

Rules for our country, rules for our world

Prospects for enhancing Parliamentary oversight of
treaty-making and implementation in South Africa

A briefing paper prepared at the request of the
Portfolio Committee on International Relations and Cooperation

28 May 2010

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Overview

Treaties are **binding international agreements**, in **written** form, governed by **international law**. They create legal rights enjoyed by South Africa, and legal obligations owed by South Africa to other members of the international community. These rights and obligations may be upheld and **enforced** through **diplomatic means** as well as through the **limited judicial mechanisms** currently available under international law.

Treaties have been called the ‘workhorse’² of international law, ‘an indispensable tool of diplomacy’³ and ‘the most important instrument for regulating international affairs’,⁴ with some 54 000 treaties registered since the inception of the United Nations in 1948. By and large, the international community has made the transition from a club of States enjoying unfettered national sovereignty to accept that mutual interdependence and reciprocity must characterise a globalised world. The challenges we face in the regulation of the global economy, promoting sustainable development, mitigating and adapting to climate change, protecting human rights and building human security are increasing in complexity and – as they transcend national borders and domestic resources – demand concerted international cooperation. This reality accounts, at least in part, for the remarkable proliferation of treaties as a means of regulating the conduct of States. Well-drafted treaties also offer an added measure of certainty, predictability and fairness in international relations when compared with the more fluid, unwritten customary norms upon which the international legal order continues to rely.

South Africa regularly enters **bilateral treaties** with one other Party - whether a State, State-owned entity or international organisation – as well as **multilateral treaties** open to all States or groups of States. An analysis of data publicly available from the website of the Department of International Relations and Cooperation (DIRCO) indicates that since 1994, the Republic has undertaken to be bound by some **261 multilateral treaties** and **1694 bilateral treaties**

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² B Simma, ‘From bilateralism to community interest in international law’ (1994-VI) 230 *Recueil des Cours* 221-384 at 322-3.

³ A Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007) at 1.

⁴ G Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge: Cambridge University Press, 2007) at 3.

affecting every sphere of activity.⁵ This is in addition to the lively, if sometimes problematic practice of provincial and municipal international relations, which falls beyond the scope of this paper.⁶ Treaty-making and implementation clearly constitute a significant component of South Africa's practice of international relations.

A number of these treaties impose obligations on South Africa to take measures at the domestic level for their effective implementation, such as enacting implementing legislation, criminalising certain conduct, adopting uniform standards or shared working practices. South Africa's participation in certain treaty regimes – notably those in the area of trade – may even impact the day-to-day lives and livelihoods of South Africans. Thus, treaty-making and implementation impacts areas of vital concern **to Parliament as the legislative authority** in the Republic.

The role of Parliament in treaty-making and implementation is framed in general terms by the Constitution, which limits its role to ratification of agreements negotiated and signed by the Executive. Experience in other jurisdictions suggests that a field of practice, permitted by the Constitution but as yet unoccupied, may well be open to Parliament; and that there may be sound reasons of public policy for Parliament to enhance its proper oversight role.

The international legal framework

Most of the rules governing the capacity to enter into treaties, their formation, interpretation, modification and termination are found in the Vienna Convention on the Law of Treaties (VCLT),⁷ itself a treaty that opened for signature in 1969 and entered into force on 27 January 1980. Curiously, and perhaps as part of the legacy of an *apartheid* government hostile to the application of treaty-based rules, South Africa is not a Party to the VCLT. Nonetheless, it is generally accepted that the principal rules of the VCLT reflect customary international law and are thus applicable to all States,⁸ including South Africa.

The VCLT rules apply to treaties regardless of their 'particular designation'⁹ – that is, whether the treaty is called a 'Convention' or 'Framework Convention', 'Statute' (which tends to regulate an international organisation, like the International Court of Justice or the International Criminal Court), 'Exchange

⁵ Not all of these treaties are currently binding on South Africa, however, as they may require a predetermined number of ratifications before they enter into force.

⁶ See C Murray and S A Nakhjavani, 'South Africa' in H Michelmann (ed) *Dialogues on Foreign Relations in Federal Countries* (Montreal: McGill-Queens University Press, 2009).

⁷ (1969) UNTS 1155.

⁸ The customary status of key rules of the VCLT has been emphasised by the International Court of Justice in cases including *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045 at para 18; *Namibia (South West Africa) (Legal Consequences of the Continued Presence of South Africa)* [1971] ICJ Reports 3 at para. 94; *Gabčíkovo-Nagymaros Dam (Hungary/ Czechoslovakia)* [1997] ICJ Reports 3 at paras 42-6; and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain)* (Jurisdiction and Admissibility) [1995] ICJ Reports 6.

