Treaties

Treaties

Australian Treaty List. Variety of subjects and types. Treaty-making practice. Treaty law.

Following is text of a paper on the subject of treaty-making generally:[69]

A casual glance through the Australian Treaty List reveals an astonishing array of documents, from the business-like Trade Agreement with Iran, to the convoluted but elegant Protocol required by Article (8)(1)(e)(ii) of the Convention for the Establishment of a European Organisation for the Development and Construction of Space Vehicle Launchers concerning the Use of Technical Information for Purposes not within the Field of Space Technology.

The List contains Agreements, Conventions, Protocols, Additional Protocols, Supplementary Protocols, Special Protocols, Charters, Statutes, Constitutions, Interim Arrangements, Exchanges of Notes, Instruments of Amendment, Regulations, Supplementary Regulations and others, each with its own number in the Australian Treaty Series.

The matters dealt with by these treaties cover nearly every sphere of human activity, from the heroic to the mundane, from the vital to the trivial, from the foundation of the United Nations to the collection of economic statistics, from international commodity agreements to the suppression of the traffic in women and children.

What is a treaty? What are the processes by which Australia becomes a party to treaties? Who is responsible for carrying out these processes? These are some of the questions this paper will deal with.

Responsibility

The Department of Foreign Affairs has sole responsibility for the conclusion of treaties between Australia and other states and international organisations. The function is one of four listed against the Department in the Administrative Arrangements Order. The responsibility of the Department for treaties, though not always extending to the substance of the document, invariably includes those aspects of treaty law and practice relating to the instrument and in particular to its form and language.

What is a treaty?

The description 'treaty' is a generic term which includes all instruments governed by international law and giving rise to international rights and obligations. The term does not generally include instruments which are more correctly described, for example, as arrangements or memoranda of understanding. In determining the appropriate classification of an instrument as a treaty on the one hand, or

69. Aust FA Rec, April 1976, 180.

as a document of less than treaty status on the other, there are various criteria which may be relevant. The primary consideration is the intention of the parties to the instrument as to its legal effect. The intention of the parties is evidenced by the following two factors:

(i) The language and form of the instrument. The mandatory and related forms of expression such as 'shall', 'agree', 'agreed', 'agreement', 'have the right', 'is liable', 'is entitled' or 'enter into force' are used when the parties wish to give rise to legally binding rights and obligations; whereas expressions of intention such as 'will', 'arrange', 'arranged', 'arrangement', 'mutual consent', 'enjoy the privilege' or 'come into effect' are the appropriate forms of language to be used when instruments of less than treaty status are being drawn up. Treaties, whatever their particular designation, also have a characteristic form. In the case of a treaty, other than an exchange of notes or letters, the form is—title, preambular recitals expressing the background, object and purpose of the treaty, articles covering the substantive and final provisions of the treaty and an attestation clause. Sometimes the treaty will have further documents, protocols, exchanges of letters, agreed minutes, annexes or schedules attached to it. Exchanges of notes and letters, when intended to constitute a treaty, contain a paragraph usually at the end of the note or letter, which states that the notes, when exchanged, will 'constitute an agreement between the two governments' (or words to that effect). The above forms are avoided in non-treaty documents such as a memorandum of understanding, an arrangement, or an exchange of letters constituting an understanding.

(ii) The nature of the subject matter. Certain subjects are generally of such significance (for example defence, civil aviation, customs and trade, human rights) or of such a character in domestic law (privileges and immunities of personnel, taxation, extradition) that they will require conclusion of a treaty to give effect to an international commitment. On the other hand certain matters on account of minor importance or through customary practice (Australian bilateral aid arrangements fall into this category) are not generally expressed in treaty form.

There are two further factors which may be relevant in relation to the treaty status or otherwise of an international instrument. Because all treaties concluded by Australia are tabled in Parliament, published, and registered with the Secretary-General of the United Nations (who publishes them internationally), there are occasions when the sensitive or classified nature of a document will determine that it must be of non-treaty status whatever the importance of its subject matter. A further consideration that may influence the status of a document is the need for flexibility in implementing its provisions. A non-treaty instrument will often be selected where there is a probability that quick action will need to be taken by the parties to take account of changing circumstances.

Vienna Convention on the Law of Treaties

In a step designed to confirm further Australia's commitment to the codification of the principles and procedures of international law, Australia recently became a contracting state to the Vienna Convention on the Law of Treaties. This Convention, although [at the time of writing] not yet in force, is widely acknowledged as authoritative on the international law and practice of the conclusion of treaties and agreements. Australian treaty practice is conducted in accordance with the terms of the Convention.

Treaty-making power

Only the Australian Government has the capacity in international law to conclude treaties with other states and international organisations; but neither the Australian Constitution nor legislation of the Australian Parliament contains any specific provision for treaty-making. This power is a prerogative of the Crown and is exercised in Australia by the Governor-General-in-Council whose approval must be sought before a treaty is either signed, ratified or acceded to by Australia. This approval is sought on the submission of the Minister for Foreign Affairs after a decision to that effect has been made by Cabinet, or alternatively, the Ministers concerned with the substance of the treaty. Parliament has no formal constitutional function in the treaty-making process, although a practice has developed whereby the Minister for Foreign Affairs or, in certain instances, another Minister concerned with the substance of a treaty, keeps Parliament informed of all treaties concluded or, in some cases, about to be concluded, by the Executive. Tabling of the texts of treaties in the latter case gives Parliament an opportunity to consider important treaties before the Executive takes further action for Australia to become a party to them.

In the case of treaty negotiations it is desirable that, as early as possible, the parties agree on the status of the document in which their intentions are to be recorded. A decision must be made whether it is to be a treaty or a document of less than treaty status, on the basis of the criteria already mentioned. From this decision flow certain consequences by way of domestic and international requirements which must be observed. For instance, a document such as a treaty, which is governed by international law, requires the approval of the Executive Council before Australia can become a party to it and subsequently will require registration with the Secretary-General of the United Nations. A document which is not governed by international law does not require the approval of the Executive Council, nor does it require international registration.

