide de la pratique des relations internationales du Québec* was published in 2000 by the Ministère des Relations internationales to assist personnel within the Quebec government who deal with international affairs: François Le Duc, *Guide de la pratique des relations internationales du Québec* (Quebec City: Ministère des Relations internationales, 2000).

[98] See online: Canada Treaty Information, *supra* note 2.

[99] A search for "rights of the child", the short form for one of the most ratified treaties, produced no results.

[100] Canada, Department of Foreign Affairs and International Trade, "Welcome to the Treaty Section", online: Canada Treaty Information <http://www.treaty-accord.gc.ca/Treaties_CLF/Section.asp?Page=TS>.

[101] Canadian confirmation of this rule can be found in *Baker*, *supra* note 5 at paras. 69 and 79, although *Baker* also modifies the common law rule to allow the courts to consider the values of an unimplemented treaty, thereby bypassing Parliament's implementation role.

Canada is a federal state, and its federal character clearly complicates the subject of treaty implementation (although this is not the case in all federations, or even all Commonwealth federations).[102] Canada's federal nature may also be a factor for any reforms to the treaty-making process that aim to address any perceived democratic deficit.

The rule in Canada, as decided by the Judicial Committee of the Privy Council in the *Labour Conventions* case of 1937,[103] is that treaties that fall within a federal area of responsibility in terms of their subject matter must be implemented by the passage of federal legislation, whereas treaties that fall within a provincial area of responsibility must be implemented by the enactment of legislation by the ten provinces. As a result, there are some treaties that are ratified by the federal executive, which must be implemented by the provincial legislatures, notwithstanding the lack of any formal ties of accountability between the two levels of government. This rule can therefore pose problems for the performance of Canada's treaty commitments (although this is not the case for all treaties), since many treaties do not entail a change in domestic law and therefore require no implementing legislation,[104] while others make use of a federal state clause[105] or reservation[106] to alleviate Canada's responsibility for the non-compliance of one or more provinces. The environmental side agreement to the *North American Free Trade Agreement*,[107] for example, leaves room for individual provincial implementation through a "Canadian Intergovernmental Agreement" ("CIA") because, in the words of the government of

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[102] The position in Australia is discussed below. India and Malaysia have taken an approach similar to that taken by Australia, while Nigeria has taken an approach similar to that taken by Canada. See Gotlieb, *supra* note 45 at 74-75.

[103] *Supra* note 41.

[104] According to Gotlieb, "a very large percentage of all treaties do not even require legislation but can be implemented by executive or administrative action (such as numerous treaties relating to defence, boundary waters, consular and immigration matters and economic co-operation)" (*supra* note 45 at 76). See also Hogg, *supra* note 45 at para. 11.4.

[105] A federal state clause permits the state to participate in a treaty on a partial basis to alleviate the problems posed to full implementation by the federal state's internal arrangements. Canadian practice with respect to federal state clauses is summarized in a letter from the Department of Foreign Affairs dated 17 March 1982, reprinted in (1983) 12 Can. Y.B. Int'l Law 319.

[106] According to Copithorne, Canada initially had such a reservation to the *UN Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3, to accommodate the opposition of the province of Alberta, which viewed the treaty as anti-family (Copithorne, *supra* note 2 at 7). See also Weiser, *supra* note 15 at 127, n. 50. Alberta later changed its position. Similar concerns about the convention's impact on the family unit and parental rights have been raised in Australia: see Melinda Jones, "Myths and Facts concerning the *Convention on the Rights of the Child* in Australia" (1999) 5:2 Austl. J. of Hum. Rts. 126 at 129-31.

[107] *North American Free Trade Agreement between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can. T.S. 1999 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

Canada, "most environmental legislation falls under provincial jurisdiction."[108] (This is an interesting admission given the recent ratification of the *Kyoto Protocol*,[109] although the rebuttal from the government would be that no implementing legislation is required.)[110]

Nevertheless, for treaties that do require provincial legislative action, the rule adopted in 1937 can be either criticized for holding the federal government hostage to provincial demands, or praised for protecting provincial autonomy and encouraging a degree of federal-provincial consultation, and even collaboration, in the treaty-making process. In any event, it would appear that the *Labour Conventions* rule is here to stay, notwithstanding the steady barrage of commentary and critique,[111] and even the disclosure of an *ex post facto* "dissent".[112] As a result, the extent of the federal parliament's involvement in treaty implementation depends on a treaty's subject matter. However, if a role were to be accorded to Parliament in the treaty-making process, the rule's recognition of a regional role in treaty implementation lends credence to the argument that a similar role should be accorded to the provincial

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[108] North American Agreement on Environmental Cooperation—Canadian Office, "Canadian Implementation", online: NAAEC <http://www.naaec.gc.ca/eng/implementation/implementation_e.htm>. A similar CIA applies to implementation of the labour side agreement to NAFTA (the *North American Agreement on Labour Cooperation*, Canada, Mexico, and the United States, 14 September 1993, Can. T.S. 1994 No. 4 (entered into force 1 January 1994)), given the need for inter-jurisdictional co-operation in the implementation of labour obligations. The text of this CIA is available from Human Resources and Skills Development Canada's website, online: <http://www.hrsdc.gc.ca/en/lp/spila/ialc/nao/02canadian_intergovernmental_agreement.shtml>.

[109] *Supra* note 7.

[110] For commentary on the implementation debate with respect to the *Kyoto Protocol*, see *supra* note 11.

[111] See F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485; Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 at 142-43; Gérard V. LaForest, "The Labour Conventions Case Revisited" (1974) 12 Can. Y.B. Int'l Law 137; W.R. Lederman, "Legislative Power to Implement Treaty Obligations in Canada" in J.A. Aitchison, ed., *The Political Process in Canada* (Toronto: University of Toronto Press, 1963) 171, reprinted in W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 350; Armand L.C. de Mestral, "L'évolution des rapports entre le droit canadien et le droit international un demi-siècle après l'affaire des conventions internationales de travail" (1987) 25 Can. Y.B. Int'l Law 301; Robert Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160; Torsten H. Strom & Peter Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993) 25 Ottawa L. Rev. 39; Hogg, *supra* note 45 at para. 11.5(c); Currie, *supra* note 28 at 211-15. See also Wallace W. Struthers, "'Treaty Implementation ... Australian Rules': A Rejoinder" (1994) 26 Ottawa L. Rev. 305.

[112] Lord Wright of Durley recorded his dissent some eighteen years after hearing the *Labour Conventions* case in an eulogy for the late Sir Lyman Poore Duff, chief justice of Canada, published in (1955) 33 Can. Bar Rev. 1123 at 1125-28. Privy Council practice at the time was to issue one unanimous opinion. See also, "Labour Conventions Case: Lord Wright's Undisclosed Dissent?" (1956) 34 Can. Bar Rev. 114.

legislative assemblies for treaties where the subject matter falls within their area of legislative competence.

IV. The British Model for Involving Parliament in the Treaty-Making Process

Ironically, Canada's current adherence to a strict separation of powers approach with respect to treaty making stands in contrast to the actual practice of the UK, where provision has long been made for some parliamentary involvement at the pre-ratification stage in the making of treaties. Under a constitutional practice, known as the Ponsonby Rule,[113] all treaties requiring ratification[114] must be presented before both Houses of Parliament for at least twenty-one sitting days[115] before the actual ratification takes place, thereby enabling any member of either House to call attention to the proposed treaty action and stimulate public debate. This laying before Parliament is effected by the deposit of a "Command Paper",[116] published in one of the three series[117] published by the Foreign and Commonwealth Office ("FCO"),[118]

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[113] See generally U.K., Foreign & Commonwealth Office, *The Ponsonby Rule* (N.p., January 2001), online: Foreign & Commonwealth Office <http://www.fco.gov.uk/Files/kfile/PonsonbyRule.pdf> [*The Ponsonby Rule*].

[114] This term has been interpreted broadly to include treaty accessions, approvals and acceptances: U.K., House of Commons Information Office, *Treaties* (House of Commons Factsheet No. 14, Procedure Series) (N.p., revised June 2003) at 3, online: The United Kingdom Parliament <http://www.parliament.uk/documents/upload/p14.pdf> [*H.C. Factsheet No. 14*]. The rule also applies to treaties amending treaties and, since January 1998, treaties that come into force by the mutual notification of the completion of constitutional and other procedures by each party. See *The Ponsonby Rule*, *supra* note 113.

[115] Twenty-one *sitting* days can be considerably longer than twenty-one *calendar* days, depending on the parliamentary schedule, since sitting days need not be continuous. Confirmation that the practice refers to sitting days can be found in Sir William McKay, ed., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed. (London: Lexis-Nexis UK, 2004) at 264, n. 2 [Erskine May].

[116] Command Papers are presented to Parliament as "by command of the Queen." They serve as a vehicle through which the government can bring forward matters deemed to be of interest to Parliament, the presentation of which is not required by statute. The term "Command Paper" is an umbrella term, under which various types of documents are published, including government department annual reports, treaties and other state papers, statements of government policy ("White Papers"), consultative documents ("Green Papers"), and Royal Commission reports. See Erskine May, *ibid.* at 261-62.

[117] The three series are the *Country Series* (for bilateral treaties), the *European Communities Series* (for treaties between member states of the European Union, or between one of the Communities, with the member states, and a non-member state or group of states), and the *Miscellaneous Series* (for multilateral treaties). A fourth series, known as the *United Kingdom Treaty Series* (or U.K.T.S.), contains the texts of all treaties that have come into force for the UK, including those subject to the Ponsonby Rule after their ratification. The U.K.T.S. has been published since 1892. Full-text copies of its recent contents have also been made freely available to the public since January 2002 through the Foreign & Commonwealth Office's website, online: <http://www.fco.gov.uk/treaties/>.

which is made readily available to members of Parliament and members of the House of Lords through the Vote Office and the Printed Paper Office respectively, and to the public through the Stationary Office and libraries.

