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PARLIAMENTS AND THE TREATYMAKING POWER

INTER-PARLIAMENTARY UNION

AIMS

The Inter-Parliamentary Union whose international Statute is outlined in a Headquarters Agreement drawn up with the Swiss federal authorities, is the only world-wide organization of Parliaments.

The aim of the Inter-Parliamentary Union is to promote personal contacts between members of all Parliaments and to unite them in common action to secure and maintain the full participation of their respective States in the firm establishment and development of democratic institutions and in the advancement of the work of international peace and co-operation.

In pursuance of this objective, the Union makes known its views on all international problems suitable for settlement by parliamentary action and puts forward suggestions for the development of parliamentary assemblies so as to improve the working of those institutions and increase their prestige.

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OFFICIAL PUBLICATION

The Union's official organ is the *Inter-Parliamentary Bulletin,* which appears quarterly in both English and French. This publication is indispensable in keeping posted on the activities of the Organization.'Subscription can be placed with the Inter-Parliamentary Bureau, Geneva.

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CONSTITUTIONAL AND PARLIAMENTARY INFORMATION

First Series - Thirty-sixth year

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PARLIAMENTS AND THE TREATYMAKING POWER

By G. J. Ploos van Amstel, Clerk of the petitionscommittees of both Chambers of the States-General in the Netherlands

Introduction

The development of international law after the Second World War has been characterized by a large increase of multilateral international treaties. Therefore it is useful to examine the procedure of approval of treaties by Parliaments.

Replies to the questionnaire were received from the following 23 countries (in alphabetical order):

Austria, Belgium, Canada, Cyprus, Denmark, Egypt, the Federal Republic of Germany, France, Greece, India, Ireland, Israel, Italy, Japan, Republic of Korea, the Netherlands, Norway, the Philippines, Spain, Sweden, Thailand, the United Kingdom, the United States of America.

The terminology used in this report is based on the Vienna Convention on the Law of Treaties of 23rd May 1969[1] Article 2 of this Convention reads as follows:

Use of terms

1. For the purposes of the present Convention:
   (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
   (b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
   (c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;
   (d) "reservation" 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 to modify the legal effect of certain provisions of the treaty in their application to that State;

[1] With the exception noted in the footnote on page 16.

(e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" means a State not a party to the treaty;

(i) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

The following countries have signed or ratified and acceded to this convention:

State	*Signature*	*Ratification, accession(a)*
Afghanistan	23 May 1969	
Argentina	23 May 1969	5 December 1972
Australia		13 June 1974
Austria		30 April 1979 (a)
Barbados	23 May 1969	24 June 1971
Bolivia	23 May 1969	
Brazil	23 May 1969	
Canada		14 October 1970 (a)
Central African Republic		10 December 1971 (a)
Chile	23 May 1969	9 April 1981
China		
Colombia	23 May 1969	10 April 1985
Congo	23 May 1969	12 April 1982
Costa Rica	23 May 1969	
Cyprus		28 December 1976 (a)
Democratic Kampuchea	23 May 1969	
Denmark	23 May 1969	1 June 1976
Egypt		11 February 1982
El Salvador	16 February 1970	
Ethiopia	30 April 1970	
Finland	23 May 1969	19 August 1977
Germany, Federal Republic of	30 April 1970 /	
Ghana	23 May 1969/	
Greece		30 October 1974
Guatemala	23 May 1969	
Guyana	23 May 1969	
Haiti		25 August 1980 (a)
Holy See	30 September 1969	25 February 1977
Honduras	23 May 1969	20 September 1979
Iran	23 May 1969	
Italy	22 April 1970	25 July 1974

State	*Signature*	*Ratification, accession(a)*
Ivory coast	23 July 1969	
Jamaica	23 May 1969	28 July 1970
Japan		2 July 1981
Kenya	23 May 1969	
Korea	23 May 1969	27 April 1977
Kuwait		11 November 1975 (a)
Lesotho		3 March 1972 (a)
Liberia	23 May 1969	29 August 1985
Lusembourg	4 September 1969	
Madagascar	23 May 1969	
Malawi		23 August 1983 (a)
Mauritius		18 January 1973 (a)
Mexico	23 May 1969	25 September 1974
Morocco	23 May 1969	26 September 1972
Nauru		5 May 1978 (a)
Nepal	23 May 1969	
Netherlands	23 May 1969	9 April 1985
New Zealand	29 April 1970	4 August 1971
Niger		27 October 1971 (a)
Nigeria	23 May 1969	31 July 1969
Pakistan	29 April 1970	
Panama		28 July 1980 (a)
Paraguay		3 February 1972 (a)
Peru	23 May 1969	
Philippines	23 May 1969	27 April 1977
Rwanda		3 January 1980 (a)
Spain		16 May 1972 (a)
Sudan	23 May 1969	
Sweden	23 April 1970	4 February 1975
Syrian Arab Republic		2 October 1970 (a)
Togo		28 December 1970 (a)
Trinidad and Tobago	23 May 1969	
Tunisia		23 June 1971 (a)
United Kingdom	20 April 1970	25 June 1971
United Republic of Tanzania		12 April 1976 (a)
United States of America	24 April 1970	
Uruguay	23 May 1969	5 March 1982
Yugoslavia		27 August 1970
Zaire		25 July 1977 (a)
Zambia	23 May 1969	

Possible differences in definition between the convention and the constitutional practice in some countries will be made clear in the course of this report.

Preliminary observations

In most countries the Constitution contains one or more provisions relating to the treaties.

The United Kingdom does not have such provisions, because it has no written constitution.

In Canada there is—with the exception of Article 132 of the Constitution Act 1867, which provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countires, arising under treaties between the Empire and such foreign countries—no specific provision in the constitution dealing with treaties under the system which is now in effect, that is, Canada having full power to deal with its own external affairs; it has to be remarked, that Section 132 has fallen into disuse so that it has no relevance to present day conditions. As a consequence, for Canada, treaty making is an executive act.

Although Israel has no codified constitution, the Basic law on the President of the State contains one provision relating to conventions (Section II (a) (5)).

The articles in the Constitution of other countries are: Austria (art. 9, 10, 16, 48, 49, 50, 65, 66, 89, 140a. 145), Belgium (art. 68, 59bis par. 2, 59bis par. 2bis, 25bis), Canada (Section 132), Cyprus (art. 169), Denmark (section 19, 20 and 42, sub-section 6), Federal Republic of Germany (art. 24, 32, 59, 73, no. 1, 79 par. 1, 1151 par. 3, 123 par. 2), Egypt (art. 151), France (art. 5, 11, 16, 52, 53, 54, 55, 85, 86, 87, 88 and art. 14 and 15 of the Preambule de la Constitution 1946), Greece (art. 2 par. 2,27,28,36,72 par. 1), India (art. 51,53,73,77,245,246,248,254,299 and the entries 10,12, 13, 14, 15, 18,19 of list I in the Seventh Schedule), Ireland (art. 29.4, 29.5, 29.6), Italy (art. 80, 87), Japan (art. 7, 61, 73, 98 par. 2), Korea (art. 5, 48, 65, 96), the Netherlands (art. 91, 92, 93, 94, 95 and additional article XXI of the 1983 Constitution), Norway (sections 26, 75, 93), the Philippines (art. II section 3, VII section 10, 12, 16, VIII section 14, X section 5, XIV section 15), Spain (art. 63 par. 2, 93,94,95, 96), Sweden (chapter 10, art. 1,2, 3,4, 5), Thailand (art. 162 par. 12,162), the United States of America (art. I section 10, II section 2 par. 2, III section 2 par. 2, VI section 2).