The substance of a treaty (whether bilateral or multilateral) is quite often primarily the concern of a Department other than Foreign Affairs, for example the Department of Transport (Air Transport Group) in the case of air agreements. Nevertheless, in any treaty

between Australia and another state, there is an international relations aspect which is of concern to the Department of Foreign Affairs. Furthermore, no matter with what Department the primary responsibility for the substance lies, the Department of Foreign Affairs is responsible for the format of the document and its general drafting. Of particular concern are the final clauses: those dealing with signature, ratification, entry into force, application to territories, duration, reservations and withdrawal.

Negotiation

In the case of a bilateral treaty, it is quite a common, though not a necessary, procedure for the head of each delegation negotiating the treaty to initial the negotiated text at the bottom of each page. The initialled text is often attached to a single covering memorandum recording the date, place and subject of the negotiation and signed by the delegation leader. The accepted practice is that the head of each delegation initials the agreed text at the left of the page in the copy which his government is to retain and at the right of the page in the copy which the other government is to retain. No specific authority is needed for this since the significance of the initialling is to identify the text as the one agreed during negotiations. The foregoing procedure does not involve signature of the treaty itself and gives rise to no specific legal rights and obligations under the treaty.

Conclusion of treaties

If the initialled text is acceptable to each government the next step is to arrange for signature. In the case of Australia the approval of the Executive Council must be sought before the document is signed. The person who is to sign the treaty is issued with appropriate full powers signed by the Minister for Foreign Affairs. These full powers are exchanged at the signing ceremony for a similar document held by the person authorised to sign for the other government. It has become accepted in current Australian treaty practice that the Prime Minister and the Minister for Foreign Affairs may, in certain circumstances, sign treaties without full powers being issued. This practice is consistent with the Vienna Convention on the Law of Treaties.

The full ratification process for bilateral treaties has to some extent fallen into disuse, and treaties often provide for their entry into force on signature or within a specific period after signature. As far as Australia is concerned the ratification procedure for bilateral treaties is unnecessary and cumbersome and should therefore be avoided where possible in the drafting and negotiating of bilateral treaties. Nevertheless the internal constitutional requirements of certain states may make it difficult for particular bilateral treaties with those states to be negotiated on the basis of entry into force on, or a specified period after, signature. In such cases, the Australian preference is for a simplified ratification procedure to be incorpor-

ated by which the treaty is expressed to enter into force after both states exchange notes notifying each other that their internal and legal requirements have been fulfilled. Acceptance by Australia of the full ratification procedure in negotiating the text of a treaty will, however, on the basis of past experience, be unavoidable on some occasions. If the terms of a bilateral treaty specify that it be ratified, the approval of the Executive Council must again be sought before the instrument of ratification is drawn up and exchanged with the other party.

Where ratification is involved the usual practice is for a bilateral treaty to be signed in one country and the instruments of ratification exchanged in the other. The exchange of instruments is recorded in a *procès verbal* prepared by the foreign ministry of the country where the instruments of ratification are exchanged. In the case of signature the accepted practice is that the host-country prepares the texts in both languages and arranges for them to be bound in plain treaty covers (which it provides) and sealed after checking the text with the mission of the other country. The wax seal to affix to treaties is held in the Department of Foreign Affairs and is despatched to a post by bag when needed.

Exchanges of notes or letters deserve mention because of certain misconceptions about their significance and use. The term has a specific meaning in treaty practice and should not be confused with the description of correspondence which passes between an embassy and a foreign ministry or between an ambassador and the Minister for Foreign Affairs. An exchange of notes or letters in the technical sense is just as much an agreement as a more formal document: the real test is what the exchange purports to be. If it states that it is to constitute an agreement between the two governments concerned, it is an agreement and nothing less and is subject to registration with the United Nations and, in Australia's case, to all the domestic requirements of the most formal treaty. Its advantages are simplicity and the lack of ceremony with which it can be concluded.

The text of a multilateral treaty negotiated at an international conference is often incorporated into what is known as a Final Act. This, in effect, is a record of the proceedings of the conference at which the text was drawn up and includes, besides the text of the treaty, such matters as the way in which the work of the conference was organised, the countries represented and the names of the delegates. It is customary for the Final Act to be signed by the leader of each delegation present and, since signature in this case is no more than an acknowledgement of the accuracy of the record, it does not require specific authority. Signing the Final Act of a treaty is not, of course, 'signing *the treaty*'.

Most multilateral treaties provide that a state may become a party by signature alone, by signature subject to ratification, followed by ratification, or by accession. It is usual for a multilateral treaty to be

open for signature only for a specified length of time, after which only the process of accession is available.

Reservations

Australia's attitude to the law of reservations to treaties is governed by the Vienna Convention of the Law of Treaties. According to Article 1(d) of that Convention a reservation to a treaty means a 'unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state'. It should be noted here that besides reservations there are other types of unilateral instruments which can sometimes have the same effect as a reservation. For example, a 'statement of interpretation' made by a party to a treaty which gives that country's opinion as to the meaning of a particular term or provision of a treaty may on occasions be regarded as placing such a construction on the words of the treaty that it amounts to a modification of the plain meaning or intended legal effect. Similarly a 'declaration' by a party with respect to its intentions on the implementation of certain provisions of a treaty may amount to a unilateral modification or exclusion.

Australia has only infrequently made reservations to treaties and, as a matter of overall treaty policy, prefers that unanimity be achieved between parties on the basis of the agreed text of the treaty so that the rights to be enjoyed and obligations to be borne are applied equally to all parties. Where commitments vary from party to party, a degree of uncertainty and inequality is introduced and it can even become necessary in extreme cases to examine a complex network of bilateral treaty relations within the multilateral framework in order to discover the exact rights and obligations applying between particular states.

A reservation may be made only at the time a state is performing some act of legal commitment to a treaty (usually signature, ratification, or accession) and it is normally lodged together with the relevant instrument of adherence with the depositary authority for the treaty.

Where a treaty deals specifically with the question of reservations (for example where only certain nominated reservations may be made or where reservations are prohibited altogether), the provisions of the treaty must be followed. Where the matter is not so dealt with by treaty, the rule is that reservations which are not 'incompatible with the object and purpose of the treaty' may be formulated by an adhering party. The standard quoted in the preceding sentence is one on which there may be considerable scope for disagreement.