The Ponsonby Rule has existed in the UK since 1924, where it began life as an undertaking given on behalf of the first government of Ramsay MacDonald[119] by Arthur Ponsonby, then under-secretary of state for foreign affairs,[120] during the second reading of the *Treaty of Peace (Turkey) Bill* in the House of Commons.[121] Appalled by the consequences of the secret treaties of alliance into which states had entered prior to World War I, Ponsonby had long campaigned for greater parliamentary control over foreign affairs and an end to secret diplomacy. As a Radical Liberal MP, Ponsonby had been a leading member of the Union of Democratic Control ("UDC"), a prominent anti-war organization formed to oppose Britain's involvement in World War I.[122] Article 2 of the UDC manifesto of 1914 stipulated that "[n]o Treaty, Arrangement, or Undertaking shall be entered upon in the name of Great Britain without the sanction of Parliament. Adequate machinery for ensuring democratic control of foreign policy shall be created."[123] As a minister in 1924, Ponsonby undertook to inform the House of all other "agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances."[124] The Ponsonby Rule was withdrawn during the Baldwin

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[118] There are a few exceptions. Treaties concerning communications satellites, for example, are laid by the Department of Trade and Industry.

[119] Ramsay MacDonald served as Britain's first Labour prime minister in 1924, but his government was short-lived. He was re-elected in 1929, and served as prime minister for the second Labour government from 1929 to 1931. Faced with an economic crisis, and weakened by splits in his own party, he formed a National Government with some Conservatives and Liberals from 1931 to 1935.

[120] Knowing that Labour was unlikely to stay in office for longer than a few months, Ponsonby had successfully urged MacDonald to serve as his own foreign secretary, noting that the "extraordinary combination of circumstances" would allow them "to have control of the F.O. [Foreign Office] and to begin to carry out some of the things we have been urging and preaching for years" (letter from Ponsonby to MacDonald, cited in David Marquand, *Ramsay MacDonald* (London: Jonathan Cape, 1977) at 300). Ponsonby was also familiar with the terrain, having worked in the diplomatic service prior to his first election as an MP in 1908. He had also been long exposed to the workings of government, being the son of Sir Henry Ponsonby, the private secretary to Queen Victoria, and the great grandson of Lord Grey, prime minister from 1830 to 1834. See Raymond A. Jones, *Arthur Ponsonby: The Politics of Life* (London: Christopher Helm, 1989) at 1 and 11.

[121] U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 171, cols. 2001-2006 (1 April 1924).

[122] See Marvin Swartz, *The Union of Democratic Control in British Politics during the First World War* (Oxford: Clarendon Press, 1971) at 14-17. See also Sally Harris, *Out of Control: British Foreign Policy and the Union of Democratic Control, 1914-1918* (Hull: University of Hull Press, 1996) at 2-3.

[123] UDC manifesto of 1914, reprinted in Swartz, *ibid.* at 42. A year later, Ponsonby expounded further on this position in *Democracy and Diplomacy: A Plea for Popular Control of Foreign Policy* (London: Methuen and Co., 1915). Like other anti-war MPs, he lost his seat in the 1918 election, but was re-elected in 1922 as a Labour MP.

[124] U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 171, col. 2005 (1 April 1924).

government of 1924-1929,[125] but reinstated when MacDonald was re-elected prime minister in 1929, and it has been observed ever since, absent cases of emergency.[126] Failure to follow the practice carries no legal sanction, but would subject the government to criticism given the long-standing nature of the convention.

Some have taken the view that the Ponsonby Rule is of "limited value",[127] since the government is not legally bound to find valuable parliamentary time to debate a motion deploring its intention to ratify a treaty, and if it did find time, it is unlikely that the government would be defeated. This, of course, assumes the government holds a majority. Moreover, although there is no rule flowing from the Ponsonby procedure that requires Parliament to debate the proposed treaty action, and parliamentary time is limited, it may still be difficult for the leader of the House to resist a debate on an important or controversial treaty that has been laid before Parliament. Ponsonby himself admitted as much in his original announcement when he stated:

> In the case of important Treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this [21 day] period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the Treaty in question.[128]

It is also possible for members of both Houses to debate a proposed treaty action by initiating a private member's statement or bill, and making use of the parliamentary questions procedure, both written and oral.

In my view, however, the most important benefit of the Ponsonby Rule has been the timely access provided to Parliament and the public to information about recent treaties, and hence its encouragement of greater transparency in treaty making, even though not every treaty laid before Parliament is expressly approved. This, in fact, was Ponsonby's intention when, in 1924, he warned that "[r]esolutions expressing Parliamentary approval of every Treaty before ratification would be a very cumbersome form of procedure and would burden the House with a lot of unnecessary business."[129] He went on to note that "[t]he absence of disapproval may

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[125] The Conservative under-secretary of state for foreign affairs, Mr. Ronald McNeill, referred to the practice as an "utterly absurd rule" during a debate on a Labour resolution requiring all treaties to be ratified with the consent of Parliament: U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 181, col. 1443 (11 March 1925). The resolution was later defeated by 255 votes to 133: U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 181, cols. 1474-78 (11 March 1925).

[126] *H.C. Factsheet No. 14*, *supra* note 114 at 3.

[127] Lord Templeman, "Treaty-Making and the British Parliament" (1991) 67 Chicago-Kent L. Rev. 459 at 466.

[128] U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 171, cols. 2003-2004 (1 April 1924).

[129] U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 171, col. 2004 (1 April 1924).

be accepted as sanction, and publicity and opportunity for discussion and criticism are the really material and valuable elements which henceforth will be introduced."[130]

Since January 1997, an additional, and equally valuable, practice has developed in the UK whereby an "explanatory memorandum" ("EM") is also made available for every treaty laid before Parliament under the Ponsonby Rule as a means of improving parliamentary treaty scrutiny.[131] As with the unratified treaties, copies of the EMs are made available to members of both Houses through the Votes Office and the Printed Paper Office, and are distributed to the chairpersons of the relevant select committees. The EMs are also posted on a treaty website maintained by the FCO[132] and through this medium are readily available to the public. EMs are drafted by the government department that has the main policy interest in a particular treaty,[133] but are cleared through the relevant legal adviser at the FCO.[134] They are signed by a minister, preferably the minister with responsibility for the subject matter of the treaty, and are intended to provide information on the contents of the treaty, the rationale for the government's support for ratification, and the government's view of the benefits and burdens for the UK in becoming a treaty party. EMs also put on record which minister is primarily responsible for the treaty, the anticipated financial implications of ratification, the means required to implement the treaty, and the outcome of any discussions that have taken place within government and with interested parties, such as business and special interest groups.[135] EMs also provide information on the content of any reservations or declarations.[136]

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[130] *Ibid*.

[131] The undertaking by the relevant ministers to provide an EM is found in the form of a Written Answer published in U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 287, col. WA 430 (16 December 1996) and U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 576, col. WA 101 (16 December 1996). This undertaking was made following an unsuccessful attempt by Lord Lester of Herne Hill, QC, to subject the treaty-making power to parliamentary approval through the introduction of a *Treaties (Parliamentary Approval) Bill*: see U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 569, col. 1530 (28 February 1996). The bill was withdrawn in exchange for the government's undertaking to introduce a system of EMs by administrative, non-statutory means, as acknowledged in the document entitled "Evidence to the Royal Commission on the Reform of the House of Lords" ["FCO Evidence"], reproduced in the volume of evidence and the CD-ROM released with the commission's report: U.K., Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534 (London: Her Majesty's Stationery Office, 2000) [*Wakeham Report*].

[132] See *supra* note 117.

[133] Only fifty-five per cent of EMs are drafted by the Foreign & Commonwealth Office. See "FCO Evidence", *supra* note 131 at para. 30. This is why the FCO has prepared "Guidelines on Explanatory Memoranda for Treaties" to assist other government departments.

[134] See *Treaties and MOUs*, *supra* note 32 at 9.

[135] See generally *ibid.* at 9-11 and the sample EM at 12-14.

[136] A supplementary EM is laid before Parliament if there are any changes to the content of a reservation or declaration, or if the government wishes to make any additional reservations or declarations. See *ibid.* at 11.

Since November 2000, the FCO has also ensured that a copy of every treaty laid under the Ponsonby Rule is sent to the relevant departmental select committee,[137] thereby enabling the existing committee system to initiate a timely inquiry, if desired, by drawing attention to a new treaty action under consideration. Such inquiries serve to involve both the government and the non-governmental community in the submission of written and oral evidence, with the utility of such submissions leading to calls within the UK for the establishment of a designated treaty scrutiny committee to ensure the institutionalized scrutiny of all international treaties. The Royal Commission on the Reform of the House of Lords reported favourably on this proposal in early 2000,[138] as did the House of Commons Procedure Committee in mid-2000[139] (having been prompted by a request from the Defence Committee to inquire into what it viewed as Parliament's unsatisfactory role in treaty making[140]). In 2004, the Joint Committee on Human Rights added its voice, viewing the "lack of effective parliamentary scrutiny [as] particularly pressing in relation to human rights treaties."[141] While this call for a treaty committee has (so far) been resisted, nothing bars an existing committee from undertaking a treaty enquiry, with the Joint Committee taking the lead.[142] The Joint Committee has now advised that it will report to Parliament on all human rights treaties, viewing the reporting mechanism as a

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[137] *The Ponsonby Rule*, *supra* note 113. Select committees are appointed by the House of Commons to perform a wide range of functions and over the years have become the principal mechanism by which Parliament holds government ministers and their departments to account. See Erskine May, *supra* note 115 at c. 26.

[138] Submissions (in which the author was involved) were made to the House of Lords Liaison Committee and the Royal Commission on the Reform of the House of Lords in 1999, urging the establishment of a treaty scrutiny committee. The FCO also submitted its views on the proposal in "FCO Evidence", *supra* note 131. The commission recommended that the Liaison Committee consider establishing such a committee since it was, in the commission's words, "exactly the mechanism we believe is required to carry out the technical scrutiny of such treaties" (*Wakeham Report*, *supra* note 131 at 91). The Lords' submission and "FCO Evidence", *supra* note 131, can also be found in the appendices to this report. The matter remains before the Liaison Committee, which is the body responsible for coordinating committee activity in the House.