In Austria, Israel, Italy, Japan, Norway and the United States of America the constitution deals with only one type of treaty, which is mostly called in English "treaty" and in French "traité". In the Netherlands, the 1983 Constitution uses the word "verdrag" (English: treaty).

In Norway there are different words for this type. These terms do not correspond to various kinds of agreements, because there exists no fixed rule concerning the use of the terms. The expressions "traktat", "forbund", "konvensjon" and "pakt" are generally used about legally binding and rather important agreements.

In Canada the Constitution contemplates only the performance of "Empire Treaties". The Canadian constitution therefore, makes no distinction between the types of treaties.

A treaty may be constituted by a single instrument called a Treaty, agreement, Protocol, etc., or it may take the form of an exchange of two or more instruments, such as an Exchange of Notes or an Exchange of Letters.

In all countries, except in the United States of America and in the Netherlands, the definitions specified in Article 23 of the Vienna Convention, as quoted in the introduction, are accepted.

In the United States of America the term treaty has a specific constitutional connotation. The distinguishing feature between a treaty and other types of international agreements lies especially in the procedural requirement of advice and consent of two thirds of Senators present and voting.

In Ireland the Constitution applies to all types of treaties, which are taken to include agreements with international organisations.

In the Netherlands too the Constitution applies to all kind of international agreements; it is not limited to one particular type. It uses the term "verdrag" (treaty) as a collective term for all these agreements. In the Netherlands the term "treaty" includes also agreements with international organisations.

The different terms that are used in countries whose constitution or constitutional practice recognises further types of treaty are: Cyprus: "convention" and "agreements", Egypt: "treaty" and "agreement", Federal Republic of Germany: "State treaties", "administrative agreements", "Government agreements", "ministerial agreements", France: "treaty of peace", "treaty of commerce", "treaties or conventions relating to international organizations", "treaties and conventions approved and ratified international agreements", India: "treaties", "conventions", "agreements", "arrangements", "memorandum of understanding", "agreements", "arrangements", "memorandum of understanding", "protocols", "declarations", Korea: "treaty", "agreement", "convention", the Philippines: "foreign loans", "treaty executive agreement", "international treaties or agreements", Spain: "treaties" or "agreements" are both used for all types of international agreements.

The distinguishing characteristics of the various types of international agreement for the different countries are as follows:

Canada

three types of international agreements are the formal "Head of State" treaty: the "Treaty in Intergovernmental" form; and the "Treaty in Exchange of Notes" form.

These three types of agreements can be distinguished because of their degree of formality and by the signatories to the agreements.

By a comprehensive document adopted in 1947 entitled "Letters Patent constituting the Office of Governor General of Canada", the Governor General is authorized "to exercise all powers and authorities lawfully belonging to use (the king) in respect of Canada". This would give the Governor General of Canada the power to sign the treaty in Head of State form. Treaties in intergovernmental form are signed by an official (plenipotentiary) who acts under the authority of an "instrument of full power", which is a document signed by the Secretary of State for External Affairs granting to the plenipotentiary full power to sign the treaty. The treaty in exchange of notes form may be signed by the State's Foreign

Ministers or by the Ambassadors or High Commissioners or perhaps by the Minister in charge of a department other than External Affairs. It is in reality two documents.

The first is a note in which one state proposes to another the terms of the agreement, and the second is a note in reply, in which the other state accepts the proposed terms. Under Article 7 (2) of the Vienna Law of Treaties Convention of 1969 Heads of Government and Ministers for Foreign Affairs are considered to represent their state in virtue of their functions and without having to produce full powers. Full Powers are *not* prepared for the signature of Exchanges of Notes.

Egypt

The first type of treaty comprises treaties of reconciliation, alliance, trade and navigation and others relating to alteration of boundaries or extra non-budgeted expenditures. The Assembly has to approve this kind of treaty. The second type includes all other treaties laid before the Assembly. The first type is known as "Treaty" while the second is called "Agreement" such as those of cooperation be it cultural, scientific, technical, tourist or administrative. These two types of treaty are the same in the following respect:

— Their conclusion and communication to the People's Assembly by the President of the Republic.

— Both are transformed into national laws after their conclusion, promulgation and publication.

Thus, the Assembly's approval of the first type of convention is imperative while it is enough for the second type to be referred to the Assembly.

The Federal Republic of Germany

The constitutional practice distinguishes between the 3 types of international agreement according to the formal criteria of the contracting parties mentioned in the agreement.

— "Staatsverträge" (State treaties) are all those treaties, the titles of which indicate that the Federal President as Head of State is the contracting party according to the wording and form of the treaty, and the conclusion of which is authorized by the Federal President. In substance state treaties generally constitute political treaties and most of the treaties relating to matters of federal legislation;

— "Verwaltungsabkommen" (administrative agreements) are treaties that do not relate to matters of federal legislation nor constitute political treaties, but relate to matters generally dealt with by executive regulations or ordinances. Constitutional practice distinguishes between two different types of administrative agreements:

a. "Regierungsabkommen" (government agreements) are concluded by the Federal Government as contracting party. It is generally the Minister for Foreign Affairs and not the Federal President who authorizes their conclusion. In substance most of the government agreements are as a rule administrative agreements while the remainder constitute treaties relating to matters of federal legislation;

b. "Ressortabkommen" (ministerial agreements) are concluded by one or several ministers of the Federal Government.

France

Treaties can be distinguished as treaties at the level of substance and at the level of form. Treaties at the level of substance are defined by their announcement as prescribed in art. 53 of the constitution.

Treaties on the formal level are part of the legislation and have to be authorised by law before they are ratified or approved by the executive power. Other agreements (or "accords"), which are not announced as prescribed by art. 53, are not part of the legislation and can be approved or ratified without preliminary intervention of Parliament. It is for the executive power to decide, if an agreement is a "treaty" or an "accord" and also to decide on "ratification" or "approval". "International agreement" can be defined as a general term covering "treaties" and "accords".

Korea

The terms "treaty", "agreement" and "convention" are types of international agreement, which can be distinguished not because of characteristics of their own, but because of their practice.

India

Internal procedures leading to the decision to be bound by treaties and agreements, by and large, are uniformly applicable to all kinds of agreements irrespective of the terminology used.

Ireland

The Constitution (art. 29.4.2) permits the Government to "avail of or adopt any organ, instrument or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international cooperation in matters of common concern". However, the procedure relating to international agreements is applied only to binding agreements between entities possessing treaty making power.

Philippines

The term "treaty", in its general sense, embraces the various kinds of international agreements, regardless of the terminology used to designate them. In its restricted sense, however, the term is commonly employed to designate the more important instruments, usually of political or quasi-political characters, such as treaties of peace, cession, alliance, friendship and commerce (Salonga, Public International Law 1966).

An "agreement", on the other hand, usually denotes an instrument of a more limited scope of lesser importance than a treaty. It is usually not subject to ratification.

Spain

The characteristics of the different types of treaty are as follows (articles are articles of the Constitution). Article 93 refers to Treaties which transfer to an international organization or institution the exercise of functions derived from the Constitution.