Reservations almost invariably require acceptance by other states party to the treaty in order to be effective. Sometimes a treaty will require acceptance by a formal act; in the vast majority of cases

however, acceptance will, under the terms of the Vienna Convention, be presumed unless a state objects to the reservation within twelve months of being notified of it (or of becoming party to the treaty where the state adheres after the reservation has been made). If a state party to a treaty wishes, it may decline to accept another state's reservation by lodging an appropriate objection or notification with the depositary within the twelve-month period.

Reservations and objections may be withdrawn at any time and normally do not require the consent of the objecting or reserving party.

When a treaty is being examined with a view to Australian adherence, it is sometimes found that our laws or policies cannot or should not be altered to accord entirely with the requirements of the treaty. In those cases, a reservation made by Australia may be the only possible way in which Australia can become a party. Proposed reservations are carefully examined to ensure that they are necessary and are permissible under the terms of the treaty. Cabinet or ministerial approval is sought to the reservation at the time of seeking approval for Australia's adherence to the treaty and the matter is then referred to the Executive Council for the exercise of the Royal Prerogative authorising Australia to enter into the treaty subject to the reservation proposed.

The text of a treaty (whether bilateral or multilateral) must be approved by the Ministers concerned with its substance before a submission is made to the Executive Council for approval for Australia to sign it. It is not possible to anticipate this approval by granting to an Australian delegation proceeding to an international conference full powers to sign the text of a treaty which the conference might draw up.

It is the responsibility of the Department of Foreign Affairs, in consultation with other Departments concerned, to prepare and submit to the Executive Council the documents required to obtain the Council's approval for Australia to sign or become a party to a treaty. Two of those documents are an Executive Council Minute covering fully and accurately all matters on which authorisation is sought and an Explanatory Memorandum giving background information on the nature and purpose of the proposed treaty.

'Domestic' effect

In some cases new legislation will be necessary to give full effect to the provisions of a treaty. The Department concerned with the substance of the treaty consults the Attorney-General's Department on the point and advises the Department of Foreign Affairs accordingly. The Minister for Foreign Affairs cannot recommend to the Executive Council that Australia become a party to a treaty where the domestic legal position in Australia is at variance with obligations to be assumed under the proposed treaty.

Repository

The originals of all bilateral treaties concluded by Australia and the certified true copies of multilateral treaties to which Australia is a party or, in some cases, is eligible to become a party, are retained in the Treaty Collection of the Department of Foreign Affiars. It is important that these be kept at one central point so that in the event of a dispute there is no difficulty in producing the authentic text. Furthermore, if legislation is required, the Parliamentary Counsel requires for reference the original of a bilateral treaty or the certified true copy of a multilateral treaty.

Publication

The treaties are given a number in the Australian Treaty Series. These do not form part of the treaty itself, and are merely for ease of reference. In the case of bilateral treaties arrangements are also made for the treaty to be registered with the United Nations, as is required by Article 102 of the Charter of that body, and it is later published in the United Nations Treaty Series. Australia is not concerned with registration with the United Nations of multilateral treaties unless we are the depositary of the treaty, as, for example, is the case with the Agreement Establishing the South Pacific Commission.

Treaties

Treaty-making through the UN. Review of multilateral treaty-making process.

At the 32nd Session of the UN General Assembly in 1977 in the Sixth Committee, the Australian Government launched an initiative, the object of which was a major study by the UN into the mechanics of the multilateral treaty-making process. The following statement to the Committee by the Legal Adviser on 15 November 1977 traces the development of the project and expounds its objectives:[70]

> It gives the Australian Delegation great pleasure to be able to open the debate on this item. As the Committee will recall, the topic has been one about which our Delegation has expressed its concern during the thirtieth, thirty-first and thirty-second General Assemblies. The Australian Foreign Minister has twice referred to it in his statements in the General Debate. Nothing that has happened since it was first mentioned two years ago has diminished the importance of the topic. We are therefore glad that it can be brought before you for your preliminary consideration.
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> My Delegation is happy and honoured that its views on the desirability of placing this item on the agenda of the General Assembly have from the outset been shared by the six States which joined in co-inscribing the item: Egypt, Indonesia, Kenya, Mexico, the Netherlands and Sri Lanka. We are grateful to these Members for their support and cooperation, including their involvement in the

70. Text supplied by the Department of Foreign Affairs, Canberra.

preparation of the Explanatory Memorandum which accompanied the letter seeking the inscription of this item. We venture specifically to remind delegations of the existence of this document (A/32/143) because we believe that it still remains relevant to our present debate, to which, because of the fullness of its exposition of the subject, it may serve as a helpful supplement.

The encouragement which we have received from the wide support given to the inscription of the item has been increased by the even wider approval which subsequent consultations have demonstrated. We shall in due course be introducing a draft resolution for which there are already some 34 co-sponsors. We shall be commending that resolution to this Committee in the hope and belief that its essential provisions will be found to be beyond significant controversy and of a nature suitable for adoption by consensus. We are glad to say that in the consultations which have been held on this draft with Members which have not become co-sponsors, as well as with Members which have, we have been unable to identify any dissent from our assessment of the value or acceptability of the course which will presently be proposed. Naturally, our wide ranging conversations have identified a number of points and questions on which delegations have sought further information. It is to the points thus raised that most of the rest of this speech will be devoted.

First, may we begin by emphasizing that this is an initiative related to the procedures for making multilateral treaties. The word upon which we lay stress is 'procedures'. The exercise is in no way connected with the substantive content of treaties, except, of course, to the extent that more efficient techniques of production may lead to more readily and speedily acceptable products.

We are concerned here with what may be called the obstetrics of international law—with the process which occurs between the conception of a treaty and its birth as an instrument forming part of our community legal system and open for ratification or adhesion by States.

Secondly, it follows that, just as the present exercise is procedural and non-substantive in character, so equally is it non-political. We have already laid stress on the widespread support which we believe it commands—support which spreads over not only the various geographic regions, but also over the whole range of developed and developing countries as well as the whole political spectrum. The subject is evidently one of concern to us all.

In the third place, it is important to say that the suggestion that we should look at the process of multilateral treaty-making in the United Nations should not be seen as in some way an attack upon existing UN structures or procedures. We must say frankly that it would never have occurred to us that it would be necessary to make this point, were it not for the fact that some delegations had specifically asked us: is this a criticism of the International Law Commission?