[139] U.K., H.C., Select Committee on Procedure, *Second Report: Parliamentary Scrutiny of Treaties* (HC 210) (London: Her Majesty's Stationery Office, 2000). For the government's response, see U.K., H.C., Select Committee on Procedure, *The Government's Response to the Procedure Committee's Second Report of Session 1999-2000, Parliamentary Scrutiny of Treaties* (HC 210) (London: Her Majesty's Stationery Office, 2000), online: Foreign & Commonwealth Office <http://www.fco.gov.uk/Files/kfile/scrutinytreaties,0.pdf>.

[140] U.K., H.C., Select Committee on Defence, *Third Report: NATO Enlargement* (HC 469) (London: Her Majesty's Stationery Office, 1998) at paras. 103-06.

[141] U.K., Joint Committee on Human Rights, *Protocol No. 14 to the European Convention on Human Rights* (HL Paper 8/HC 106) (London: Her Majesty's Stationery Office, 2004) at para. 6 [*Report on Protocol No. 14*].

[142] See U.K., Joint Committee on Human Rights, *The UN Convention on the Rights of the Child* (HL Paper 117/HC 81) (London: Her Majesty's Stationery Office, 2003); U.K., Joint Committee on Human Rights, *The International Covenant on Social, Economic and Cultural Rights* (HL Paper 183/HC 1188) (London: Her Majesty's Stationery Office, 2004).

means to "enhance the democratic legitimacy of human rights obligations incurred ... by the Executive pursuant to the prerogative power."[143]

Some treaties are not subject to the Ponsonby Rule. Treaties that explicitly call for parliamentary approval in order to come into force are handled outside of the Ponsonby process,[144] as are treaties that are not subject to ratification in the international sense, although these treaties are later laid before Parliament upon their entry into force via publication in the *Treaty Series*.[145] Bilateral double taxation agreements are also exempt, since there is a statutory requirement to expose such treaties to parliamentary scrutiny when the draft order-in-council providing for the taxation relief is laid before the House of Commons for approval.[146] These too are also later published in the *Treaties Series*. Lastly, the Ponsonby Rule allows for exceptions when other means of consulting or informing Parliament can be used instead, although such departures from the rule are rare.[147]

The UK government has also engaged in extraparliamentary treaty consultations, with the public discussion of the *Rome Statute of the International Criminal Court*[148] prior to ratification being the first example.[149] As Professor Warbrick has so aptly noted, if extra-parliamentary consultations on how best to implement a treaty are feasible prior to ratification, then surely such consultations are possible within Parliament.[150] The UK has also shown that it is possible to carry out a public consultation on the position to be adopted at the negotiation stage of treaty making. For example, with respect to amending the 1972 *Biological and Toxin Weapons*

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[143] *Report on Protocol No. 14*, *supra* note 141 at para. 7.

[144] Section 12 of the *European Parliamentary Elections Act 2002* (UK), 2002, c. 24, for example, requires any treaty increasing the powers of the European Parliament to be approved by a specific Act of Parliament in order for ratification to take place. The UK has established extensive, sophisticated, and systematic methods for the parliamentary scrutiny of EU developments. See also Priscilla Baines, "Parliamentary Scrutiny of Policy and Legislation: The Procedures of the Lords and Commons" in Philip Giddings & Gavin Drewry, eds., *Britain in the European Union: Law, Policy and Parliament* (New York: Palgrave Macmillan, 2004) at 60-96; Adam Jan Cygan, *The United Kingdom Parliament and European Union Legislation* (The Hague: Kluwer Law International, 1998).

[145] *Supra* note 117.

[146] See the Written Answer to a parliamentary question on "Command Papers (Economies)" provided by the Lord Privy Seal: U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 4, col. WA 82 (6 May 1981).

[147] See *The Ponsonby Rule*, *supra* note 113.

[148] *Rome Statute*, *supra* note 24.

[149] The consultation was carried out through the publication in August 2000 of a draft version of an "International Criminal Court Bill", with a request for comments from the public, parliamentarians, senior judges, police and legal associations, human rights organizations and academics. By the end of the consultation period on 12 October 2000, forty-five submissions had been received, leading to the introduction of a revised bill in the House of Lords on 14 December 2000, which would later become the *International Criminal Court Act 2001* (U.K.), 2001, c. 17.

[150] Colin Warbrick, "Current Developments: Treaties" (2000) 49 I.C.L.Q. 944 at 950.

Convention,[151] public consultations were conducted from April to September 2002, and involved the publication of a consultation document that expressly sought "views from MPs, NGOs, and other organisations and individuals with an interest in [the] subject."[152]

V. The Australian Contribution to an Improved Treaty-Making Process

Australia also serves as a model for reforming the Canadian treaty-making process, particularly given Canada and Australia's shared legal heritage and similar political structure. As in Canada, treaty making is a prerogative power exercised by the federal executive of Australia,[153] and like Canada, Australia experienced an earlier era of parliamentary participation that gradually fell into decline. A study undertaken in the mid-1960s revealed that fifty-five treaties had received the Australian parliament's approval prior to ratification between 1919 and 1963.[154] Then in 1961, at the behest of Prime Minister Robert Menzies, a practice began whereby all treaties were tabled in both Houses of the Commonwealth Parliament for a period of time prior to ratification.[155] But this practice, oddly enough, also fell into disuse in Australia in the 1970s, and was replaced with a practice of tabling batches of treaties at six-month intervals, usually after the executive had given the nation's consent to be bound, and thus leaving no room for prior parliamentary scrutiny.[156]

As in Canada, however, a ratified treaty in Australia requires the passage of domestic legislation to gain direct domestic legal effect (unless, of course, there is existing legislation that is sufficient to give effect to the obligations in the new treaty).[157] The Australian constitution, however, in marked contrast to that of Canada, contains an express "external affairs" power in section 51(xxix), which has been interpreted broadly by the Australian courts so as to grant the Commonwealth

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[151] *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, 10 April 1972, 1015 U.N.T.S. 163, Can. T.S. 1975 No. 12, 11 I.L.M. 310 (entered into force 26 March 1975).

[152] U.K., H.C., "Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons", Cm 5484 (London: Her Majesty's Stationery Office, 2002) at 3, online: Foreign & Commonwealth Office: <http://www.fco.gov.uk/Files/kfile/btwc290402,0.pdf>.

[153] The inheritance of the prerogative power by the federal rather than state executive is confirmed by section 61 of the *Commonwealth of Australia Constitution Act, 1900* (U.K.), 63 & 64 Vict., c. 12 [Australian constitution].

[154] Günther Doeker, *The Treaty-Making Power in the Commonwealth of Australia* (The Hague: Martinus Nijhoff, 1966) at 138, 257-61.

[155] See Anne Twomey, "International Law and the Executive" in Brian R. Opeskin & Donald R. Rothwell, eds., *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997) [Opeskin & Rothwell, *Australian Federalism*] at 87.

[156] See Twomey, *ibid.* See also Daryl Williams, "Establishing an Australian Parliamentary Treaties Committee" (1995) Pub. L. Rev. 275 at 278-79 [Williams, "Establishing a Treaties Committee"].

[157] For a current review of the reception of international law in Australia, see Hilary Charlesworth *et al.*, "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney L. Rev. 423.

Parliament the power to enact any legislation necessary to bring into effect Australia's treaty obligations, even when the subject matter of the legislation falls within the constitutional competence of the six state parliaments.[158] If such legislation conflicts with any state law, section 109 of the Australian constitution provides that the Commonwealth law prevails to the extent of any inconsistency. Thus, the Australian courts take the opposite position to that taken in Canada since the *Labour Conventions* case, having decided that the consequences that flow from allowing the state parliaments to hamper the national parliament's ability to ensure treaty compliance outweigh the possible usurpation or emasculation of the states' powers.

Since 1996, however, Australia has reformed its treaty-making process through the creation of a designated parliamentary committee to which all future treaty actions must be sent before they become binding legal obligations. Known as the Joint Standing Committee on Treaties (or "JSCOT"), the story of its creation is intertwined with the Australian High Court's decision in *Teoh*,[159] where it was held that the ratification of a treaty created a legitimate expectation that the executive and its agencies would act in conformity with that treaty, even when the treaty had not been implemented into domestic law. The Supreme Court of Canada later adopted a similar position in *Baker*,[160] notwithstanding the almost immediate repudiation of the *Teoh* principle by the Australian Government.[161] *Teoh* did, however, add fuel to a passionate debate then taking place about the perceived lack of parliamentary or public oversight regarding Australia's involvement in international affairs that had been triggered by the *Toonen* decision[162] of the UN Human Rights Committee, which had found Australia in breach of the *International Covenant on Civil and Political Rights*[163] because of a criminal ban on homosexuality in Tasmania. The *Toonen* case was both a political issue, with some expressing concern about the impact of UN bodies on Australian sovereignty, and a federal issue, given the Commonwealth government's

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[158] See generally Tony Blackshield & George Williams, *Australian Constitutional Law and Theory*, 3d ed. (Sydney: Federation Press, 2002) at 774-801; Leslie Zines, *The High Court and the Constitution*, 4th ed. (Sydney: Butterworths, 1997) at 274-86. On the key case of *The Commonwealth v. Tasmania*, (1983), 158 C.L.R. 1 (H.C.A.) [*Tasmanian Dams* case], see Andrew C. Byrnes, "The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism" (1985) 8 B.C. Int'l & Comp. L. Rev. 275-339.

[159] *Supra* note 3.

[160] *Supra* note 5.