Article 94 par. 1 refers to treaties of a political or military character, to those which affect the territorial integrity of the Spaniards, to those which imply financial obligations for the State, and, finally, to those that imply the modification of any Spanish law, or should be given effect by a Spanish Act. This type of treaty cannot be concluded without the Cortes' participation.

Article 94 par. 2 refers to a residual type of treaty that is, one which cannot be included in the above mentioned types.

Finally, Article 95 refers to treaties which contain regulations against the Constitution.

The United States of America

The chief distinguishing feature between treaties and non-treaty international agreements is that the former are made in accordance with constitutional requirements, i.e., by the President but only with the advice and consent of two-thirds of Senators present and voting (Article II, section 2 clause 2). Among executive agreements, perhaps the principal distinguishing characteristic is the authority making them, i.e., treaty, act of congres, or presidential constitutional powers.

Executive agreements vary widely in formality and in importance. The executive agreement, therefore, is not really distinguishable simply by virtue of the matters with which it is concerned.

It does not appear that there are established rules for distinguishing executive agreements from treaties, other than formal ratification subject to Senate approval by a two-thirds vote. It is by no means easy to define the term "executive agreement" more precisely or to provide a clearcut distinction between the executive agreement and the treaty.

In all countries the Constitution or the constitutional practice allows the conclusion of international agreements not only with States, but also with public international organisations.

As for the existence of international agreements, which are neither treaties, nor governed by private international law, according to the constitution of Austria, the Federal President can authorize the Federal Government to conclude certain categories of treaties, which do not fall under the definition of a political treaty. Such an authorization extends also to the power to enact ordinances in accordance with the constitutional provision, that at the time of conclusion of a treaty, which is not a political treaty Federal President can direct, that the treaty in question shall be implemented by the issue of ordinances. In Norway, agreements that are not legally binding to Norway as a state in accordance with international, law do not have to be presented to the Parliament for approval.

In Cyprus, France, Greece, India, Israel, Italy, Japan, Thailand, Spain, there is neither a provision in the Constitution for such agreements nor is it part of the Constitutional practice.

In Belgium, Canada, Denmark, France, Korea, Norway, the Philippines, Sweden, the United States of America it is possible in accordance with constitutional practice to conclude agreements with foreign states, which are not treaties in the sense of the constitution. The Netherlands constitutional practice and—to some extent that of the Federal Republic of Germany— recognizes the possibility of concluding arrangements between the competent authorities of the Netherlands and another country; these arrangements are not considered to be treaties.

Conclusion of treaties

In all countries only the Executive is empowered to initiate and conduct negotiations, leading to the conclusion of treaties.

In none of the countries does Parliament play a role during the negotiations although in most cases the Executive can inform Parliament about certain negotiations and Parliament can ask information about negotiations and about initiating negotiations.

In Norway, the Storting has no formal authority in the stage of the negotiations but will often exert considerable influence either before the negotiations start or during the negotiation period. The Government may ask for the Storting's express consent even before important deliberations are started. Or the Government may present its plan to the Storting in order to have a parliamentary discussion of the matter before further steps are taken. At this stage the Government may—instead of initiating a discussion in the Storting—bring its plan to discussion in the Enlarged Committee on Foreign Affairs and the Constitution. The duty of this committee is "to discuss important questions of foreign policy, trade policy and defence policy with the Government" and such discussions "should take place before important decisions are reached" (Rules of Procedure, section 13). The business of the committee shall be kept secret unless otherwise expressly decided, and the matter discussed shall only be brought to discussion in the Storting if it is requested by at least four of the 26 members of the committee.

Formally the Storting can concerning negotiations only give the Government advice, no binding order. But a vote in the Storting, nevertheless, will always be politically binding for the Government or the competent Minister.

In all countries it is the Executive Power, (including the Head of State, who is part of the Executive), which according to the constitution or constitutional practice is empowered to conclude treaties subject to ratification.

In Canada the formal grant of treaty-making power is not found in the *Constitution Act 1867,* but in the instrument by which the King or Queen delegated the prerogative powers over foreign affairs to the Governor General of Canada, who exercises these powers upon the advice of the Canadian government. The current instrument of delegation is a comprehensive document which was adopted in

1947. In this document, no prerogative power over Canada is whithheld. The central government therefore has the power to enter into treaties binding Canada.

In the United Kingdom power to make treaties is vested in the Crown, that power being exercised on the advice of the Secretary of State for Foreign or Commonwealth Affairs, who in turn consults Departments of Her Majesty's Government as to how far the implementation of a particular treaty may be desirable.

In Denmark and Egypt, according to the Constitution or constitutional practice, Parliament is empowered to express consent to be bound by an international agreement. In the Federal Republic of Germany a special provision exists for peace treaties.

In all other countries consent to be bound is given by the Head of State or the Executive or those who have received general authorization and are empowered for this purpose.

In all countries—although not always spelled out explicitly in the Constitution—amendments to a treaty require the same procedure as the original treaty if the amendments are laid down in a treaty.

In Austria, Egypt and the Federal Republic of Germany, according to the Constitution, Parliament is, in relation to treaties which need parliamentary approval, empowered to agree to reservations made by another State. In Denmark this situation is not dealt with by the Constitution, but the government is supposed to inform Parliament, when consent is procured.

In Norway, the King (the Government) decides whether a treaty shall be ratified despite reservations from another party. But if the treaty is being presented to the Storting for approval, the Storting will be aware of such reservations.

In the United States of America Congress is also empowered to agree to reservations. If another country ratifies a treaty subject to a reservation and the President deems acceptance desirable, the text of the reservation is communicated by the President to the Senate to obtain its approval.

If the Senate has already given its approval but the instruments of ratification have not yet been exchanged, the express consent of the Senate to acceptance of the reservation is awaited before exchanging the ratifications. If the treaty is still under consideration, Senate consent to the reservation may be either expressed or implied in the resolution giving its advice and consent to the treaty. In all other countries only the Executive (Head of State, government or these combined) can object or agree to reservations made by other States.

In Austria, Denmark, Egypt, Ireland and Spain according to the Constitution or constitutional practice the Head of State or the Executive is only empowered to denounce or otherwise terminate an international agreement with consent of Parliament, if approval of Parliament was needed to establish it.

In Thailand the National Assembly may submit a motion for the Executive to initiate such a denunciation.

In Canada the involvement of Parliament in relation to the termination or denunciation of an international agreement would depend upon whether the matter is submitted to Parliament for its consideration by the executive or whether it is dealt with as a matter of the Crown prerogative. Therefore on its own Parliament has no power to denounce, terminate or withdraw from a treaty.

In the Philippines the Constitution authorizes the nullification of a treaty not only when it conflicts with the fundamental law, but also when it runs counter to an act of Congress.

In the United States of America the Constitution makes no provision for the termination of treaties. The constitutional practice supports the conclusion that Congress can terminate treaties, but the practice also indicates that a similar power is possessed by the President and the Senate jointly, and even court decisions are unequivocal on only one point in this regard—namely that the termination of a treaty is a political act so that the judiciary is foreclosed from the area.

In all other states only the Executive (Head of State, and/or Government) can terminate an international agreement.

Communication of treaties

In Austria the Constitution does not prescribe that a treaty is to be communicated for information in other ways than by the usual publication in the federal law gazette (Bundesgesetzblatt).

In Belgium the Constitution provides that the King communicates concluded treaties to Parliament. This communication occurs after signature but before consent to be bound.