The answer is emphatically: No. As will presently be seen, we view both the structure and the procedures of the International Law Commission as a model of how certain aspects of treaty-making should be approached. This is a matter to which we shall in due course return. But we have felt that the point is of sufficient importance to warrant early mention of it.

With these preliminary observations behind us, we may turn to the material problem as we see it. The United Nations is active in the treaty-making field. In virtually a third of a century of existence it has promoted some 80 treaties. Even at the present session of the General Assembly, a rough count indicates that the Assembly will be concerning itself with one or another stage of some 12 emergent conventions. Work on these conventions takes up a great deal of Assembly time. To offer but one example, it may be noted that the Third Committee has devoted no less than *eight* meetings at the present session to a consideration of a draft Convention on the Elimination of Discrimination against Women. Moreover, work on the elaboration of multilateral treaties takes up a great deal of the time of UN bodies outside the General Assembly. Even leaving aside the exceptional case of the many months which have been constructively devoted to the Conference on the Law of the Sea, a brief glance at the Calendar of Conferences and Meetings of the UN will serve to demonstrate the significant periods which are devoted to the preparation of a wide range of multilateral treaty texts. We are not dealing here with a peripheral or marginal aspect of UN activity. We are dealing with one of its central functions—the deliberate improvement of international life by the establishment of the texts through which States may assume binding legal obligations.

Yet, in 33 years of treaty-sponsoring activities, the UN does not appear to have given deliberate, comprehensive or even detailed thought to the process of multilateral treaty-making, although there have been some earlier approaches to it. Thus, there was some discussion of procedures in 1949 by the Special Committee which examined ways of implementing Article 13(1) of the Charter and which drafted the Statute of the International Law Commission. This was followed by the discussion in the Assembly in 1950 of the structure and operation of the Commission. Again in 1951 and 1952 there was consideration by the Assembly of the identification and treatment of legal questions in General Assembly procedure. The last episodes are reflected in Annexes I and II of the Rules of Procedure of the General Assembly. Delegations will find reproduced in Annex I some of the recommendations and suggestions of the Special Committee on Methods and Procedures of the General Assembly approved by the Assembly. One of these relates to consideration by the General Assembly of International Conventions negotiated by Conferences of Government Representatives of all Member States. Beyond finding that the General Assembly had on occasion devoted

a particularly large number of meetings to the detailed consideration, article by article, of texts of international conventions, the Committee recommended that, when conventions had been negotiated by international conferences, the Assembly should not undertake a further detailed examination, but should limit itself to discussing them in a broad manner and to giving its general views on the instruments submitted to it. (See Rules of Procedure of the General Assembly, UN Doc A/520/Rev 12, p 37).

That recommendation of the Special Committee on Methods and Procedures of the General Assembly approaches the subject matter of the present item in that it demonstrates a concern with the process of negotiating treaties. But it touches only one limited aspect of the matter and deals with it exclusively from the standpoint of the General Assembly. Moreover, it reflects the situation a quarter of a century ago when the membership of the UN was much smaller. In no way does it represent any significant attempt to examine the treaty-making process in the UN as a whole.

We have been asked in the course of consultations what is wrong with the present system of treaty-making. Why do we need to examine it? After all, so some have suggested, the UN produces the treaties. Isn't that fact enough by itself to demonstrate the adequacy of the system?

The best way of attempting to answer questions of this kind is to recall certain facts:

First, it is not enough for the system merely to produce the texts of treaties. They must be treaties which are acceptable to the members of the community once they are opened for signature and ratification or adhesion. The conclusion of a text is no guarantee that what it contains will commend itself to States. In this connection, it is worth taking note of certain facts assembled in a UNITAR study on participation in multilateral treaties. Although it is now some eight years old, there is no reason to believe that it represents a situation which has significantly altered. It shows, in particular, the surprisingly low level of acceptance of even some of the major codifying conventions, such as the Law of the Sea Treaties and the various conventions on aspects of human rights. Even at 31 December 1975 (as shown by the volume on the Status of Multilateral Treaties of which the Secretary-General is Depositary), the Geneva Convention on the Territorial Seas had only 45 ratifications, the High Seas Convention 55 ratifications, the Convention on Fishing and Conservation 35 ratifications, and the Continental Shelf Convention 53 ratifications. In the field of human rights, the International Covenant on Civil and Political Rights had 35 ratifications and the International Covenant on Economic, Social and Cultural Rights had 37. It is unnecessary to prolong this recitation of statistics, but one conclusion is evident. It is that, even in the case of some major multilateral treaties, the number of States who are parties to them falls signifi-

cantly short of the number of States which could and desirably should be parties to them.

A second relevant fact is, as already mentioned, that no deliberate or specific thought appears to have been given to the treaty-making process.

Third, we are bound to observe that many different methods are used in the elaboration and formulation of treaty texts; and that the choice between one method and another does not reveal any established pattern of selection according to any identifiable set of factors. Thus, the preparation of the first draft of a treaty is sometimes the work of a single State, or of a group of experts, or of a committee, or of the International Law Commission. There is no uniformity as to the number or nature of the stages through which the text may pass before it is opened for signature.

A fourth material consideration is that the character of the treaty-making community has changed considerably in the past two decades—as to numbers, as to the types of States of which it is composed and as to the actual treaty needs of States.

In the fifth place, we must note that, despite the importance of treaty-making as a State activity, it does take up a great deal of administrative time and imposes a heavy burden upon the limited resources of skilled manpower available to States for the performance of governmental functions. And closely connected with this is the fact that the composition of national delegations is constantly changing as officers are moved from one post to another.

A sixth feature of the present treaty-making situation is that the element of technicality, even in what may be thought of as essentially political treaties, is constantly increasing. As a result, there is an ever-growing problem of communication and understanding between States in the process of treaty-making.