⁹ VCLT, op cit, Article 2(1)(a).

of Notes', 'Charter', 'Joint Declaration' etc.¹⁰ The term 'Memorandum of Understanding' is confusing as it is used in diplomatic practice both to refer to informal, non-binding agreements, not governed by international law and thus not *treaties* as defined by the VCLT, as well as to treaties where the Parties have an intention to create legal obligations. DIRCO had registered 16 'Memoranda of Understanding' as multilateral treaties, and 226 as bilateral treaties.

The process whereby a treaty becomes binding *under international law* may be understood in three basic stages: treaty **negotiation, adoption and signature, ratification or accession** and **entry into force**. In order to become binding under *South African law*, the treaty must also be **transformed** through an Act of Parliament, annexure to an Act of Parliament, or delegation of power to the Executive to bring the treaty into effect under South African law by publication in the Government Gazette.¹¹ Following **negotiations** between States, the authentic text of a treaty may be initialled (in the case of bilateral treaties); or adopted by a two-thirds majority vote at an intergovernmental conference (in the case of multilateral treaties). **Signature** can express a State's consent to be bound by the contents of a treaty, but is most often made *subject to ratification* at a later stage. **Ratification**, in turn, is the process whereby 'a State establishes on the international plane its consent to be bound by a treaty'.¹² This requirement of State *consent* clearly indicates that sovereignty is not being relinquished by ratification, but rather than ratification is a free exercise of that sovereignty.

Having ensured the compatibility of domestic law with new treaty obligations, the Executive will usually prepare a written instrument of ratification which it submits to the other Party to a bilateral treaty or to a depository specified in a multilateral treaty – usually the Secretary-General of the United Nations.¹³ Some treaties allow States that have not signed a treaty for whatever reason to nonetheless become bound by **accession**. Given the scant regard for treaty-making of the *apartheid*-era government, it is not surprising that after 1994, South Africa acceded to most key multilateral treaties which had been adopted or signed prior to the democratic dispensation. Finally, a treaty **enters into force** once it has attracted a sufficient number of ratifications, as specified in the treaty itself. For instance, the Rome Statute of the International Criminal Court was signed in July 1998 but only entered into force in July 2002, following the deposit of 60 instruments of ratification. States enjoy rights and obligation only under treaties **currently in force**.

The Constitutional framework

The idealism and values of 'transparency and accountability'¹⁴ that characterised the Kempton Park negotiations led the drafters of the Interim Constitution of 1993 to require parliamentary approval for ratification of all treaties, and to allow Parliament to decide whether a treaty should, in addition to

¹⁰ See Aust, *op cit*, at pp, 23-29.

¹¹ J Dugard, *International Law: A South African Perspective* (Cape Town: Juta, 2005) at 61.

¹² VCLT, *op cit*, Article 2(1)(b).

¹³ Aust, *op cit*, at 103.

¹⁴ Dugard, *op cit* at 58.

binding the Republic under international law, become part of the domestic law of South Africa. This stood in contrast to the position during the *apartheid* era, where treaty-making was the exclusive preserve of the Executive.

According to Professor Dugard, a distinguished South African scholar of international law, the long delays arising from the vetting of treaties for compliance with South African law prior to submission to Parliament led the drafters of the Final Constitution of 1996 to further limit the involvement of Parliament in treaty-making and implementation.¹⁵ S 231 of the Constitution sets out the general approach, excluding the requirement of Parliamentary approval for those agreements of a 'technical, administrative or executive nature' as well as those not requiring ratification or accession.

S 231 International agreements

- 1. The negotiating and signing of all international agreements is the responsibility of the national executive.*
- 2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*
- 3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*
- 4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*
- 5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.*

In the view of one commentator, the model of S 231 reflects 'both monist and dualist elements in uneasy alliance.'¹⁶ While **monism** (the prevailing view in civilian legal systems) sees international and domestic law as part of a whole, with obligation arising in one sphere being automatically enforceable in the other, **dualism** (which prevails in common law systems) understands international and domestic law as two distinct systems of law. S 231 displays monist elements in its treatment of self-executing provisions – a test which 'may not be at all easy' to apply,¹⁷ and dualist elements in requiring most international agreements to be 'enacted' by Parliament in order to become law in the Republic.

¹⁵ Ibid at 59.

¹⁶ Aust, op cit at 195.

¹⁷ Ibid.