[161] Australia, Department of Foreign Affairs and Trade, Media Release M44, "Joint Statement M44 by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney General, Michael Lavarch: International Treaties and the High Court Decision in *Teoh*" (10 May 1995), online: Department of Foreign Affairs and Trade <http://www.dfat.gov.au/media/releases/foreign/1995/m44.html>. See also Lacey, "In the Wake of *Teoh*", *supra* note 3. South Australia has also passed anti-*Teoh* legislation, even though an expectation cannot arise from state action.

[162] Human Rights Committee, Communication No. 488/1992, *Toonen v. Australia*, 1994, UN Doc. CCPR/C/50/D/488/1992.

[163] *Supra* note 6. Australia has been a treaty party to the covenant since 1980.

ability to use the external affairs power to override Tasmanian state law to comply with the committee's decision.[164]

Given this interest in international law, including treaty making,[165] a request was made to the Senate Legal and Constitutional References Committee in December 1994 to undertake an extensive review of the treaty-making power. The results of this review were published in November 1995, in the form of an extensive report entitled *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*,[166] which recommended improved access to treaty information, an enhanced role for Parliament through the creation of a treaty committee,[167] and greater consultation with industry, civil society, and subnational governments. The report received a favourable response from the coalition government that came to power after the March 1996 election,[168] and on 2 May 1996, the minister for foreign affairs and the attorney general made a statement to Parliament introducing reforms that would, in their words, "overcome what this Government considers to have been a democratic deficit in the way treaty-making has been carried out in the past."[169]

Under the reformed treaty-making process, all proposed treaty actions must, according to administrative practice rather than legislation, be tabled in Parliament at least fifteen sitting days before binding action is taken, although there is some

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[164] See Brian R. Opeskin & Donald R. Rothwell, "The Impact of Treaties on Australian Federalism" (1995) 27 Case W. Res. J. Int'l L. 1 at 49-54.

[165] An interest also evident across the Tasman Sea: in 1993, the New Zealand Law Commission circulated a draft report, *The Making, Acceptance and Implementation of Treaties: Three Issues for Consideration*, prepared by its then president, Sir Kenneth Keith, which later led to the publication of *Report 45: The Treaty Making Process: Reform and the Role of Parliament* (Wellington: Law Commission, 1997), calling for the creation of a treaty committee.

[166] Austl., Commonwealth, Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (N.p., November 1995), online: Parliament of Autralia—Senate <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/pre 1996/treaty/report> [*Trick or Treaty?*].

[167] The proposal to create a Standing Committee on Treaties was long-standing, having been introduced in 1983 by Brian Harradine, Australia's longest-serving independent senator, and then reintroduced in subsequent sessions. See Twomey, *supra* note 155 at 88; I.A. Shearer, "International Legal Notes" (1995) 69 Austl. L.J. 404 at 406, n. 12.

[168] In part because the report was a reflection of the government's own policies. See Daryl Williams, "Australia's Treaty-Making Processes: The Coalition's Reform Proposals" in Alston & Chiam, *supra* note 15, 185 at 192 [Williams, "Australia's Process"]. Coalition support for a treaty committee was also fostered by the public reaction to the discovery that Prime Minister Paul Keating had secretly negotiated a mutual security treaty with Indonesian President Suharto in 1995. See also Greg Sheridan "Security deal moves into the open" *The Australian* (21 October 2004) online: The Australian <http://www.theaustralian.news.com.au>.

[169] Australia, Department of Foreign Affairs and Trade, Media Release FA29, "Joint Statement by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams: Government Announces Reform of Treaty-Making" (2 May 1996), online: Department of Foreign Affairs and Trade <http://www.dfat.gov.au/media/releases/foreign/1996/fa29.html>.

flexibility when circumstances require either a shorter or longer time period.[170] Each treaty is tabled with a "national interest analysis" ("NIA"), a public document prepared by the line agency in consultation with the Department of Foreign Affairs and Trade ("DFAT"), that sets out the proposed treaty action's advantages, legal impacts and financial costs, and documents the consultation that has taken place.[171] The tabled treaty (and NIA) is then sent for scrutiny and review to JSCOT, a relatively large all-party committee comprised of nine members of the House of Representatives and seven members of the Senate, and supported by a small secretariat. JSCOT is empowered to inquire into and report upon any treaty matter, whether bilateral, plurilateral or multilateral, including treaties in the process of being negotiated, as well as those that have already been concluded. It can accomplish this mandate through several means, including the holding of public hearings across Australia and the review of submissions from other parliamentarians, non-governmental organizations, academics, industry groups, and individual members of the public.[172] At the completion of its inquiry, JSCOT prepares a report for Parliament containing its advice on whether the treaty should bind Australia and on any other related issues that may have emerged during the review process. These reports, as well as the treaty text, the NIA, the hearing transcripts, and even the written submissions received by JSCOT, are all made available to the public (and the world) through the Committee's website, thereby serving as a useful resource on a treaty's intentions, effects, and consequences.[173] To bolster these reforms, Australia also created an excellent online treaty database, providing free public access to treaty texts, their ratification records, NIAs, and detailed information on multilateral treaty actions currently under negotiation, consideration or review by the Australian government.[174]

The reformed treaty-making process has now been in place for over nine years. During this time, well over two hundred treaties have been examined by JSCOT, resulting in sixty-five reports to Parliament,[175] which in turn have prompted over thirty "Government Responses".[176] While some treaty actions so examined have been relatively bland, others have prompted substantial numbers of written submissions

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[170] Special arrangements can be made if a treaty is sensitive or requires urgent and immediate implementation.

[171] See all the NIAs since 1996 on AustLII, online: <http://www.austlii.edu.au/au/other/dfat/nia>.

[172] Notices for meetings appear regularly in *The Australian* newspaper under the heading "What's Happening at Your House," and JSCOT staff regularly send out email alerts to civil society groups about specific inquiries of interest.

[173] See JSCOT's website, online: <http://www.aph.gov.au/house/committee/jsct/index.htm> [JSCOT website].

[174] See the Australian Treaties Database, online: <http://www.info.dfat.gov.au/treaties>. The Department of Foreign Affairs and Trade also supports the Australian Treaties Library maintained by the Australasian Legal Information Institute, online: <http://www.austlii.edu.au/au/other/dfat/>.

[175] JSCOT, "Committee Activities (Inquiries and Reports)", online: JSCOT <http://www.aph.gov.au/house/committee/jsct/report.htm>.

[176] The Government Response to a JSCOT report is also made publicly available on the JSCOT website, *supra* note 173.

and the holding of public hearings in every capital city in Australia.[177] In fact, so successful has this process been in enhancing public awareness of treaties that in 2000, after record levels of public submissions to JSCOT, the government agreed to extend the scrutiny period to twenty sitting days (roughly equivalent to eight weeks) for treaties identified as being of major political, economic or social significance and likely to attract considerable public interest and debate.[178] In any event, the government's own review of the process in 1999 concluded that the typical fifteen-sitting-day period (roughly equivalent to five weeks) did not pose an obstacle to the executive's ability to undertake timely treaty action.[179] Moreover, the sufficiency of the scrutiny process was seen, at least by the government,[180] as alleviating any need for a rule requiring the parliamentary approval of treaties for ratification, as had been previously mooted in the deliberations of the 1988 Constitutional Commission[181] and a private member's bill.[182]

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[177] See *e.g.* Austl., Commonwealth, JSCOT, *Report 61: Australia-United States Free Trade Agreement* (23 June 2004), online: JSCOT website, *ibid.*

[178] As a result, treaties are classified as either category A (requiring fifteen sitting days) or category B (requiring twenty sitting days). See the brief explanation on the Department of Foreign Affairs and Trade's website, online: <http://www.dfat.gov.au/treaties/making/category.html>. Many bilateral treaties fall within category A, especially "template" treaties on matters of tax and extradition, while category B is for multilateral treaties and significant "one-off" bilateral treaties such as the *Timor Sea Treaty* (East Timor and Australia, 20 May 2002, [2003] A.T.S. 13 (entered into force 2 April 2003)).

[179] Austl., Commonwealth, *Review of the Treaty-Making Process* (N.p., August 1999), online: Attorney-General's Department <http://law.gov.au/agd/Attorney-General/Treaty-Making%20Process.htm> [*1999 Review*]. See also Glen Cranwell, "The Treaty-Making Process in Australia: A Report Card on Recent Reforms" [2001] Austl. Int'l L.J. 177; Madelaine Chiam, "Evaluating Australia's Treaty-Making Process" (2004) 15 P.L. Rev. 265.

[180] *1999 Review*, *ibid.* at para. 5.4.

[181] In the end, only two members of the Constitutional Commission supported the view that there should be a statutory requirement that the ratification of treaties be conditional on either the approval of both Houses of Parliament or the disallowance by either House within a specified period: Austl., Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission*, vol. 2 (Canberra: Australian Government Publishing Service, 1988) at 745-46 (Professor Leslie Zines) and 749 (Sir Rupert Hamer).

[182] Senator Vicki Bourne, the Foreign Affairs spokesperson for the Australian Democrats, introduced a private member's bill in June 1994, and again in May 1995, that would have required the executive to secure Parliament's approval to ratify a treaty: see Vicki Bourne, "The Implications of Requiring Parliamentary Approval of Treaties" in Alston & Chiam, *supra* note 15, 196 at 196-97. This proposal has been seen by some to breach the constitutional separation of powers in Australia, as well as in New Zealand where, coincidentally, a similar private member's bill was proposed by Green Party MP Keith Locke. See also Mai Chen, "A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making" (2001) 19 N.Z.U.L. Rev. 448; Treasa Dunworth, "International Treaty Examination: The Saga Continues" [2002] N.Z.L. Rev. 255 at 255-61. The Senate References Committee, however, drew no conclusions about approval versus scrutiny in *Trick or Treaty?*, *supra* note 166, and as noted earlier, Antigua and Barbuda already require parliamentary approval for treaty ratification (*supra* note 37). A similar proposal was included in a draft constitution for the UK published by the British Institute for Public Policy Research in 1993.