A seventh element in the present situation, of which specific note must be taken, is that the adequacy of the *travaux préparatoires* of treaties is fast being reduced. So often, significant, if not vital, discussion is now conducted in bodies—sub-committees, informal working groups, consultative meetings, and so on—for which no records are kept. That is not to say that such discussions never took place before. In the past, however, they did not constitute so large a proportion of the negotiating process. When this factor is considered together with the constant change in negotiating personnel just mentioned, it will be evident that we are faced by a real problem of maintaining the essential level of knowledge of, and involvement in, the subject matter without which progress in negotiation can hardly be made. Nor, it hardly need be added, is the sound interpretation of treaties promoted by inadequate preservation and publication of preparatory work.

These seven points which we have just made are not statements of opinion. They are statements of fact relevant to the treaty-making

process. In the presence of such facts, it can be seen that the question which should be asked is not, what is wrong with the present system, but rather, are we satisfied that the present system is as good as we can make it? To suggest, as some have done, that we should be satisfied by the mere production of treaties is to ignore the very real question which is prompted by the factors which have just been mentioned: do the procedures as at present used enable the community to produce with the appropriate speed and effectiveness all the treaties which its needs require? Perhaps the answer is yes. More likely, the answer is no. And it is the very possibility that we may find that there are ways of improving the treaty-making process which leads us to urge the proposed inquiry.

The next important question which is often asked is: what do you expect the outcome of the review to be? What will be the final outcome? An answer may be offered in two parts.

The first part of the answer is that none of us can be expected to know now what the answer will be since the full dimensions and content of the problem are not known to us collectively and we have not had the opportunity to discuss it collectively. It is not for my Delegation to preempt the conclusions of what must be a detailed study, a detailed debate and a sharing and careful weighing of various points of view as yet not known to any of us.

The second part of the reply to the question of the eventual outcome of the proposed activity involves some speculation as to the possible content of at least some of our conclusions. They may fall into at least two groups.

The first group of conclusions may consist of essentially technical, but nonetheless important, suggestions. For example, there is wide agreement that one of our major difficulties is communication in relation to the complex and often politically sensitive issues which are dealt with in treaties. This difficulty is compounded by the facts—which I have already mentioned—that negotiations almost invariably are extended over a period of several years; that in that time there may be a large, perhaps even complete, turnover in the personnel of any given national delegation; and that often the *travaux préparatoires* are either too limited adequately to reflect developments or too dispersed or otherwise inaccessible for newcomers to the negotiations to be able adequately to absorb them. How then are delegations to know and understand the precise implications of the changing drafts? We are in this very session of the Assembly confronted by a difficulty of this kind where, so one is led to believe, our colleagues in the Third Committee are having some problem of this kind with the preparation of a Convention on the Elimination of Discrimination against Women.

One approach to this kind of difficulty is the device of the explanatory comment—a comment which accompanies a draft, explaining the background against which the text has been prepared, the pur-

poses which the words used are intended to achieve and the kinds of solutions which have been used in comparable situations. The preparation of explanatory comments is a vital and significant feature of the work of the International Law Commission. This is one of the reasons why the work of the Commission has, as we were reminded in the debate on the report of the Commission, been invoked in the interpretation of treaties which had their origin there. But how often is that practice used outside the International Law Commission? Clearly, we must consider whether it is desirable to promote the extension of this practice. If the answer is yes, we should in due course suggest appropriate ways and means of doing so. For example, it is strongly arguable that every draft convention should be accompanied by a commentary. And the same might be said of all proposed amendments.

Here, then, is but one illustration of the kind of practical suggestion which might be recommended for use in almost any treaty-making situation. Another group of conclusions might have some bearing on the stages through which a draft should pass from its conception to the time when as a fully-formed text it is opened for signature, ratification and accession. These conclusions might relate to the following questions:

- who should be entrusted with the preparation of the first draft of a treaty?
- by what kind of body should a first draft initially be considered? Should all stages be considered by plenary groups? If not, by what size of group can drafts best be considered? And, if limited groups are thought desirable, what are the factors which should influence their composition?
- what is the proper relationship in this connection between the General Assembly and other United Nations organs?
- what are the relative merits and demerits of negotiating treaties in United Nations organs and in diplomatic conferences?
- what is the role of the Sixth Committee in treaty-making?
- should any emphasis be given to the introduction into the treaty-making process of an 'assessment' stage at which the emerging text is subjected to comprehensive scrutiny by persons who have not been directly involved in its negotiation, so that before it is finally concluded those involved in its preparation may be in possession of a detached and objective assessment of any problem of interpretation to which the language used is likely to give rise?

There will, no doubt, be many other aspects of the treaty-making process which other delegations will wish to raise for consideration. There is no need for my Delegation to probe these possibilities further at this stage. We have only touched upon them now as part of our answer to the question of what kind of matter is likely to be covered by the review process.

The next question that has been posed is: what form will the conclusions of this review of the treaty-making process take? Here again it would be premature to make a firm prediction. One thing, however, does seem clear. It is that we should exclude from our thoughts any idea of establishing a rigid single inflexible code of rules. This point requires emphasis. The nature of individual treaties is so diverse, and the political circumstances in which they are concluded vary so greatly, that it would be quite inappropriate to contemplate the possibility of forcing all treaty-making into a single set pattern. Different types of multilateral treaties call for different procedures. We must not limit flexibility. Perhaps the best we can hope for eventually—by way of a concrete product of our consideration of the item—is a manual or repertoire of practice which will remind us of the various techniques and devices that are available, as well as their particular advantages or disadvantages. The content of such a manual could be borne in mind by Governments and the Secretariat when working out the procedures to be followed in particular situations. The fact is that there is very little recorded about the ways in which treaties are made. A rare exception is the exceedingly interesting statement made last month by Ambassador Vindenes of Norway at the Seminar on the Economy of the Oceans arranged by the UN Economic Commission for Latin America in Buenos Aires. He spoke on 'Negotiation procedures and techniques at the Third UN Conference on the Law of the Sea and their incidence in the search for a substantive agreement'. But apart from such isolated contributions as this, we have little material to guide us on the detailed techniques of treaty-making and, so far as we are aware, nothing at all in the way of a systematic general survey of methods. And the subject, though of course suitable for academic study, is essentially one of a practical kind, directed towards practical ends, which should be carried out in the very organization under whose auspices so much treaty-making takes place and within which we may find the political knowledge and judgment which are indispensable to progress in this field.