The practice in Canada, whether or not legislation is required, or parliamentary approval is sought, is to table in Parliament all agreements including a treaty in the form of an exchange of notes.

In Egypt the Constitution stipulates that the President of the Republic expeditiously briefs the Assembly on every treaty with suitable clarifications.

In Denmark, if the treaty does not require the consent of Parliament, the Constitution does not prescribe that a treaty is to be communicated for information in other ways than through the usual publication of treaties in part C of the Danish Gazette (corresponding to the "Public General Acts and Statutes"). The Minister for Foreign Affairs might also inform parliament about this type of treaty through the Committee of Foreign Policy.

In France the Constitution does not have provisions concerning the communication of treaties to Parliament before introducing a bill for authorizing the ratification. However, there is a list of international agreements and the Foreign Committee can ask for the text of a convention.

In Greece the Constitution prescribes that the President of the Republic informs Parliament, giving all the necessary explanations insofar as the interest

and security of the State permit. Moreover all treaties, including those which do not have to be announced to Parliament have to be published in the Official journal.

In India, the Constitution does not make any provision for communication of a treaty for information to Parliament. According to the present practice, the Government of India places a copy of every treaty on the table of both Houses of Parliament before or after it is ratified.

In Ireland, every international agreement to which the State becomes a party must be laid before Dáil Éireann (the Irish Parliament). The procedure may be observed after the State has consented to be bound except in the case of agreements which must be approved by Dáil Éireann i.e. international agreements involving a charge upon public funds (not being of a technical and administrative character).

In Israel, only conventions of the International Labour organizations are laid on the table of the Knesset. But this is done only because members States of the ILO are required to do so, not because of accepted practice in Israël.

In Korea the Constitution does not provide explicitly for the communication of treaties. In the case of some agreements, which do not need parliamentary approval, the agreements can be communicated to the National Assembly for its information. However the communication does not take place in the case of agreements which need the parliamentary approval shortly after their signature. In these cases, communications and submissions for approval are made at the same time.

In the Netherlands, according to the constitutional practice all treaties, irrespective of whether or not they require parliamentary approval, are to be communicated to Parliament for its information. The constitutional requirements for communication are strictly complied with in the case of agreements which do not need parliamentary approval before they can enter into force. However, communication does not take place in the case of agreements which need parliamentary approval and which will be submitted to Parliament for approval shortly after their signature. In those cases communication and submission for approval are made at the same time.

In Norway, the King (the Government) is obliged to inform the Storting about all treaties entered into. This happens once a year, jointly for all treaties entered into the course of the year, and after expression of consent to be bound. The information is given in a report to Parliament. Information about secret treaties is given through an annual secret report to Parliament.

In Spain a treaty whose conclusion does not require Parliaments authorization has to be communicated to Parliament. Parliament is informed of the "conclusion". In constitutional practice, there is no special procedure; the communication normally occurs when the treaty is already effective. The Government sends to the Houses the text of the agreement, the date of the signature and a note on its effect. The Rules of the two Houses provide that these texts must be sent to the Committees which have competence on that subject (in the Senate) or to the Committees of Foreign Affairs (in the Congress).

In the United Kingdom constitutional practice prescribes that any treaty which requires ratification, acceptance, approval or accession must be laid before Parliament. This occurs after signature and before ratification. The practice of laying the treaty before Parliament unless the treaty has before then been debated in Parliament, is based on a voluntary undertaking by the Executive. When a treaty requires ratification the Government does not usually proceed with ratification until a period of twenty-one days has elapsed from the date on which the text was laid before Parliament. This practice, which is known as the Ponsonby Rule, has its origin in a departmental minute dated 11 th February 1924 and signed by Mr. Arthur Ponsonby, then Undersecretary of State for Foreign Affairs. This practice is subject to modification if necessary when urgent and important considerations arise.

In the United States of America the principal provision of the Constitution on treaties simply states who shall make treaties for the United States: "the President by and with the advice and consent of two-thirds of the Senators present and voting". Neither this provision nor any other of the constitutional provisions applicable to treaties contains any procedural detail including the timing or manner of communicating treaties to the Senate. Of course, the necessity for communication between the Executive which negotiates and the Senate is implicit in the latter's duty to advise and consent to treaties. The timing and manner of communicating with the Senate on all treaties are matters largely in the hands of the President. He may submit treaties to the Senate for approval any time after signature as long as it is before expression of consent to be bound. Similarly, international agreements to be approved by law are submitted after signature, but before United States acceptance.

In addition, all other international agreements must be submitted to Congress for information purposes. Public law 94-403 (the so-called Case-Zablocki Act) specifically requires the Secretary of State to transmit to Congress the text of any international agreement other than a treaty (which requires Senate approval) within sixty days after its entry into force. This includes the text of any oral agreement, which must be reduced to writing. Any Department or agency of the United States is required to transmit the text of the agreement to the Department of State within twenty days after signature. If the President determines that the immediate public disclosure of an agreement would be prejudicial to the national security of the United States, the agreement is transmitted not to Congress but to the Senate Foreign Relations Committee and the House Foreign Affairs Committee under an injunction of secrecy.

Following signature of a treaty by a representative of the United States, the Secretary of State prepares a report to the President and submits the treaty to him with a recommendation that he transmits the treaty to the Senate. If the President concurs, he transmits the treaty and the Secretary's report to the Senate for its advice and consent. A State Department Regulation prescribes the procedure for transmitting other international agreements to Congress. Under these procedures the Department of State's Assistant Legal Adviser for Treaty Affairs transmits the agreements to the President of the Senate and the Speaker of the House of Representatives within sixty days after the entry into force of such agreements. The Assistant Secretary of State for Congressional Relations transmits agreements

classified for national security purposes to the Senate Foreign Relations Committee. The State Department officials also are required to send background statements explaining the agreement, the negotiations, the effect and a precise citation of legal authority. A treaty is submitted to the Senate prior to ratification, and some international agreements are submitted to Congress for approval prior to acceptance. All other international agreements are subject to the above requirement in the Case-Zablocki Act (transmission to Congress within sixty days).

In all other countries there are no provisions for communicating treaties.

Approval of treaties[1]

In Egypt, India, Israel and the United Kingdom the constitutional practice does not require the approval of the treaty by Parliament before consent to be bound to the international agreement is expressed by the Executive, in the United Kingdom on behalf of the Crown. Nevertheless, in the United Kingdom Parliament has the opportunity to express its views during the period before ratification.

As a matter of principle and practice, the government of Canada does seek the approval of Parliament in relation to certain types of important treaties before ratification is authorized by the Governor General in Council. In this way, Parliament has a certain measure of control over the exercise of the treaty-making power by the Crown. This is in addition to the indirect control which Parliament may exercise through the normal functioning of the parliamentary system, that is cabinet responsibility to the House of Commons.

International agreements may be brought directly to the attention of Parliament and the approval of the House of Commons and the Senate may be sought by Joint Resolution before Canada commits itself to treaties which involve military or economic sanctions, political or military commitments of a farreaching character, or the large expenditure of public funds. The decision on whether Parliamentary approval should be sought is made in each instance, by the Government of the day. Recent practice has been to seek Parliamentary approval by resolution for only the most important treaties. The last agreement to have been submitted to Parliament for approval by resolution was the Canada-United States Automotive Products Agreement, approved by a joint resolution of the House of Commons and the Senate in 1966.