As for the content of the scrutiny, JSCOT has examined mostly new treaty actions, including new amendments to existing treaties, although the broad interpretation it has taken of its mandate has allowed for the examination of one treaty well after ratification (in essence providing an audit of that treaty's domestic implementation),[183] and the examination of another during its negotiation.[184] Some of its reports cover several treaties at once, while others focus solely on a treaty of particular importance, such as the *Rome Statute of the International Criminal Court*[185] and the *Kyoto Protocol*.[186] JSCOT has also examined the domestic legislation intended to implement a treaty obligation,[187] leading to the revision and improvement of this legislation, and the law and policy of a subject area based on a network of treaties (that subject area being extradition law).[188] It has also examined a treaty that the government had publicly stated it was not intending to ratify.[189] JSCOT has thus proven it has the powerful tool of initiative, and does not work solely at the behest of executive action.

JSCOT has usually concluded its review with a positive recommendation to the executive to take binding treaty action. But, as with other parliamentary committees, there can be dissenting reports, usually made by opposition members, and on

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[183] Austl., Commonwealth, JSCOT, *Report 17: United Nations Convention on the Rights of the Child* (28 August 1998), online: JSCOT website, *supra* note 173. This Convention has attracted considerable controversy in Australia since its ratification in 1990, not least because of its role in asylum cases such as *Teoh*, *supra* note 3. The JSCOT inquiry provided an opportunity for many Australians to be heard, as evidenced by the over 700 letters and submissions, although some contributors believed (erroneously) that the purpose of the inquiry was to facilitate Australia's withdrawal from the treaty. For an analysis of the JSCOT inquiry, see Jones, *supra* note 106.

[184] Austl., Commonwealth, JSCOT, *Report 14: Multilateral Agreement on Investment: Interim Report* (1 June 1998) and *Report 18: Multilateral Agreement on Investment: Final Report* (23 March 1999), online: JSCOT website, *supra* note 173.

[185] Austl., Commonwealth, JSCOT, *Report 45: The Statute of the International Criminal Court* (14 May 2002), online: JSCOT website, *ibid.* [*Report 45*].

[186] Austl., Commonwealth, JSCOT, *Report 38: The Kyoto Protocol—Discussion Paper* (4 April 2001), online: JSCOT website, *ibid.* Australia signed the *Kyoto Protocol* in 1997, but has since decided not to ratify the treaty. Australia is pursuing instead its own strategy for reducing greenhouse emissions: Australian Greenhouse Office, Department of the Environment and Heritage, "Kyoto Protocol", online: Australian Greenhouse Office <http://www.greenhouse.gov.au/international/kyoto/index.html>.

[187] Austl., Commonwealth, JSCOT, *Report 16: OECD Convention on Combating Bribery and Draft Implementing Legislation* (2 July 1998), online: JSCOT website, *supra* note 173.

[188] Austl., Commonwealth, JSCOT, *Report 40: Extradition—A Review of Australia's Law and Policy* (6 August 2001), online: JSCOT website, *ibid.* This report has since been discussed in some detail by the Federal Court of Australia in the extradition case of *Hellenic Republic v. Tzatzimakis*, [2002] FCA 340, [2002] WL 461785 at paras. 73-82 (F.C.A.) (WL), and in brief by the High Court of Australia in the extradition case of *Pasini v. United Mexican States*, [2002] 187 A.L.R. 409, [2002] HCA 3 at para. 92 (H.C.A.).

[189] Austl., Commonwealth, JSCOT, *Report 58: Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (23 March 2004), online: JSCOT website, *supra* note 173.

occasion, albeit rarely, JSCOT has made a unanimous recommendation against the ratification of a proposed treaty action.[190] It has also criticized departmental officials when they have provided inadequate NIAs, and it has criticized the government when it has found there to have been insufficient consultation, thereby having an impact on the pre-signature stage of treaty making.[191] As accepted publicly by the former attorney general, the unanimous conclusions of a multipartisan committee have an impact,[192] and in this way, the JSCOT process can serve to keep the executive branch in check, while also making a wealth of treaty information (including departmental information) available for scrutiny. A review of the appendices to the annual reports[193] published by DFAT reveals a steady list of departmental officials regularly appearing before JSCOT to provide it with information that is later made more widely available through transcripts and reports.[194] The final advantage to the JSCOT process is that it does not bar other parliamentary committees from examining a treaty action should they so desire,[195] such as when a particular committee has a specialized expertise in a treaty's subject matter. Furthermore, the familiarity with treaties generated by the JSCOT process may embolden other committees to act.

VI. Federal Innovations in Commonwealth Treaty Making

As for accommodating Canada's federal character in a reformed treaty-making process, the UK, perhaps surprisingly for some readers, also provides a model worthy of adaptation, though admittedly the model is at a nascent stage of development. With the passage of legislation in 1998 to "devolve" certain specified legislative and executive powers to new parliaments and administrations in Scotland, Wales, and Northern Ireland, the UK has become a quasi-federal state. While devolution is not, strictly speaking, a form of federalism since there has been no abdication of the

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[190] Austl., Commonwealth, JSCOT, *Report 11* (24 November 1997), online: *supra* note 173 at xii, concerning a proposed *Agreement on Economic and Commercial Cooperation* with Kazakhstan. The committee's unanimous support for the International Criminal Court in *Report 45*, *supra* note 185, is also interesting given the internal division then present within the government party.

[191] See *e.g.* Austl., Commonwealth, JSCOT, *Report 28: Fourteen Treaties Tabled on 12 October 1999* (6 December 1999) online: JSCOT website, *supra* note 173, concerning a proposed *Consular Agreement* with China. See also Austl., Commonwealth, JSCOT, *Report 18: Multilateral Agreement on Investment: Final Report* (23 March 1999) online: JSCOT website, *ibid.*

[192] See Williams, "Establishing a Treaties Committee", *supra* note 156 at 283.

[193] Unlike Canada, but like the UK, Australia continues to publish departmental annual reports. The DFAT annual reports (since that of 1993-1994) are also available online: Department of Foreign Affairs and Trade, Australia <http://www.dfat.gov.au/dept/annual_reports/>.

[194] Staff from the Commonwealth Attorney General's Department also attend JSCOT meetings regularly.

[195] See *e.g.* Austl., Commonwealth, Senate Foreign Affairs, Defence and Trade References Committee, *Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement* (Canberra: Australian Government Publishing Service, 2003).

central legislature's supremacy,[196] there is an intention to develop a convention whereby the central parliament in Westminster will "not normally legislate with regard to devolved matters ... without the consent of [the devolved body]."[197]

Under devolution, international relations, including treaty making, remain a matter expressly "reserved" to Westminster in relation to Scotland,[198] a function not transferred in relation to Wales,[199] and an "excepted matter" in relation to Northern Ireland.[200] Yet the spirit of devolution has led to a change in the UK's treaty-making practice so as to provide for the involvement of the devolved administrations where a treaty action might have implications for devolved areas of responsibility. This change builds on the practice of consultation already in place in respect of any treaty making affecting the Channel Islands, the Isle of Man or the Overseas Territories.[201] The UK has also opted for a *Labour Conventions*-style approach with respect to treaty implementation in the post-devolution era, accepting that a dual or "parallel"[202] competence for implementation exists as a result of the division of powers between Westminster and the devolved legislatures.

To ensure effective co-operation between the national and devolved orders of government, certain ground rules have been formalized to guide each administration

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[196] By contrast, in a federal state, legislative supremacy is divided between the central and regional authorities, with neither being subordinate to the other within their sphere of competence.

[197] This is known in Scotland as the "Sewel Convention" after the statement to this effect made by Lord Sewel during the second reading of the *Scotland Bill* (Bill 104, *Scotland Bill*, 1997-1998 Sess., 1998). See U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 592, col. 791 (21 July 1998). See also Barry K. Winetrobe, "Counter-Devolution? The Sewel Convention on Devolved Legislation at Westminster" (2001) 6 Scot. L. & Prac. Q. 286 at 287. The Sewel Convention is restated to apply to all the devolved bodies in the Memorandum of Understanding discussed at note 205, below. "Sewel motions", indicating that the consent of the devolved body has been obtained, were given fairly frequently during the early days of devolution. See Alan Page & Andrea Batey, "Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution" [2002] P.L. 501.

[198] See *Scotland Act 1998* (U.K.), 1998, c. 46, Sch. 5, Part I, s. 7.

[199] See *Government of Wales Act 1998* (U.K.), 1998, c. 38. The National Assembly for Wales is the weakest of the devolved bodies since it lacks the power to pass primary legislation.

[200] See *Northern Ireland Act 1998* (U.K.), 1998, c. 47, Sch. 2, s. 3. The UK's form of quasi-federalism is asymmetrical, both in terms of the powers given to the subnational units and the terminology used to describe these powers.

[201] It is recognized, however, that neither the Channel Islands and the Isle of Man, nor the fourteen Overseas Territories, are constitutionally part of the UK. The former are self-governing dependencies of the Crown with their own legislative assemblies, while the latter have separate constitutions, and most have elected governments with varying degrees of responsibilities for domestic matters.

[202] To borrow the term used by the Foreign Office Legal Adviser, Sir Franklin Berman, KCMG, QC, in "Treaty Implementation in Great Britain after 'Devolution'" in Thomas M. Franck, ed., *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (New York: Transnational Publishers, 2000) at 256.

and their respective officials as to what is now required.[203] These rules can be found in the "Memorandum of Understanding" and the five "overarching concordats",[204] including a "Concordat on International Relations" and another specifically on the "Co-ordination of European Union Policy Issues", agreed to by the UK government and the devolved administrations in 1999, with some more recent revisions as devolution has evolved.[205] Described as "one of the main pillars of the novel devolutionary architecture of the United Kingdom,"[206] these non-statutory executive agreements are "intended to be binding in honour only" rather than in law.[207] Nevertheless, the agreements promise inter-institutional co-operation in the exchange of information, the formulation of UK foreign policy, the negotiation of treaties, and the implementation of treaty obligations. Provision also exists in the concordats for ministers and officials from the devolved administrations to form part of a UK treaty negotiating team, and for the apportionment of any quantitative treaty obligations, as well as the imposition of penalties should the devolved bodies default on any agreed liability. In this way, the UK is sharing its treaty-making power with its subnational authorities, albeit on the condition of mutual respect for the confidentiality of the discussions and adherence to the resultant "UK line" in any international negotiations.[208]

Since devolution, the Scottish Parliament has established a dedicated parliamentary committee on "European and External Relations" to keep watch on matters of international relations, although the "external relations" aspect of its mandate has only been present since March 2003[209] and much of the committee's

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[203] A "Parliamentary Relations and Devolution Department" has also been established within the Foreign Office to assist with the new practice.