And so we come to the last important question: what do we contemplate should be done now? At this point, it may be helpful to the Committee if, on behalf of 34 co-sponsors, representing all facets of the membership of the Organization, my Delegation introduces a draft resolution on this subject. The Committee will have before it UN Doc A/C.6/32/L36, entitled: 'Item 124: Review of the Multilateral Treaty-Making Process'. As can be seen, it enjoys the evident support of a wide range of co-sponsors. We are honoured by the confidence which our co-sponsors have shown in us by suggesting that we should introduce the draft.

May we begin with the Preamble. This recites a number of pertinent considerations. It recalls the duties of the General Assembly in relation to the codification and progressive development of international law. It observes that many multilateral treaties have been

prepared by various UN organs. It records the important contribution which the International Law Commission has made to the preparation of multilateral treaties. It identifies the heavy burden which involvement in treaty-making places upon Governments. It then introduces the important opinion that it is desirable to assess the efficiency and adequacy of the procedures followed by the UN in the formulation of the texts of multilateral treaties with a view to the improvement of such procedures.

From there, the Preamble goes on to remind us of the need for economy in the use of UN resources. It mentions that there are important and specialized areas of treaty-making in which the interested parties have developed methods of negotiation of proved and continuing value. The Preamble also recalls the work which UNITAR has done in this field, as reflected in its study on the wider acceptance of multilateral treaties. It recalls the fact that the General Assembly has itself in the past urged greater participation in multilateral conventions. Finally, the Preamble observes that the UN has not hitherto given comprehensive consideration to the present problem.

None of these preambular paragraphs would appear to require explanation. But, in deference to one point of view which has been strongly expressed to us, we should stress the content and implications of the paragraph which refers to the desirability of assessing the efficiency and adequacy of the procedures followed in the UN, with a view to the improvement of these procedures. It is this paragraph which points the direction in which we should be moving. The object of this initiative is not academic. It is intensely practical. We are constantly involved in treaty-making. We must, as a matter of operational necessity, assess the efficiency of our methods and determine whether and how they can be improved.

We turn now to the operative paragraphs of the draft resolution. These have been framed on the assumption that we are now embarking on what is only the first of two main stages in our approach to the matter. The first such stage involves the ascertainment of facts. The second stage involves the application of the political judgment and wisdom of this Committee. We must first find out the facts. We must place ourselves in possession of detailed and systematic information as to how multilateral treaty-making has been carried out in the UN in the past and we must have some basis on which to compare it with methods used elsewhere. Only when we have this information can we be confident about our appraisal of the limitations of the present situation and seek to propose methods of improvement.

It is, therefore, to the first of these stages that the present draft resolution is directed.

Accordingly, the first and principal operative provision is the request to the Secretary-General to prepare a report on the techniques and

procedures used in the elaboration of multilateral treaties. It should be explained that the scope of this report is not intended to be limited to treaties prepared in or under the auspices of the United Nations. Although the scope of the present initiative is limited in this way, that is because the United Nations is the organization with which we are concerned. But some knowlege of the methods used in other organizations and elsewhere, including the evolution of the Red Cross Conventions and the Disarmament Agreements, is necessary if our own practices are adequately to be considered.

We contemplate that the Secretary-General's Report will be entirely factual and analytical in character. We believe that it would be helpful if the Report were to examine, if not every multilateral treaty concluded in or under the auspices of the United Nations, at least a sufficient number of representative examples to illustrate the whole range of methods used and problems encountered. As will be apparent from what has already been said, the points on which information is sought include the following: what was the origin of the idea of concluding the particular treaty; to whom was the preparation of the first draft entrusted; what form did it take and, in particular, was it accompanied by any kind of explanatory comment? What happened next? What body first considered the draft? Were its deliberations recorded in a record or report? Through what stages did the draft subsequently pass? And what records are there of these stages? Where was it finally considered, adopted and opened for signature? Was it in a United Nations Committee or a diplomatic conference?

Questions of the kind just indicated are all essentially factual in character and the answers to them will be of great value. But we are then faced by the problem of whether the Secretariat should go further in its report and provide us with other important information which includes an element of judgment. For example, in relation to the use of any particular method in connection with any particular treaty, it is important to know what, if any, difficulties were encountered and whether the product of any stage was not commensurate with the time spent on it. While we can foresee the possibility that the Secretary-General may feel some inhibition in making this type of assessment, the fact is that he and his staff are particularly well placed to do it and to give us the benefit of the knowledge which they have derived from close and continuous involvement in the treaty-making process. Moreover, such information would be particularly difficult for delegates or individuals to collect in other ways.

My delegation hopes that other members of this Committee will feel able to express some opinion on this aspect of the matter in the course of their speeches. As will be noted, the concluding phrases of the first operative paragraph of the resolution request the Secretary-General to take into consideration the present debate on this subject. If the opinions here expressed run in the same direction, the task of the Secretariat will be eased. If our views diverge, then at

least the Secretariat will be aware of a need to exercise some caution as to the degree to which it steps beyond the purely factual description of the processes followed in the past.

The first operative paragraph also requests the Secretary-General to take into account the observations of Governments and of the International Law Commission which are solicited in the second operative paragraph. At the same time, it should be appreciated that the observations of Governments and of the ILC will be somewhat different in character from the contribution of the Secretariat. Governments, while no doubt in a position to provide some factual information, are likely to wish to comment from a more policy-oriented point of view on the nature and efficiency of the treaty-making process; while the ILC will be approaching the matter in terms of its own past experience and future role. The justification for seeking these observations at this stage of the initiative lies primarily in the assistance which such observations may give the Secretariat in making an assessment of the difficulties which have been encountered and of the adequacy of the results achieved. A further advantage of obtaining the views of Governments and the ILC at this stage is that such views will help to identify the aspects of the problem which will need debate when the item next comes before the Assembly.

The first operative paragraph of the draft Resolution concludes with a reference to the submission of the Report to the General Assembly at its Thirty-Fourth Session, that is, two years from now. We believe that this represents the minimum period of time which the Secretariat, Governments and the ILC will need for the preparation of their respective contributions.

That is all that we believe needs to be said about the first operative paragraph, and enough has also now been said about the second paragraph.