Many international agreements require legislation to make them effective in Canadian domestic law.

The legislation may be either federal or provincial or a combination of both in fields of shared jurisdiction. Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted. If the legislation falls within federal jurisdiction,

[1] In this chapter "approval" does not (as in art. 2 sub 1 b of the Vienna Convention, cited in the Introduction) mean an international, but a national act.

the implementing legislation will often include a section stating that Parliament approves the agreement. This would be employed, for example, in statutes implementing double taxation agreements, under which the agreement in question is given the force of law in Canada.

All treaties of any significance are tabled in the House of Commons and the Senate after they enter into force. On occasion the Government may wish to bring a proposed agreement to the attention of the Parliament before it has been signed. This was the case with the Transit Pipeline Agreement between Canada and the United States. An initialled text of this agreement was tabled in the House of Commons on May 11, 1976. The agreement was signed on January 28, 1977, and entered into force on October 1, 1977.

In all other countries the Constitution or constitutional practice requires the approval of the treaty by Parliament before the consent to be bound to the international agreement is expressed by the competent national body. In these countries, however, preliminary approval by Parliament is not required for all treaties.

In Austria it applies only to political treaties and other treaties in so far as their contents modify or complement existent laws; they may only be concluded with the sanction of the Nationalrat.

In Belgium there is no procedure for preliminary approval, but in constitutional practice there are different ways in which the legislature gives previously approval to treaties, which later will be concluded.

In Cyprus international agreements with a foreign state or any international organization relating to commercial matters, economic cooperation (including payments and credit) and modus vivendi are concluded under a decision of the Council of Ministers; these agreements are binding on the Republic without the approval of the House of Representatives. Any other treaty, convention or international agreement is negotiated and signed under a decision of the Council of Ministers and is only operative and binding on the Republic when approved by a law made by the House of Representatives, whereupon it is concluded. In Denmark provisions of the Constitution imply that, before consent to be bound by a treaty is expressed (i.e. before the passing of possibly any necessary Bills) the government must be sure that the Folketing will not oppose the treaty. As a consequence, it has become common practice for the government to try to ensure the passing of the necessary legislation either in advance of or at the same time as it introduces the proposal to consent to the ratification of the treaty.

In the Federal Republic of Germany, political treaties and treaties relating to matters of federal legislation are subject to approval by Parliament before the Federal President expresses the consent to be bound. In constitutional practice, the Bundeskanzler (Federal Chancellor) and the Foreign Minister shall not sign unless with the provision of formal ratification.

In France the Constitution requires previous approval of certain treaties by Parliament before consent to be bound is given. The treaties for which previous approval is required are mentioned in the Constitution.

In Greece almost all treaties need previous approval by Parliament before they can enter into force.

The Constitution acknowledges exceptions in circumstances of extreme urgent necessity. In that situation the President of the Republic can, on the proposal of the Council of ministers issue an Act. Once an Act is issued, he has the right to ratify a treaty. However, this Act has to be laid before Parliament within forty days. If this does not occur or if Parliament does not approve the treaty, it is abrogated for the future.

In India an international agreement which requires a formal consent to be bound is approved by the Cabinet before its conclusion and entry into force.

In Korea, the requirement of approval by Parliament applies to the following types of international agreements: treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigations; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

In Ireland the State cannot be bound by any international agreement involving a charge on public funds (not being an agreement of a technical and administrative character) unless the terms of the agreement have been approved by Dáil Éireann.

In the Netherlands previous approval is not required in the following circumstances:

(a) if the agreement is one in respect of which no approval is required by the law;

(b) if the agreement is exclusively concerned with the execution, of an approved agreement, provided that the Act regulating the approval does not contain any reservations in this respect;

(c) if the agreement does not impose considerable obligations on the Kingdom and has been concluded for a period not exceeding one year; and

(d) if, in exceptional cases of a compelling nature it would be definitely prejudicial to the interests of the Kingdom if the agreement were not to enter into force before it has been approved. Such an agreement must still be submitted as soon as possible to the States-General for approval. If approval is withheld, the agreement must be terminated as soon as this is legally possible. Such an agreement shall be concluded only if it contains a reservation providing for its termination in the event of approval being withheld, save in cases in which the making of such a reservation would be definitely prejudicial to the interests of the Kingdom.

In Norway, the treaty must be presented to Parliament for approval if it concerns "matters of special importance" *or* when its implementations necessitates a new law or another resolution by Parliament (e.g. budgetary resolution).

In the Philippines, the requirement of approval applies to treaties in general except executive agreements entered into pursuant to public policy, national welfare and interest.

In Sweden, previous approval is not required in the following circumstances:

(a) If the agreement does not presuppose any amendment or abrogation of any law or the enactment of a new law;

(b) if the agreement does not otherwise concern a matter on which the Riksdag shall decide;

(c) if the agreement is not of major importance. If the approval is required only by the fact that the condition that the treaty is not of major importance is not fulfilled, the Government may omit obtaining the Riksdag's approval if the interest of the Realm so requires. In such a case the Government shall instead confer with the Foreign Affairs Advisory Council before the agreement is concluded.

Under the law of the United States of America an international agreement entered into by United States of America in the form of a treaty cannot become binding upon the United States, or effective as law of the United States, until the President, with the advice and consent of the Senate, has ratified the treaty or otherwise given official notification of assent to it. Although the Senate's consent to a treaty is absolute, the final act of ratification belongs to the President. Once the Senate has consented, the President ratifies (or does not ratify) the treaty.

In all countries where parliamentary approval of treaties is required Parliament has full discretion in granting or withholding approval.

While in Canada Parliament would have the full discretion to grant or withhold approval through the indirect control of the House of Commons over the executive under the Canadian system of cabinet government, it is unlikely that this would occur. The government of the day having negotiated a treaty would also require through political party solidarity that the treaty be approved.

In the Federal Republic of Germany, where Parliament *de jure* can exercise full discretion, *de facto* discretion is limited.

In the countries where approval by Parliament is required, the form of approval is in some given by resolution and in others by an Act.

In Austria the approval of the "Nationalrat" takes the form of an express decision of the plenary after preceding committee deliberations.

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In Canada the decision on whether Parliamentary approval of both Houses is necessary is made by the Government of the day. Parliamentary approval is sought only with regard to important bilateral treaties which fall into four general groups involving: 1) military or economic sanctions; 2) large expenditures of public funds; 3) political considerations of a far-reaching nature; 4) obligations the performance of which will affect private rights in Canada.

The procedure which is followed in relation to these treaties is as follows:

1. An order in council must be passed which provides that the Secretary of State for External Affairs is authorized to "execute and issue" an "instrument of full power" authorizing a named plenipotentiary to sign a specific treaty;

2. The instrument of full power, consisting of the formal written authority to sign, is issued in the name of the Secretary of State for External Affairs;
3. After the treaty is signed, but prior to ratification, a resolution of both Houses of Parliament is proposed when the treaty is an important one;
4. Ratification of the treaty after signature, requires the adoption of an order in council (usually issued following a decision of Cabinet) in which the Governor General in council authorizes the Secretary of State for External Affairs to "execute and issue" an instrument of ratification of the treaty;
5. The instrument of ratification must then be issued by the Secretary of State for External Affairs;
6. The instruments of ratification of the two states concerned are then exchanged in a subsequent brief formal ceremony which is attested by representatives of the two parties, and which is always accompanied by a protocol of exchange—a written record of the fact of the mutual handing over the instruments and of the actual date when the agreement is to enter into force.