[204] Separate departmental concordats have been drafted which operate within the overarching framework.

[205] See U.K., H.C., "Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales", Cm 4444 (London: Her Majesty's Stationery Office, 1999), online: Cabinet Office <http://www.cabinetoffice.gov.uk/cabsec/previous%20years/1999/memorandum/cm4444.pdf>. The terms of the memorandum allow for regular review and revision. A revised memorandum was published in July 2000 to take account of the devolution process in Northern Ireland, which had been suspended from February to May 2000. However, on 14 October 2002, the Northern Ireland Assembly and Executive were again suspended and the province returned to direct rule from Westminster. The memorandum and concordats cease to operate during the suspension.

[206] Richard Rawlings, "Concordats of the Constitution" (2000) 116 Law Q. Rev. 257 at 258.

[207] *Ibid.* at 282. The concordat further states that it is not intended to constitute a legally enforceable contract or to create any rights or obligations that are legally enforceable. At most, it might create a "legitimate expectation of consultation" in the procedural sense if subject to judicial review. See *supra* note 197 and accompanying text.

[208] These requirements can be found in U.K., H.C., "Scotland's Parliament", Cm 3658 (London: Her Majesty's Stationery Office, 1997) at para. 5.4 ["Scotland's Parliament"].

[209] An amendment to rule 6.8 of the Standing Orders of the Scottish Parliament was adopted on 5 March 2003 to extend the remit of the "European Committee" to include external relations more broadly: *Standing Orders of the Scottish Parliament*, 2d ed., September 2003 (5th Revision, March 2005), online: The Scottish Parliament <http://www.scottish.parliament.uk/business/co/sto-3.htm#6>.

energies remain focussed on the scrutiny of EU developments.[210] This is not surprising since Scotland has long had an interest in gaining a greater voice in EU matters given the importance of fishing and agriculture to the Scottish economy, the distinct character of the Scottish legal system, the inclusion of matters of justice and home affairs in the EU mandate, and the desire for regional development funds.[211] The UK government has stated that it will take into account the views of the Scottish Parliament;[212] but both implicit and explicit in the nature of the devolved arrangements is the fact that Westminster retains the ability to override the actions of any devolved body and could do so to ensure the state's compliance with its international commitments.[213]

Notwithstanding the very recent nature of these developments, an example can already be found of the UK sharing its treaty-making capacity with its subnational units. The example concerns the *Convention on the International Protection of Adults*,[214] a treaty drawn up by the Hague Conference on Private International Law to improve the protection in international situations of incapacitated adults. The treaty essentially sets out rules to determine which country's courts or administrative authorities should have jurisdiction in situations involving adults with connections to more than one country. Under devolution, the subject matter of the treaty falls within the competence of the Lord Chancellor for England, Wales and Northern Ireland, and the (Scottish) minister of justice for Scotland. Consultations carried out in 1999 in England and Wales, Scotland, and Northern Ireland, with respect to the draft convention, revealed broad support for its provisions and led the Scottish Parliament in 2000 to enact those provisions into Scottish law that would prepare Scotland for the treaty's implementation.[215] The treaty was then signed on 1 April 2003 on the UK's behalf by a Scottish member of Parliament, Mr. Hugh Henry (who is also the Scottish deputy minister of justice), and presented to the Westminster parliament in July 2003 as required by the Ponsonby Rule.[216] The UK government, however, declined to bring the treaty into force for all of the UK and a note was entered upon ratification on 5

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[210] Details are available on the Scottish Parliament's website, online: <http://www.scottish.parliament.uk/business/committees/europe/>.

[211] A similar interest is evident within other subnational regions of the EU, including Catalonia, Flanders, and the German Länder, and is also reflected within the EU itself, which established a Committee of the Regions in 1991 to address, or deflect, increasing demands for greater regional involvement.

[212] See "Scotland's Parliament", *supra* note 208 at para. 5.7.

[213] *Scotland Act 1998*, *supra* note 198, s. 57; *Government of Wales Act 1998*, *supra* note 199, s. 108; *Northern Ireland Act 1998*, *supra* note 200, ss. 26-27.

[214] 13 January 2000, online: Hague Conference on Private International Law <http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=71>.

[215] *Adults with Incapacity (Scotland) Act 2000*, A.S.P. 2000, c. 4.

[216] The convention was presented as U.K., H.C., *Convention on the International Protection of Adults*, Cm 5881 (London: Her Majesty's Stationery Office, 2003).

November 2003 declaring that the convention would apply to Scotland alone.[217] The UK has indicated that the ratification will be extended to the rest of the UK once the necessary implementation legislation is in place.[218]

Federal innovations in treaty-making practice have also appeared in Australia, [219] particularly since the 1996 reforms, although there are earlier examples of the states themselves indicating a desire to participate in federal treaty making. One such example can be found in the state of Queensland, which established a Treaties Commission to advise the Queensland government on the benefit to Queensland of existing treaties.[220] In its first report, the Treaties Commission also advised the Queensland government (relying heavily on what was viewed erroneously as clear Canadian practice),[221] that the Australian states had the competence to enter into legally binding intergovernmental agreements.[222] A change of government in Canberra in 1975 removed the need for Queensland to test this thesis.[223] The commission was later disbanded in 1977.

During the subsequent tenure of the Fraser government, the matter of Commonwealth-state consultation with respect to treaty making in areas of state interest was placed on a more formal footing, with Prime Minister Fraser announcing a new era of "co-operative federalism" based on an agreement reached with the premiers in 1977.[224] This agreement was further formalized in 1982 by way of an

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[217] The ratification status and the text of the UK's declaration can be obtained from the website maintained by the Hague Conference on Private International Law, online: <http://hcch.e-vision.nl>.

[218] U.K., Foreign & Commonwealth Office, *Explanatory Memorandum on the Hague Convention on the International Protection of Adults* (London: Her Majesty's Stationery Office, 2003), online: Foreign & Commonwealth Office <http://www.fco.gov.uk>.

[219] Australia is comprised of six states, two internal territories, and many external territories. The six states were all former British colonies, which federated in 1901 to become the Commonwealth of Australia. The two internal territories were formed at a later date from land surrendered by the states, but have now been granted self-governing status. Although important differences remain, the internal territories are often treated as akin to states in practice.

[220] See *Treaties Commission Act 1974* (Qld.). The act was later repealed by the *Statute Law (Miscellaneous Provisions) Act 1993* (Qld.), Sch. 3(B)(4), with a note indicating that the commission had not functioned since 1977.

[221] For the debate about provincial treaty-making capacity in Canada, see *supra* note 46, especially van Ert. State claims to international personality, including the capacity to negotiate or enter treaties, have also been rejected by the High Court: *New South Wales v. The Commonwealth* (1975), 135 C.L.R. 337 (H.C.A.), [1975] 8 A.L.R. 1 [*Seas and Submerged Lands* case].

[222] See *e.g.* H. Burmester, "The Australian States and Participation in the Foreign Policy Process" (1978) 9 Fed. L. Rev. 257 at 262-64. The full text of the first report of the Treaties Commission can be found annexed to the proceedings of the Australian Constitutional Convention, held in Brisbane from 29 July to 1 August 1985.

[223] The then Queensland premier, Sir Joh Bjelke-Petersen, having played a key role in bringing down the Whitlam government through a Senate appointment that upset the balance and led to the blocking of supply, triggering the constitutional crisis that resulted in Whitlam's dismissal from office by the governor general in November 1975.

[224] The details of this agreement are found in Burmester, *supra* note 222 at 280-82.

agreed statement of "Principles and Procedures for Commonwealth-State Consultation on Treaties", which was later adopted by the Council of Australian Governments ("COAG") in 1992 and subsequently revised in 1996.[225] This statement is a public document designed to ensure that intergovernmental consultation takes place from the time negotiations begin on a treaty. It also requires the Commonwealth government to take into account the views of the states, although the lack of state consent does not bar treaty ratification.[226] The *Principles and Procedures* further provide for possible state representation at treaty negotiations and for the sharing of information, including departmental information, through the creation of a Standing Committee on Treaties ("SCOT") comprised of senior officials from each jurisdiction.[227] Following JSCOT's creation in 1996, an additional change was made to the "Principles and Procedures" to provide for state and territory consultation in the development of the NIAs applicable to treaties of state or territorial interest.[228] This inclusion also provides an opening for JSCOT to examine the NIA with a view to ensuring that state and territorial consultation has in fact taken place.

A "Treaties Council" has also been created as part of the reform package of 1996, although the idea (borrowed from Germany)[229] had previously been supported by the Australian Constitutional Convention of 1985,[230] the Constitutional Commission of 1988, and the Senate References Committee in its 1995 *Trick or Treaty?* report,[231] as well as the Leaders' Forum of 1995.[232] The Treaties Council consists of the prime minister, state premiers, and territorial chief ministers, and serves as a forum in which

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[225] Austl., Council of Australian Governments, *Attachment C—Principles and Procedures for Commonwealth-State Consultation on Treaties*, online: COAG <http://www.coag.gov.au/meetings/140696/attachment_c.htm> [*Principles and Procedures*]. The Council of Australian Governments is the peak intergovernmental forum in Australia, comprising the prime minister, state premiers, territory chief ministers and the president of the Australian Local Government Association. It has been in existence since 1992. Further details can be obtained from its website, online: COAG <http://www.coag.gov.au>.