The third operative paragraph contains a request by the Assembly to the specialized agencies and other interested organizations active in the preparation and study of multilateral treaties, as well as UNITAR, to meet any request that the Secretary-General may make for their assistance. This reflects appreciation of the fact that in addition to the expertise of the Secretariat of the United Nations, there lies a body of valuable experience and involvement outside the Secretariat upon which the Secretary-General should feel free to draw. In the case of the specialized agencies and other interested organizations, the justification for recourse to them lies in the variety and intensity of their treaty-making experience or concern. One non-governmental body in particular which is likely to have something to offer is the Institut de Droit International. In the case of UNITAR, the justification for specific mention of it lies, partly as stated in the Preamble, in its own previous activity in the field of multilateral treaties as evidenced by its study on Wider Acceptance

of Multilateral Treaties and partly in the fact that, as the United Nations Institute for Training *and Research*, its interest in research in international law should not only be recognized but encouraged and utilized in the most practical possible way.

There is a close precedent for an express reference of this kind to UNITAR and specialized agencies in General Assembly resolution 2817 (XXVI) on Scientific Work on Peace Research. There, after requesting the Secretary-General to prepare biennial reports on work in the field of peace research, we find a paragraph which specifically requests 'UNITAR and those specialized agencies which are active in the field of peace research to lend their assistance in the drafting of the report'. We very much hope that the Secretary-General will interpret the proposed paragraph broadly and will issue invitations to provide material and assistance to the widest possible range of interested organizations.

The fourth and concluding operative paragraph of the draft resolution contains a decision to include the item in the provisional agenda of the General Assembly at its Thirty-Fourth Session in 1979.

So much for the draft resolution on the first stage of activity in relation to this item. There remains the question of what should follow. We assume that the item would come back to the General Assembly, and to this Committee in particular, in 1979. At that time, the Committee would consider the Report of the Secretary-General and begin the process of assessing the effect of the Report in political terms. How that process of applying political judgment to the facts should be carried out will, of course, be a matter for this Committee to consider in 1979. One possibility would be for the Sixth Committee to proceed to an immediate substantive debate. Coupled with that would be the possibility of establishing an *ad hoc* committee which could carry out the task in a more deliberate and detailed manner. In either case, we are left asking what should the end product be. As we have already suggested, it is not for us at this stage to preempt a discussion on this matter which would better be held two years hence. But one possibility which we envisage is that the Sixth Committee, or the *ad hoc* committee, might, on the basis of the Secretary-General's Report and of the views expressed by States, establish a manual or repertoire of procedures, with guidance as to what methods have been, or are likely to be, most suitable in certain circumstances. Such a set of procedural guidelines might be endorsed by a General Assembly resolution, or a resolution might itself set out the salient guidelines. No doubt other ideas will present themselves to Members; and it appears to us unconstructive to risk narrowing the range of debate and possibilities by speculating now about what will happen in 1979.

In closing, we feel bound to revert to a question which we touched on in the earlier part of this speech—namely, what is the relation of this initiative to the operation of the International Law Commission.

Some apprehension has been voiced lest in some way this initiative should operate to the detriment of the Commission. Nothing could be further from our minds. My delegation believes that the Commission performs an important and essential service in the preparation of multilateral treaties. Its attainments have been considerable and its methods provide in many respects a model which could be emulated in other bodies concerned with the preparation of treaties. We have given as an example the fundamental idea of commentaries on drafts. In short we cannot do without the Commission and we cannot conceive that its role could be called into question in this debate. The possibility that suggestions may be made for supplementing or even enhancing the role of the Commission is not to be excluded. But that is a matter on which we shall all wait with interest to hear the observations of the Commission itself. However, the main thrust of this item is collateral to the activity of the Commission.

This brings us, Mr Chairman, to the close of this introduction of a new item on our agenda. We have approached our task encouraged by the consideration shown to us in the course of our consultations and by the breadth of support that the introduction of the item commands. We believe it to be an important problem which should engage the responsible attention of all Members of the United Nations. It is not an item which will be disposed of in one or two sessions. At the same time, we must not make too much of it. Its principal value will no doubt be in the discussion of the treaty-making process which it will generate. But some of its value will lie also in bringing all of us to an increased awareness of the importance of adopting a deliberate rather than a casual or haphazard approach to the treaty-making process. We should rule it. It should not rule us.

Mr Chairman, we end as we began, with an expression of our appreciation of the confidence shown in us by other delegations, who have encouraged us to speak first in this debate and to move the adoption by this Committee of the resolution which stands in the names of 34 of its Members. We earnestly hope that this essentially procedural initiative will commend itself to the Committee and that the debate on this item may be concluded by the adoption of the draft resolution.

Treaties

SEATO. 'Phasing out' of Organisation. Status of Treaty.

Following is the text of a news release issued by the Minister for Foreign Affairs on 30 June 1977:[71]

On the occasion of the final phasing out of the South East Asia Treaty Organisation (SEATO) on 30 June 1977, the Acting Minister for Foreign Affairs, The Rt Hon Ian Sinclair, MP, said that he was confident that the spirit of co-operation which had marked the work of the Organisation during its 23 years of existence, would continue

71. Text supplied by the Department of Foreign Affairs, Canberra.

to inspire future efforts to advance the well-being and economic and social development of the peoples of South East Asia.

The Acting Minister recalled that the Organisation had been established under the South East Asia Collective Defence Treaty signed at Manila in 1954. The decision to phase out the Organisation was taken by member countries in September 1975 in recognition of changing circumstances in South East Asia.

The Manila Treaty itself, the Acting Minister noted, remains in being and Australia remains a party to it. The Treaty was at its origin, and remains today, an expression of the determination of member states that the countries of this region should be free to determine their own destinies and plan their own futures free from outside interference.

The progress that the South East Asian member states have made in consolidating their political independence and in advancing the prosperity of their peoples is testimony to their continued commitment to the aims and objectives which underlined the Treaty at the time of its signature.

The Acting Minister paid tribute to all those who have contributed their talents and energies to the work of the Organisation over the years. He paid special tribute to the last Secretary-General of SEATO, His Excellency Mr Sunthorn Hongladarom, a Thai citizen of great distinction.

Treaties

Treaty with Japan.