Elements of current South African treaty-making practice

Treaties are usually initiated and negotiated 'behind closed doors.'¹⁸ As such, it is difficult to assess the strategies and methods of South African diplomats in the course of bilateral or multilateral treaty negotiations based on open sources. In a recent article assessing the role of Parliament in South Africa's foreign policy development, AK Ahmad (a parliamentary official writing in an individual capacity) refers to *Quagliani's* case¹⁹ before the Constitutional Court to provide insight into the negotiation process of an extradition treaty:

In the South African Constitutional Court's decision in the Quagliani case, for instance, Sachs J provides an overview of the process involved in the negotiation of an international agreement; in this case the extradition treaty signed between South Africa and the United States. The uncontested facts provide a timeline of the negotiation process starting with preparatory discussions between officials from both sides in May 1998 to the ratification of the agreement on 2 November 2000 in the National Council of Provinces, and the publication of the agreement in the Government Gazette on 29 June 2001.

This timeline provides useful insights into the negotiation, signing and ratification of international agreements. Firstly, it shows that it took approximately three years from the discussion and negotiation phase to the ratification and publication of the international agreement. Secondly, in this instance, the Department of Justice and Constitutional Development as well as DIRCO were involved in the agreement. The primary department however, appears to have been the Department of Justice. The role played by staff and experts from both sides in the initial negotiation and drafting of the agreement is the third observation that can be distilled from the timeline. Fourthly, parliament's role in this process was limited to discussion in the relevant committees and then a simple motion was passed in both houses to ratify the agreement. Finally, the acting Minister of International Relations and Co-operation (not the Justice Minister) signed the instruments of ratification which was followed by publication of a copy of the agreement in the Government Gazette.²⁰

While the intricacies of treaty negotiation are rarely elaborated upon in detail, treaty-making procedures are set out in Chapter 5 of the *Manual on Executive Acts of the Office of the President of the South Africa* and synthesised in the *Practical Guide and Procedures for the Conclusion of Agreements* (2nd edition, 2007), prepared by the Office of the Chief State Law Adviser (International Law) for the erstwhile Department of Foreign Affairs. In sum, the current procedure involves the following steps:

¹⁸ L Barnett, 'Canada's Approach to the Treaty-Making Process', Report of the Parliamentary Information and Research Service, No. PRB 08-45E (24 November 2008) at 3.

¹⁹ *The President of the Republic of South Africa and Others v Quagliani; The President of the Republic of South Africa and Others v Van Rooyen and Brown; Goodwin v Director-General, Department of Justice and Constitutional Development*; (the Speaker of the National Assembly and the Chairperson of the National Council of Provinces intervening) [2009] ZACC 9; 2009 (8) BCLR 785 (CC)

²⁰ A K Ahmed, 'The role of parliament in South Africa's foreign policy development process: lessons from the United States' Congress', (2009) South African Journal of International Affairs, 16:3, 291 – 310 at ____.

- an opinion on the agreement's consistency with domestic law must be obtained from the State Law Advisers at the Department of Justice and Constitutional Development;
- an opinion on the agreement's consistency with international law and South Africa's international obligations must be obtained from the State Law Advisers (International Law);
- a President's Minute must be prepared by the responsible government department for signature by both the responsible line function Cabinet Minister and the President;
- the President's Minute, a short Explanatory Memorandum together with two copies of the agreement must be forwarded to the Office of the Chief State Law Adviser (International Law) for certification in accordance with the prescribed procedures in a Z137 coversheet, before it can be presented to the Presidency for approval;
- the line function department, together with the State Law Advisers (International Law) determine whether the agreement falls within the scope of S 231(2) or S 231(3) of the Constitution; **agreements will fall under S 231(3) if they (a) do not require ratification or accession; (b) have no extra-budgetary financial implications; and (c) do not require new legislation or legislative amendments;**
- for agreements requiring the approval of Parliament under S 231(2), the line function department prepares a Cabinet Memorandum for the relevant Cabinet Portfolio Committee; then an Explanatory Memorandum for the National Assembly and National Council of Provinces, which decide whether to approve the agreement.²¹

AK Ahmad draws the following conclusions regarding the limitations of current South African practice:

Traditionally, parliaments are not usually associated with the initiation or development of their country's foreign policy; legislatures are primarily responsible for overseeing executive action on foreign policy matters and passing laws establishing the international relations bureaucracy. As a result, as noted earlier, the legislature tends to defer to the executive on matters of foreign policy and participation in international affairs. South Africa is no exception to this tendency.

However, in the case of South Africa, it is not so much the executive branch overall that dominates foreign policy as the presidency. The executive, in the form of the Departments of International Relations and Co-operation (DIRCO), Trade and Industry, Defence, and several other ministries, appear to be more focused on policy setting than on policy implementation, while parliament's role in the foreign policy decision making process is virtually absent. Even parliamentary debate between the ruling and opposition parties on matters of foreign policy tends to be limited with one or two exceptions.²²

These observations raise the question of whether and how the role of Parliament could be enhanced through the negotiation, ratification and implementation phases of treaty practice.