In Denmark consent is given through the passing of a parliamentary resolution or by Act.

In Japan, Korea, the Philippines and Thailand a decision of Parliament or a resolution is required.

In Ireland, no form of approval is prescribed.

In the United States of America the action of the Senate results in a resolution of ratification. When the treaty is received by the Senate, it is read the first time, referred to the Committee on Foreign Relations, and ordered to be printed for the use of the Senate. The Committee on Foreign Relations holds hearings on the treaty and, if it approves it, reports it to the Senate with a recommendation that the Senate give its advice and consent to ratification. The advice and consent requires a two-thirds majority of the Senators present and voting. If the Senate concurs, the Secretary of the Senate attests to the resolution of advice and consent and transmits the resolution with the treaty to the President. As indicated, the "resolution of ratification" is the form employed with respect to all international agreements in the form of a treaty, e.g., bilateral and multilateral treaties.

In the case of an international agreement not made in the form of a treaty, specifically an executive agreement made pursuant to a treaty or act of Congress, presumably the choice of form is that specified in the underlying treaty or law (e.g., act of Congress, concurrent or joint resolution).

In the other countries the approval has to be given by an act.

In the Federal Republic of Germany approval is given in the form of a federal law and treaties concluded by a "Land" (constituent state) require approval in the form of an act of Parliament of that state.

In the Netherlands the constitution recognizes two equal methods of approval: tacit approval and express approval. The last is given by an Act. Tacit approval has been given, if within thirty days after the treaty has been submitted for that purpose to both Houses of the States-General, no wish has been expressed by or on

behalf of either House or by at least one fifth of the constitutional number of members of either House, that the agreement be subjected to express approval. In Spain for special treaties the authorisation is granted through an "organic law" (which has to be approved by a special majority in the Congress of Deputies).

In Sweden in some cases a special procedure is required. If the approval of an agreement presupposes an amendment or abrogation of a law or the enactment of a new law, or if it otherwise concerns a matter in which the Riksdag shall decide and a special procedure is prescribed for the requisite decision of the Riksdag, the same procedure shall be followed in connection with the approval of the agreement.

In most countries Parliament has to approve or reject the treaty as a whole. Nevertheless, if Parliament wishes to make any modifications, it can delay its approval and its deliberations until the government has tried to meet this wish, which will have been expressed during the deliberations.

In Denmark, Japan and the Philippines Parliament is deemed to have the power to approve the treaty subject to the content of the treaty.

In Japan however there is no precedent for Parliament approving a treaty with an amendment.

In the Netherlands, the Upper House of the States-General can only reject or approve the treaty as a whole. The Lower House may amend the Act regulating the approval in such a way that approval is subject to certain reservations to be made at the time when the consent to be bound is expressed, provided of course that these reservations are admissible under the treaty. Nor has the Chamber the power to approve a treaty subject to the making of certain amendments.

In Spain Parliament cannot introduce modifications to the text of the treaty. It can, however, approve reservations or interpretation clauses which become a part of the authorization to express the consent and, therefore, have to be formulated by the Spanish State when expressing its consent to be bound by the treaty.

In the United Kingdom, if a treaty has to be implemented by domestic legislation, Parliament has the power to enact statutory provisions extending beyond the terms of the treaty, though it does not have the power to amend the content of the treaty itself. Such provisions would have to be complied with.

In the United States of America the Senate may give its advice and consent unconditionally, or it may include in its resolution of advice and consent reservations, understandings, interpretations and clarifications. In the resolution of advice and consent the Senate may recommend amendments to the treaty and may make its advice and consent conditional upon the acceptance of these amendments.

In Belgium, Cyprus, Denmark, Greece, Ireland, Italy, Korea, Japan, Norway and Thailand, Parliament cannot make its approval of a treaty subject to conditions which do not relate to the contents of the treaty.

In Egypt and France, Parliament does not have the power to make its approval subject to any condition.

In Canada the system of cabinet responsibility would make it most unlikely, that Parliament would approve a treaty subject to certain conditions not relating to the contents of a treaty. As indicated earlier, only certain treaties are presented to Parliament for approval and it is only the subject of those treaties which would be in question before Parliament.

In Israel, the Philippines and Sweden, this possibility exists.

In the Federal Republic of Germany and Spain, if Parliament gives its consent subject to a reservation which does not relate to the content of the treaty, this consent would—as far as its effect under international law is concerned—legally be a consent without reservations for the contracting party.

In the field of domestic law it is possible—particularly in view of the freedom of Parliament to pass resolutions—that the granting of consent is made dependent on a condition relating to an area other then that covered by the treaty, or on a condition which has an influence on the interpretation of the treaty.

In the United States of America neither the Constitution nor constitutional practice provides an authoritative answer to the question, whether Parliament has the power to approve the treaty subject to certain conditions not relating to the contents of the treaty. Senate rules do not define the scope and nature of amendments or reservations. The Senate has never undertaken to set conditions to a treaty unrelated to its contents. In theory this seems to be well within the power of the Senate.

One noted commentator, who reserves judgment on the wisdom of such an action by the Senate, nevertheless concludes that it is legally possible since the need of the Senate's consent is absolute.

In Belgium, Cyprus, Egypt, France, the constitution or constitutional practice does not permit that, pending approval, some effect is given to the international agreement, e.g. in the form of a provisional application as envisaged in art. 25 of the Vienna Convention on the Law of treaties[1].

In Austria, India, the Philippines and Thailand, there are no provisions on the subject.

If in Canada the Government decides to seek the approval of Parliament before entering into a treaty, in other words before signing and/or ratifying a treaty, no effect would be given to the agreement until a joint resolution of both Houses has been obtained and the treaty has been signed and/or ratified on behalf of Canada.

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[1] Article 25 of the Vienna Convention reads as follows:

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   a. the treaty itself so provides; or
   b. the negotiating States have in some manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

In the other countries the Constitution or constitutional practice allows that, pending approval, some effect is given to the international agreement.

In Cyprus, Italy, Japan and Thailand the Executive is not free to give or withhold its consent to be bound. In all other countries, where approval of Parliament is needed, the Executive is free to give or withhold its consent to be bound.

In Egypt, the Federal Republic of Germany, France, Israel and the Philippines the Executive is considered to be still entitled to add reservations to a treaty, which has not been subjected to the approval of Parliament or which has been rejected by Parliament.

In Norway the Executive is not entitled to add reservations to a treaty, which the Storting has rejected. In no other country can such reservations be added. In no country does the Constitution authorize another body to obtain the approval of an international agreement after the consent to be bound by the agreement has been given by Parliament or another body competent to give its approval.

In all countries where Parliamentary approval is required, the procedure in the case of an amendment of a treaty is the same as for the original treaty.

In Austria, Egypt, Israel, Korea, the Philippines, Spain, Sweden and the United States of America the same requirements for the approval of treaties apply to the acceptance of reservations raised by other parties to the treaty after it has already been approved.

In other countries except Norway this is not the case.

In Norway the Storting in principle does not approve or reject the reservations from other parties, but they are taken into consideration when the Storting decides on approval or non approval to the treaty as a whole. If the King (Government) after the storging's approval is informed that another party has ratified with a reservation, the Government will have to present a treaty for a renewed consideration in the Storting only if the other party's reservation is of so great importance that it will obviously bring the Storting to countermand the approval of the treaty.