The Basic Treaty of Friendship and Co-operation between Australia and Japan was ratified with the exchange of the instruments of ratification between the Australian Minister for Foreign Affairs, Mr Andrew Peacock, and His Excellency the Ambassador of Japan, Mr Yoshio Okawara, on 21 July 1977. This note provides some general observations on its purpose and contents:[72]

Explanation of Negotiations

The first Australian draft of the present Treaty was given to Japan in December 1973. A Japanese draft was presented in May 1974. During subsequent negotiations in the last quarter of 1974 and the first quarter of 1975, progress was achieved in reaching agreement on large parts of the text, but difficulties were encountered in deciding on appropriate wording to prescribe the specific standard of treatment that would be accorded to nationals and companies of each side under Articles VIII and IX. Proposals to achieve satisfactory wording were under consideration for the rest of the year.

In December 1975, following the election of the present Australian Government, the Japanese Prime Minister, Mr Miki, indicated in a message to the Australian Prime Minister, Mr Fraser, the Japanese Government's desire to conclude the proposed Basic Treaty as soon as possible. After conducting an urgent comprehensive review of the

72. *Backgrounder*, 22 July 1977.

course of negotiations, the Australian Government advised the Japanese Government of its willingness to conclude the Treaty at an early date provided agreement could be reached on a satisfactory text. Progress was achieved through diplomatic exchanges in March and April 1976 and all outstanding issues of substance were settled during formal negotiations at Canberra from 3 to 6 May 1976. The Treaty was then signed by the Australian Prime Minister, Mr Malcolm Fraser, and the then Japanese Prime Minister, Mr Takeo Miki, in Tokyo on 16 June 1976.

Purpose and Significance of the Treaty

The Treaty enshrines in formal and symbolic terms the friendship, community of interests and interdependence that exists between Australia and Japan and establishes a broad framework for further co-operation, including new agreements, in specific areas. It also recognises the two countries' mutual interest in each being a stable and reliable supplier to and market for the other and prescribes, on a mutual basis, specific standards of treatment to be accorded to nationals and companies as regards their entry and stay and business and professional activities.

The Treaty is significant in that it is the first of its kind that Australia has concluded with any country. None of Australia's other treaty commitments, including the ANZUS Treaty with the United States and New Zealand, the Commerce Agreement with Japan and the Trade Agreement with New Zealand, is as comprehensive. For Japan also the Basic Treaty has unique aspects in that its scope and purpose are broader than those of Japan's treaties of commerce and navigation with a dozen or so other countries, including the United States and Britain.

Contents of the Treaty

(a) The Preamble and Articles I, II, III and IV describe the basic principles underlying the Australia/Japan relationship and express the spirit in which the Treaty was concluded.
(b) Article I foreshadows the possibility of Australia and Japan concluding new agreements to govern their relations in specific fields.
(c) Article II describes the general principles for Australia/Japan co-operation in the international political arena and expressly confirms the two countries' acceptance of the Principles of the Charter of the United Nations.
(d) Article III lists various areas in the bilateral relationship in which the two Governments undertake to encourage co-operation and understanding by promoting consultations and appropriate exchanges.
(e) Article IV lays down the general principles for Australia/Japan co-operation in the general area of international economic relations.

(f) Article V contains important statements related to Australia/Japan economic relations, including an undertaking that those relations will be developed on the basis of mutual benefit and trust. This Article also recognises the two countries' mutual interest in each being a stable and reliable supplier to and market for the other in respect of their bilateral trade. It should be noted that the Basic Treaty does not provide for specific treatment with regard to Australia/Japan bilateral trade, as this is set out in detailed terms in the Australia/Japan Commerce Agreement of 1957, as amended in 1963, and in the General Agreement on Tariffs and Trade, to which both countries are parties.

(g) Articles VI and VII cover respectively co-operation in the trade and development of mineral resources and co-operation in the exchange of capital and technology. In each case, it is provided that such co-operation shall be in accordance with the provisions of Article V.

(h) Articles VIII and IX incorporate significant undertakings for each side to provide specific treatment to the nationals of the other as regards entry and stay and business and professional activities, including investment activities. In particular, paragraph 1 of Article VIII and paragraph 3 of Article IX provide in this regard for 'fair and equitable treatment . . . provided that in no case shall such treatment be discriminatory between nationals of the other Contracting Party and nationals of any third country'. It should be noted that paragraph 1 of the Agreed Minutes confirms that this standard of treatment will in effect be most-favoured-nation treatment, where it is understood that there is no requirement to apply retroactively policies that have already become inoperative. It should also be noted that this standard of treatment is entirely consistent with Australia's existing policies and practice.

(i) Article X contains general commitments for shipping between the two countries to be developed on a fair and mutually advantageous basis.

(j) Articles XI, XII, XIII and XIV are general machinery provisions allowing for representations and consultations on the implementation of the Treaty and describing the details of the Treaty's ratification and entry into force.

(k) The various related instruments attached to the Treaty all have the same legal effect, but differ in presentational status in accordance with their contents and purpose.

(l) The Protocol is considered as an integral part of the Treaty and contains various qualifications to the commitments made in the Treaty proper. For example, paragraph 1 of the Protocol excludes from the scope of the Treaty commitments special privileges such as those granted by either country to developing countries, those granted under taxation agreements, those

granted by Australia to third countries by virtue of their membership of the Commonwealth of Nations, and those granted by Japan to persons who originated in its former colonies.

(m) The Exchange of Notes relating to the Non-Metropolitan Areas of Australia confirms that the undertakings given by Australia shall not apply within Australia's non-metropolitan areas such as Cocos Islands, Christmas Island and Norfolk Island.

(n) The Exchange of Notes relating to Article VIII contains supplementary provisions relating specifically to the treatment of businessmen temporarily resident in the territory of the other country.

(o) The Agreed Minutes lists various understandings and interpretations concerning the provisions of the Treaty and the related instruments mentioned so far. It should be noted that paragraph 3 of the Agreed Minutes confirms that investment activities fall within the scope of paragraph 3 of Article IX.

(p) The Record of Discussion records Japan's acknowledgement of Australia's position as regards its aspirations towards ownership and control of its resources and industries. Japan has noted Australia's position rather than subscribed to it, because existing Japanese legislation inhibits direct government intervention in the ownership and control of Japan's resources and industries.