[226] *Principles and Procedures*, *ibid.*, s. 3.1.

[227] See Williams, "Australia's Process", *supra* note 168 at 187-89. See also Cheryl Saunders, "Articles of Faith or Lucky Breaks? The Constitutional Law of International Agreements in Australia" (1995) 17 Sydney L. Rev. 150 at 162-63. Some subject areas have long had their own mechanisms for intergovernmental consultation on treaty developments. There is, for example, a 1992 Intergovernmental Agreement on the Environment setting out detailed Commonwealth-state mechanisms relating to the negotiation and implementation of environmental treaties. See Bill Campbell, "The Implementation of Treaties in Australia" in Opeskin & Rothwell, *Australian Federalism*, *supra* note 155 at 149.

[228] *Principles and Procedures*, *supra* note 225 at s. 4.2. See also Daryl Williams, "Treaties and the Parliamentary Process" (1996) 7 Pub. L. Rev. 199 at 201.

[229] A German "Permanent Treaty Commission" was created pursuant to the Lindau Agreement of 1957 and serves to coordinate the Länder view on treaties. See Saunders, *supra* note 227 at 165.

[230] See Saunders, *ibid.* at 163-66.

[231] *Supra* note 166 at c. 13.

[232] See Council of Australian Governments, Communiqué, "Council of Australian Government's Meeting" (11 April 1995), online: COAG <http://www.coag.gov.au/meetings/110495/>.

to share information and discuss treaties of particular sensitivity and importance to the states and territories.[233] It also has an advisory function and is supposed to meet at least once a year.[234] However, in its 1999 *Review of the Treaty-Making Process*, the government admitted that the council had met only once from 1996-1999.[235] This meeting occurred in November 1997, at which time the council did discuss four treaties and a draft UN declaration.[236] In light of the submissions made by the states and territories during the review process, it is clear that consultation at any early stage in a treaty's negotiation continues to be a matter of key concern, with several states still pushing for the ability to approve a treaty where the subject matter falls within state areas of responsibility. The Commonwealth government, however, is of the view that the 1996 reforms are sufficient, and while the Treaties Council has not shared the details of its meetings since 1997, its members have met through the broader COAG meetings (although this leads to a fear that treaties have become a ten-minute item on a lengthy inter-governmental agenda).

The Australian state parliaments, nevertheless, still push for a greater role in the negotiation, scrutiny, and sometimes approval of treaties of significance to them. Shortly after the publication of the *Trick or Treaty?* report, the Victoria Parliament established a Federal-State Relations Committee with the power to inquire into, consider, and report on matters of Commonwealth, state, and territory relations, including "areas of responsibility for which the State should have an enhanced role for the benefit of the Federation."[237] In its first report, released in October 1997, the committee chose to tackle the question of state involvement in treaty making, recommending that the Victoria Parliament establish its own treaties review committee.[238] The report also recommended that all treaties and treaty information be tabled in the Victoria Parliament and encouraged the Victoria government to call on the Commonwealth government to extend the fifteen sitting days to a period no longer than six months to provide time for state consideration of future treaty actions. The government of Victoria accepted the recommendation to table treaties in the Victoria

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[233] See Council of Autralian Governments, "Treaties Council", online: COAG <http://www.coag.gov.au/treaties_council.htm>.

[234] See *Principles and Procedures*, *supra* note 225 at ss. 5.1, 5.3.

[235] *1999 Review*, *supra* note 179.

[236] For details, see Council of Australian Governments, Communiqué, "Treaties Council Meeting Communique" (7 November 1997), online: COAG <http://www.coag.gov.au/meetings/071197/treaties_council_communique.htm>.

[237] Austl., Victoria, Federal-State Relations Committee, "Terms of Reference" in *Victorian Government Gazette*, No. G-26 (4 July 1996) at 1706-07, reprinted in Michael John, "Victoria Launches 'Insight' Committee" *The Parliamentarian* (April 1998) 143 at 145.

[238] Austl., Victoria, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (October 1997), especially c. 5, online: Federal-State Relations Committee <http://www.parliament.vic.gov.au/fsrc/report1/contents.htm> [*Victoria Report*].

Parliament, but refused to establish a treaty committee on resource grounds.[239] The Federal-State Relations Committee responded by keeping a eye on treaties itself, even tabling comments on the proposed *Multilateral Agreement on Investment*. However, it was itself disbanded in 2001.

JSCOT has itself recognized the state interest in treaty making, convening a meeting with representatives from all states and territories in 1999 to discuss the role for "parliaments" in treaty making, as well as state proposals for according such parliaments a greater role.[240] Two proposals, in particular, appeared to garner support at the meeting: the institution of procedures to ensure that the presentation of treaty information by state executives to state parliaments is a matter of routine, and the creation of parliamentary committees in each state and territory with specific responsibility for reviewing treaties.[241] After the seminar, the state representatives reported back to their respective parliaments, with some states, such as Western Australia, remaining strongly in favour of the parliamentary scrutiny of treaties at the state level.[242] In Queensland, the Legal, Constitutional and Administrative Review Committee ("LCARC") supported a middle ground position, recommending against a Queensland treaty committee on grounds of duplication, but successfully convincing the Queensland premier to periodically table in the Queensland Parliament a schedule of treaties under negotiation, as well as all JSCOT advices regarding proposed treaty actions.[243] It would then be open to members of the Queensland Parliament to debate the proposed treaty or refer the matter to a committee for further inquiry. The LCARC has also endorsed a suggestion made by Professor Cheryl Saunders to require the relevant state officials involved with intergovernmental relations to report annually to LCARC on treaty matters.[244]

Canada is also not without past examples of federal-provincial co-operation in treaty making where the circumstances have justified the involvement of one or more provinces. The negotiation of the *Canada-US Columbia River Treaty* of 1961 is an

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[239] Victoria's position is reproduced in Austl., Commonwealth, JSCOT, *Report 24: A Seminar on the Role of Parliaments in Treaty Making* (30 August 1999), online: JSCOT website, *supra* note 173 [*Report 24*].

[240] A full transcript of the meeting can be found in *Report 24*, *ibid*.

[241] A third proposal to create an interparliamentary working group on treaties, which stemmed from the *Victoria Report*, *supra* note 238, also received support.

[242] Austl., Western Australia, Standing Committee on Constitutional Affairs, *Report in relation to a Seminar on the Role of Parliaments in Treaty Making—Canberra 24 and 25* (Report No. 38) by Murray Nixon (N.p., 1999).

[243] Austl., Queensland, Legal, Constitutional and Administrative Review Committee, *The Role of the Queensland Parliament in Treaty Making* (Report No. 22) (N.p., April 2000) [*LCARC Report No. 22*]. The tabling of the actual treaty text was deemed unnecessary given the existence of the Australian Treaties Database, *supra* note 174. A favourable review of the new tabling requirement was conducted by the LCARC in 2003: Austl., Queensland, Legal, Constitutional and Administrative Review Committee, *The Role of the Queensland Parliament in Treaty Making—Review of Tabling Procedure* (Report No. 39) (N.p., July 2003).

[244] *LCARC Report No. 22*, *ibid.* at 9.

early example, where the obvious interest of British Columbia (the province in which the river originates)[245] led to the establishment of a federal-provincial liaison committee at the ministerial level and the inclusion of a provincial representative on the Canadian negotiating team.[246] An arrangement was also worked out between Ottawa and British Columbia whereby the province would be responsible for the treaty's execution, with an agreement to indemnify the federal government in the event of its failure to do so.[247] There are, however, no guarantees that the federal government will invite the provinces to participate in a treaty's negotiations, no matter how significant the treaty is to the province, and while such co-operation may occur, there is no formalized or institutionalised process for involving the provinces in treaty negotiations.

Various remedies for Canada's treaty-making woes have been proposed, with the subject being included on the agenda of several past studies, including the 1940 *Report of the Royal Commission on Dominion-Provincial Relations* (which recommended that the provinces give their power to implement international labour conventions to the federal parliament)[248] and the 1979 report of the Ontario Advisory Committee on Confederation (which recommended that all treaties should be ratified by both Houses of Parliament, with the Senate being replaced by a "House of Provinces").[249] Constitutional amendments have also been proposed. In 1972, the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada recommended, *inter alia*, that "[a]ll formal treaties should be ratified by Parliament rather than the Executive Branch" and that the "Government of Canada should, before binding itself to perform under a treaty an obligation that comes within the legislative competence of the Provinces, consult with the

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[245] Those familiar with BC politics will also know that the vast dams built on the Columbia and Peace Rivers were the desired legacy of the then premier W.A.C. Bennett, who used the dams to generate contracts and employment as well as huge amounts of hydroelectric power, half of which was sold to the US to benefit the provincial treasury.

[246] *Treaty between Canada and the United States of America relating to Cooperative Development of the Water Resources of the Columbia River Basin*, 17 January 1961, Can. T.S. 1964 No. 2 (entered into force 16 September 1964). See Bora Laskin, "Some International Legal Aspects of Federalism: The Experience of Canada" in David P. Currie, ed., *Federalism and the New Nations of Africa* (Chicago: University of Chicago Press, 1964) at 405-06. Atkey, writing in 1970, provides further examples of provincial participation in Canadian delegations to international conferences, mostly in the field of education: Atkey, *supra* note 46 at 171-75.

[247] See Martin, *supra* note 48 at 31.

[248] Canada, *Report of the Royal Commission on Dominion-Provincial Relations*, vol. 2 (Ottawa: Queen's Printer, 1940) at 48 (Chairs: N.W. Rowell and Joseph Sirois).

[249] Ontario Advisory Committee on Confederation, *Second Report of the Advisory Committee on Confederation: The Federal-Provincial Distribution of Powers* (Toronto: Queen's Printer, 1979) at 44. One member of this committee is now a member of the federal cabinet: Ken Dryden is the minister of social development.