In Austria, Denmark, Egypt, Korea, the Netherlands, Spain, Sweden and the United States of America the requirements for approval of a treaty also apply to the denunciation or other forms of termination of a treaty.

In the other countries this is not the case.

The role of Parliament in the implementation of treaties within the national legal system

In Austria, as a rule, treaties, which have been approved by Parliament, become an integral part of Austrian law ("General transformation"; direct application). The Nationalrat can, however, vote that effect shall be given to the treaty in question by legislation (Art. 50 (2). In such a case, special laws are required to transform the treaties into domestic law ("Special transformation"). The "special transformation" is, so to speak, the exception to the general rule that treaties are directly applicable.

In Belgium the role of Parliament concerning self-executing treaties is confined to the adoption or rejection of bills to approve such treaties.

A treaty must be made public in order to be incorporated into domestic law. This incorporation is effected in most cases by Royal warrant, or by an Act or decree.

In Canada, treaties do not, in themselves, become part of the law of the land. When a treaty comes into force, an international obligation to comply with the specific terms of the treaty is imposed upon Canada. This does not, in itself, change the internal law of the country. The Parliament of Canada, or, if appropriate, the legislature of the provinces, must enact legislation that they deem necessary for the performance of the treaty obligations. It therefore follows that the courts in Canada will got give effect to a treaty unless it has been enacted into law by the appropriate legislative bodies; or, to put the same proposition in another way, the courts will apply the law laid down by statute or common law, even if it is inconsistent with the treaty which is binding upon Canada.

In Denmark, if a treaty is concluded under the provisions of the constitution, the Folketing must give its consent to be bound by it. If the fulfilment of the treaty does not require the subsequent concurrence of the Folketing, this will be apparent from the fact that consent is given in advance. The consent will then certify that the treaty can be incorporated directly or that the Danish legislation already is in conformity with the provisions of the treaty ("harmony of norms"). The direct incorporation of treaties is a method which is infrequently used in Denmark. An example of the direct application of internationally binding treaties is the Act of 1972 on the Accession of Denmark to the European Communities, which was passed according to the procedure laid down in section 20 of the Constitution, and provides that the regulations laid down in the E.C. treaties should be applicable to the extent that they are directly applicable in Denmark according to the Community Law.

The same applies to the legislation passed by the institutions of the E.C. before Denmark's entry.

According to section 2 of the Act of Accession, powers vested in the authorities of the Realm according to the Constitution can be transferred to the Institutions of the E.C.-rules which have come into being in this way. They are thus directly applicable in Denmark and do not require transformation into domestic law.

In Egypt, if the Assembly approves a treaty, it will have the power of a law passed by legislature and it will be incorporated in domestic law. The direct implementation of the treaty requires one procedural step namely publication in an official newspaper.

Parliament of the Federal Republic of Germany, in giving its approval in the form of a "treaty law", makes treaties directly applicable within the domestic law. A treaty, whose direct application is not possible because of the type of treaty (e.g. a skeleton agreement to be transformed into national law), can be transformed into domestic law by implementing laws of Parliament and/or by governmental ordinances having the force of law (within the scope of Article 80 paragraph 1 of the Basic Law), to ensure that the treaty is applied within the domestic law.

In France, Parliament does not play a specific role to assure direct application of treaties in domestic law, because the Constitution contains a provision to the effect that treaties or agreements, when properly ratified and approved, override national legislation as from the date of their publication. In Greece, a treaty which has been approved by Parliament is directly incorporated in domestic law.

In Korea the National Assembly cannot take part in directly applying the treaty in domestic law. In case it is necessary to take a special national measure designed to transform the treaty into domestic law the National Assembly has power to deliberate and decide on a bill providing for measures necessary to implement the treaty.

In Ireland, the Constitution (art. 29.6) provides that "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas (i.e. National Parliament)".

In the Netherands, Parliament has no special role in relation to the direct application of treaties. Parliament may, however, during the procedure of parliamentary approval, ask the Government for its opinion as to which provisions may be considered as directly applicable in the national legal order. The opinion of the Government as stated in Parliament may assist courts of justice in deciding questions in this respect. If there is no possibility of direct application, then an Act or another regulation is needed for the execution of a treaty.

The Constitution of India does not provide for direct application of treaties in domestic law. In the implementation of treaties, Parliament comes in where legislation is required to implement a treaty.

Legislation is required to give effect to a treaty in the following cases:

— where it provides for payment of money to a foreign power, which must be drawn from the Consolidated Fund of India;
— where it effects citizens' rights;
— where it requires the taking of property, life or liberty such as extradition, or the imposition of a tax;
— where it entails a change in the existing domestic law.

Outside the foregoing specified matters, legislation would not be required, and a treaty may be implemented by the exercise of executive power under Article 53 of the Constitution. An amendment of the Constitution itself would be required where the implementation of a treaty would involve cession of Indian territory. But no amendment of the constitution nor even legislation is necessary where it involves the settlement of a boundary dispute.

In Israel there is no possibility of direct application. A treaty can only be applied by the enactment of a law. The law may provide also for ministerial regulations which override other existing laws.

In Italy the law, authorising a treaty contains provisions which incorporate the treaty into domestic law. If a treaty is not self executing an Act of Parliament is needed to execute the provisions of a treaty.

In Japan, Parliament first approves a treaty and then decides on a bill which provides for concrete steps to implement the treaty.

In Norway, a treaty has no direct impact on the national law. If the treaty is not in conformity with national law, the Storting will have to take the necessary legislative measures. Exceptions apply in some fields where Parliament in the form of a law has decided in advance that treaties concluded in the field concerned, shall have direct impact as an internal law. (But also in these fields it is possible that a treaty must be presented to Parliament for approval before it is ratified, because it is "of special importance"). Further, if Parliament according to paragraph 93 in the Constitution agrees to transfer to an international organization some of the powers belonging to national authorities, the organization's joint authorities can adopt rules with a direct effect as Norwegian law. If the treaty necessitates a new law, the Government will present a Bill in order to have the necessary legal provisions adopted by the Storting.

In the Philippines the Constitution allows the direct application of internationally binding treaties in domestic law.

In Spain, an international treaty which is validly concluded becomes part of the domestic law. Publication is required to give it effect, but there is no need for an internal provision (legal or of any other kind) for the application of the treaty in Spain.

In Swedish law, there is normally no direct application of internationally binding treaties. In most cases, a transformation is needed. The international law concerned is introduced into a Swedish law (by an act of the Riksdag) or other statute. In many cases Swedish law is of course, already in conformity with the international law adopted.

In Thailand, a treaty does not have direct application. It must be incorporated in domestic law by Act of the National Assembly.

In the United Kingdom, an Act of Parliament would be necessary to make any internationally binding treaty directly applicable within domestic law. The European Community Act 1972 is an example.

In the United States of America, not all treaties entered into, have immediate effect as domestic law in the United States upon becoming binding between the United States and the other parties under international law. Treaties as well as Acts of Congress are declared by the Constitution to be the supreme law of the land. Pursuant to Article VI, clause 2 of the Constitution, a valid self-executing treaty supersedes the provisions of prior inconsistent federal legislation. The same applies to State legislation.