Comparative perspectives on an enhanced role for Parliament

Enhanced parliamentary oversight of treaty-making and implementation – going beyond mere approval of agreements made by the Executive – is not a

²¹ Adapted from the *Practical Guide and Procedures for the Conclusion of Agreements* (Office of the Chief State Law Adviser (International Law), 2007).

²² Ahmad, op cit at ____.

new phenomenon. While constitutional imperatives across different legal systems do limit the impact of comparisons, it is instructive to consider the following findings of a 1994 comparative study of parliamentary participation in treaty-making and operation across selected States in the Americas (Brazil, Argentina and the United States) and Europe (the United Kingdom, France, the Netherlands, Germany, Switzerland and Italy):

- that, in all cases, during the initiation and negotiation phase of a treaty, 'there is an **informal process** in which the **executive consults with the leaders of [P]arliament**.'²³ In six of the surveyed countries, the consultations are characterised as 'substantial';²⁴ one example mentions opportunities for Members of Parliament to serve on treaty-negotiation delegations. This appears to be an area in which the South African Parliament can play an enhanced role;
- that, in most cases, Parliament can **override the self-executing character** of a treaty in domestic law by adopting inconsistent legislation.²⁵ This power appears to be inherent in S 231(4) of the Constitution;
- that, as Parliament can generally **censure** the government as well as exerting **budgetary pressure** on the Executive in areas not necessarily limited to the subject-matter of the treaty, the Executive should exercise restraint in ignoring 'important [P]arliamentary demands.'²⁶

In the Canadian constitutional order, which is perhaps most closely related to that of South Africa, the House of Commons (the first chamber of Parliament, comprising elected deputies of the people) has, since 2008, has been granted a 'louder voice'²⁷ in the pre-ratification phase by the Executive, although as a matter of 'courtesy',²⁸ not law. The non-partisan Canadian Parliamentary Information and Research Service summarises these changes:

*In January 2008, the government announced that all treaties between Canada and other states or entities will **be tabled in the House of Commons before ratification**. The clerk of the House of Commons will distribute **the full text** of the agreement accompanied by a **memorandum explaining the primary issues at stake**, including subject-matter, primary obligations, national interests, policy considerations, federal-provincial/territorial considerations, implementation issues, a description of any intended reservations or declarations and a description of consultations undertaken. The executive is to give the House of Commons **21 sitting days** to consider the treaty before the executive takes action to bring the treaty into effect through ratification or other preliminary measures, such as introducing legislation. The House has the power to **debate the treaty** and to **pass a motion recommending action**, including ratification.²⁹*

It is noteworthy that the contents of the memorandum described above would, in the South African context, amount to an extended version of the memorandum prepared by the line function department when tabling an agreement for the approval of Parliament in accordance with S 231(2) of the

²³ S A Riesenfeld & F M Abbott (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Kluwer, 1994) at 7.

²⁴ *Ibid* at 8.

²⁵ *Ibid* at 13.

²⁶ *Ibid* at 14.

²⁷ Barnett, *op cit* at 11.

²⁸ *Ibid* at 5.

²⁹ *Ibid* at 4 [emphasis added].

Constitution. The difference would seem to lie in the enhanced prospects for robust Parliamentary participation.

An earlier Canadian paper, also prepared by the Parliamentary Information and Research Service, examines practice in the negotiation and implementation of multilateral trade agreements in particular. In the course of the Doha Development Round of WTO talks, the responsible Standing Committee of Parliament, through a subcommittee, undertook a credible and well-received set of public hearings – the ‘high water mark’ of Parliamentary scrutiny of trade negotiations in that country.³⁰ The authors commend the South African Constitution for granting Parliament an explicit role in ratification and conclude with a series of recommendations which may be considered in the South African context. These include:

- delivering (non-binding) treaty-negotiating mandates to the Executive;
- monitoring negotiations through Parliamentary questions, reports, briefings;
- communicating with the public and responding to their concerns; and
- exercising due diligence in the passing of implementing legislation.³¹

Experience in other jurisdictions suggests that a field of practice, permitted by the Constitution but as yet unoccupied, may well be open to Parliament. Furthermore, there would appear to be several sound reasons of public policy favouring enhanced parliamentary participation in treaty-making and implementation – chief among them the increasing domestic impact of international agreements, including the impact on individual rights, thus engaging the responsibilities of the legislative authority; the preservation of checks and balances; and the need for enhanced democratic accountability, transparency and fairness in the work of intergovernmental organisations which, in the absence of political will for organisational reform, can be mitigated by greater parliamentary participation at the domestic level.

³⁰ P Berg & G J Schmitz, ‘Strengthening Parliamentary Oversight of International Trade Policies and Negotiations: Recent Developments in Canada and Internationally’, Report of the Canadian Parliamentary Information and Research Service, No. PRB 05-68E (9 February 2006) at 5.

³¹ Ibid at 13-18.

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