Government of each Province that may be affected by the obligation."[250] A recent report by an Albertan committee of government MLAs, released in June 2004, echoes this last sentiment.[251]

A statutory approach to the problem has also been espoused. In 2002, the National Assembly of the province of Quebec enacted legislation to require the Assembly's prior approval for all important international commitments ("des engagements internationaux importants") intended to be made by either the Quebec or Canadian executive branch, provided that, in the latter case, the subject matter of the commitment falls within an area of Quebec responsibility.[252] The primary object of the new legislation, according to the then Quebec minister of international relations, Louise Beaudoin, was to democratize the process of treaty making by giving a voice to the elected representatives of the citizens of Quebec.[253] She also suggested that the new law would allow for greater transparency in the treaty-making process, suggesting that in some cases, a parliamentary commission could be established to study a proposed treaty action and invite submissions from the public.[254] The new law was also intended to address the concern in Quebec that the language, culture, and future interests of the province may be threatened if the federal government acts on the international stage without provincial agreement in areas of provincial competence.[255]

In essence, the Quebec legislation requires three actions to occur, and occur sequentially, for an important international commitment to be valid. The three actions are the signature by the responsible minister, the approval by the legislature (the National Assembly), and the ratification by the provincial government. The legislation also requires the minister to table all future treaty actions in the National Assembly, with an explanatory note on the content and effects of the commitment—a procedure that was expressly acknowledged during the legislative debates to be similar to that followed in the UK, Australia, and New Zealand.[256] Once tabled, the treaty can be the subject of a motion to either approve or reject, but not amend, provided at least ten

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[250] Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Queen's Printer, 1972) at 68-69 (Chairs: Gildas L. Molgat and Mark MacGuigan, MP).

[251] Alberta, *Report of the MLA Committee on Strengthening Alberta's Role in Confederation* (Edmonton: Government of Alberta, 2004) at 46, online: Government of Alberta, International and Intergovernmental Relations <http://www.iir.gov.ab.ca/canadian_intergovernmental_relations/documents/mla_committee_report_003.pdf>.

[252] *An Act respecting the Ministère des Relations internationales*, R.S.Q., c. M-25.1.1, s. 22.4.

[253] See Quebec, National Assembly, *Journal des débats*, 79 (20 March 2002) at 5247 (Louise Beaudoin).

[254] See *ibid.* at 5248.

[255] See the speech of the then premier Bernard Landry in Quebec, National Assembly, *Journal des débats*, 1 (22 March 2001) at 7-8 (Bernard Landry).

[256] See the debates within the Quebec Committee on Institutions: Quebec, Commission permanente des institutions, *Journal des débats*, 70 (1 May 2002), online: Assemblée nationale du Québec <http://www.assnat.qc.ca/fra/Publications/debats/journal/ci/020501.htm>.

days have passed since tabling to ensure time for access and reflection.[257] Provision is also made for cases of urgency, allowing the Quebec government to ratify an important international agreement before it is tabled or approved by the National Assembly.[258]

As for what constitutes an "important international commitment", the law suggests that all treaties requiring the passage of implementation legislation, the imposition of a tax, or the acceptance of an important financial obligation, as well as treaties concerned with human rights and freedoms or international trade, will require Assembly approval.[259] There is also a residual category for treaties determined by the minister to be so important as to require parliamentary approval,[260] with the *Kyoto Protocol* being identified by the minister during the legislative debates as an example because of its strategic importance.[261] However, treaties addressing technical issues and treaties signed by Canada affecting only matters within federal jurisdiction will not need National Assembly approval under the new legislation. Provision is also made to apply the new procedure to the denunciation and termination of an agreement in the same way that the process applies to the adoption and conclusion of a new agreement.[262]

It would be interesting to see other provinces in Canada adopt similar legislation to encourage, or bargain for, the institutionalisation of federal-provincial co-operation in treaty making, as well as greater access to treaty information; however, the stark problem with this legislative initiative is that it does not bind the government of Canada. The government of Canada may choose to seek advance provincial agreement to a future treaty action, but it is under no legal obligation to do so, nor is it bound by a resolution of disapproval from a provincial legislature. Nevertheless, I should note that the Quebec legislation was adopted by a unanimous vote in an assembly comprised of federalists and separatists, presumably because the democratic credentials of a greater role for the legislature in treaty making cuts across the political spectrum.

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[257] *An Act respecting the Ministère des Relations internationales*, *supra* note 252, s. 22.3. Pursuant to order-in-council 223-2004, G.O.Q. 2004.II.136 at 1738, dated 14 April 2004, the minister of economic and regional development and research exercises jointly with the minister of international relations the functions of the latter as regards any important international commitment that concerns international trade.

[258] *An Act respecting the Ministère des Relations internationales*, *ibid.*, s. 22.5.

[259] *Ibid.*, s. 22.2.

[260] *Ibid.*, s. 22.2(4).

[261] The comments of the minister during the debates within the Committee on Institutions can be found in the *Journal des débats* for 1 May 2002, *supra* note 256 at 32-39.

[262] *An Act respecting the Ministère des Relations internationales*, *supra* note 252, s. 22.6.

Conclusion and Recommendations

The desire for greater accountability in treaty law making has no natural political home. It is an idea that is neither left nor right, as evidenced by its embrace by Australian conservatives and British liberals alike. Nor is it decidedly American, as some have claimed, given the historical role that Commonwealth parliaments once played in the treaty-making process. It is not, however, a desire included in Prime Minister Paul Martin's much-publicized *Action Plan for Democratic Reform*[263]—a disappointing omission given that Canada is in greatest need.

In evaluating our current treaty-making process, it must not be forgotten that treaties are law—often permanent law—and as such, the law makers, be they ministers or officials, should be accountable to Parliament and the public that it serves. Their work product should also be made readily accessible, with this requiring more than the bare notation in *Hansard* that a certain number of treaties have now been tabled. As Allan Gotlieb stated many years ago: "It is, of course, obvious that a country must give suitable publicity to the treaties it concludes in order that the public may be aware of the undertakings and engagements its government makes."[264]

The adoption of rules requiring the tabling of all treaty actions in Parliament for a twenty-sitting-day period after signature but before ratification, as well as the public provision of explanatory memoranda on the legal effects and financial costs of a proposed treaty action, would serve to better educate us all as to the benefits and burdens of new treaty obligations, while also providing a suitable opportunity for parliamentarians to scrutinize the treaty action when desired. These steps may also instil greater treaty compliance by enhancing a treaty's democratic credentials. The quarterly publication of a list of treaties currently under negotiation—as done in Australia—and its provision to the provincial premiers and territorial leaders would also assist in alerting both the provinces and the public to future treaty actions of importance. The new Council of the Federation could serve as an intergovernmental forum for this purpose, akin to Australia's Treaties Council, while a robust approach by federal parliamentarians to the scrutiny of tabled treaties would offset the need for provincial treaty scrutiny requirements in their legislatures and the resulting duplication of effort. Consultations with civil society groups, industry leaders and other stakeholders could also be recorded in the documents so tabled, leading to the expectation over time that such consultation must take place. As for intergovernmental support, the concordat approach of the UK could be adopted in Canada to institutionalize, and make more transparent, the degree of federal-provincial co-operation at the pre-signature stage of treaty making.

In my view, however, a multipartisan federal parliamentary committee specifically dedicated to the task of treaty scrutiny is the best means to achieve both

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[263] Canada, Privy Council Office, *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform* (Ottawa: Government of Canada, 2004).

[264] Gotlieb, *supra* note 45 at 66.

public awareness and improved democratic accountability in the field of treaty making. A treaty committee focuses public attention on treaty making, dispells any myths and uncovers matters needing further investigation, and also provides a public repository for treaty information. Such a committee, however, must be established with the support of the government in power since the committee will need the co-operation of its ministers and officials. It must also be of an adequate size if it is to follow Australia's lead and carry out hearings beyond the confines of the capital, and it must be supported by an adequate secretariat to assist with the development of a corporate memory and a fruitful relationship with civil society groups, industry leaders, academics, and other non-governmental organizations.

As for the need for parliamentary approval for future treaty action, whether federal or regional, it is my view that the treaty-making process must allow for the possibility that a state will not ratify a treaty following an expression of parliamentary disapproval. All treaties need not be expressly approved by Parliament, but there should be a mechanism that enables Parliament to draw attention to a future treaty action that has strong opposition, and this mechanism should not rest on the goodwill or discretion of the executive branch. Oddly enough, such a mechanism is already in place in Canada for social security treaties,[265] and I can hardly see the expansion of this legal fetter on the prerogative power of the Crown causing any great harm. A negative resolution procedure applicable to treaties after signature but before ratification will not unduly tie the hands of the executive during treaty negotiation, and may foster a greater degree of consultation, and even co-operation, between the levels and branches of government at the pre-signature stage. It is also a middle ground position that balances the various interests at play.

A final impetus for securing a greater role for the elected legislature in the making of treaties comes from the domestic courts. No longer is it "elementary", to use the words of Lord Denning, "that these courts take no notice of treaties as such ... until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us."[266] Our common law courts are increasingly finding ways to give unincorporated treaties domestic legal significance, if not domestic effect, and for this reason too, I support a greater role for Parliament, whether federal, state, provincial or devolved, in the making of treaties. The resulting public record of Parliament's involvement prior to ratification could serve to either counterbalance the activism of the courts when Parliament is against giving domestic effect to a treaty, or bolster the decisions of the courts by providing evidence of Parliament's support for a treaty's provisions. In any event, a parliamentary role in treaty making is necessary to avoid engaging the nation in long standing legal commitments without public scrutiny and debate.

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[265] *Old Age Security Act*, *supra* note 14.

[266] *Blackburn v. Attorney General*, [1971] 1 W.L.R. 1037 at 1039. See also the argument made by Gotlieb in 1968 that because treaties do not, in themselves, become part of the "law of the land," there is less need to involve parliaments in the making of treaties: Gotlieb, *supra* note 45 at 14-15.