When a non self-executing treaty requires legislation by Congress in order to be implemented, Congress has the power to implement the treaty by legislation, even though it might not have the delegated power under the Constitution to enact the legislation in the absence of the treaty. It has this power under the "necessary and proper" clause in the Constitution. The power of Congress to legislate to carry out a treaty is co-extensive with the power of the President and the Senate to make treaties. Legislation enacted by Congress of the basis of the "necessary and proper" clause, to implement a non self-executing treaty, supersedes inconsistent provisions of state legislation. Even though a treaty is cast in the form of a self executing treaty, it does not become effective as domestic law in the United States

upon becoming binding between the United States and the other party or parties to it, if it deals with a subject matter which by the Constitution has been reserved exclusively to Congress. For example, only Congress can appropriate money from the treasury of the United States.

Treaties containing provisions which derogate from the Constitution or constitutional practice

In Canada, Cyprus, Denmark, Egypt, Greece, India, Ireland, Israel, Italy, Japan, Korea, Norway, the Philippines and Thailand according to the Constitution or constitutional practice the conclusion of treaties containing provisions which derogate from the Constitution is not permissible.

In the Philippines the constitutionality or validity of any treaty or executive agreement may be ventilated in the Supreme Court as provided in the Constitution. The Constitution authorizes the nullification of a treaty not only when it conflicts with the Constitution but also when it conflicts with legislative enactments. There is therefore in the ultimate analysis a primacy of local laws over the international agreements.

In Belgium, opinion is divided on the question, as to whether a treaty can derogate from the Constitution.

In the Federal Republic of Germany, derogations from the Constitution require in general a federal act of parliament passed by a two-thirds majority both in the Bundestag and in the Bundesrat which expressly changes the wording of the constitution; i.e. the relevant provisions must be incorporated into the text of the Basic Law. In respect of international treaties the subject of which is a peace settlement, its preparation, the abolition of an occupation regime, or which are designed to serve the defence of the Federal Republic, there is a special provision allowing a derogation from the Basic Law if this derogation is mentioned in the constitution. This clarification having obtained the affirmative vote of both houses of the Parliament, the "treaty law" may be passed by a simple majority-

The United Kingdom doctrine of Parliamentary sovereignty permits the implementation by Parliament of treaties (already concluded by the Executive), which would limit the future action of Parliament, but there is no constitutional barrier against the enactment of subsequent or inconsistent legislation.

In Austria, France, the Netherlands, Spain and Sweden it is possible to conclude treaties containing provisions, which derogate from the Constitution. In all these countries there are provisions in the Constitution.

In Austria, parts of treaties modifying or complementing constitutional law must be explicitly specified as "constitutionally modifying". A vote for approval is valid only if at least half of the members of the Nationalrat are present and there is a two-thirds-majority. On promulgation, the respective parts of the treaty must again be specified as "constitutionally modifying".

In the Netherlands, if developments in international law so require, an agreement may deviate from the provisions of the Constitution. In such cases only

express approval may be given; the Houses of the States-General may pass such an Act only by a two third majority of the votes cast. However, if the question of constitutionality of a treaty is raised by one or more members of the Second Chamber of the States General, the Chamber decides with ordinary majority, if the treaty deviates from the Constitution. There are no special rules as to promulgation or publication of agreements, which deviate from the provisions of the Constitution.

In France and Spain an amendment of the Constitution is required before the authorization or approval for such treaties can be given. In France, if the Constitutional Council has declared that if an international agreement is contrary to the Constitution, the Constitution has to be amended before Parliament itself deals with the agreement. The Procedure amending the Constitution is an especially exacting one, since qualified majorities are required. In Spain, there is firstly a special procedure to determine whether the treaty does or does not contain a provision conflicting with the Constitution. The Government or any of the Houses can demand from the Constitutional Court the declaration that the treaty is or is not against the Constitution. If the Constitutional Court says that the treaty contains provisions against the-Constitution, the Constitution should be changed through a special procedure, which requires qualified majorities and the referendum of the citizens. Once the reform has been completed, the treaty can be concluded.

In Sweden the right to make decisions which under the present Instrument of Government devolve on the Riksdag, the Government, or any other body referred to in the Instrument of Government, may be delegated to a limited extent, to an international organization for peaceful co-operation of which Sweden is or is to become a member or to an International Tribunal. No right to make decisions in matters regarding the enactment, amendment, or repeal of a fundamental law or restricting any of the freedoms and rights referred to in Chapter 2 of the Constitution may thus be transferred. In regard to any decision concerning such delegation the provisions relating to the enactment of fundamental laws shall apply. If a decision in accordance with such provisions cannot be postponed, the Riksdag may decide on a transfer of the right to make decisions by a majority of not less than five sixths of those present and voting and by not less than three fourths of the Riksdag members.

Treaties transferring powers to international organizations

In Cyprus, Korea, India, Japan, the Philippines, Thailand and the United States of America the Constitution or constitutional practice does not permit the conclusion of treaties transferring legislative administrative and judicial powers to international or supranational organisations.

In Austria, as such treaties are regarded as modifying Constitution, a vote for approval of such provisions is valid only if at least half of the members of the Nationalrat are present and there is a two-thirds majority.

In Belgium, Egypt, the Federal Republic of Germany, Israel, France, Italy and the Netherlands, the conclusion of such treaties is possible although the Consti-

tution or constitutional practice does not contain special rules concerning the parliamentary procedure for approval, promulgation and publication of such treaties.

In Greece, Norway, Spain and Sweden too such treaties can be concluded and in these countries there are special rules concerning such treaties.

In Greece the Constitution requires for such treaties that they are adopted by sixty percent of the members of Parliament.

In Ireland the Constitution (art. 29.4.3) provides that the State may become a member ofthe European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951) the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

In Norway the Constitution requires a three fourths majority decision and the quorum is raised to two thirds of the members.

In Spain the authorisation of the conclusion of these treaties has to be granted through an "organic law", which has to be approved by a qualified majority in the Congress of Deputies.

In Sweden any judicial or administrative function which does not under the present instrument of Government devolve on the Riksdag, on the Government or on any other body referred to in the Instrument, may be entrusted to another State, to an international organisation or to a foreign or international institution or community, if the Riksdag so determines by a decision in which not less than three-fourths of those present and voting have concurred. Any decision on an entrustment of such function may also be taken in the manner prescribed for the enactment of fundamental laws.

In Denmark, if a treaty is concluded under the provision of the Constitution, the Folketing must give its consent to be bound by it. If the fulfillment of the treaty does not require the subsequent concurrence of the Folketing, this will be apparent from the fact that consent is given in advance. The consent will then certify that the treaty can be incorporated directly or that the Danish legislation already is in conformity with the provisions of the treaty ("harmony of norms"). The direct incorporation of treaties is a method which is infrequently used in Denmark. It can be used particularly as for treaties transferring powers to international organizations.

The United Kingdom doctrine of Parliamentary sovereignty permits the implementation of treaties transferring powers to international organizations. But there is no constitutional barrier against subsequent or inconsistent legislation.

Special provisions concerning the conclusion of treaties by federal states or member units thereof

In Austria the federal constitution does not permit member units of the federation to conclude treaties with foreign states and public international organi-

zations. The constitution expressly provides that it is the Republic (Federation, "Bund") that has (exclusive) powers of legislation and execution regarding "external affairs, including political and economic representation with regard to other countries and in particular the conclusion of international treaties of all kinds".

As for the permissibility of the federal government entering into treaties which are otherwise within the competence of the member units in Austria, the "Länder" are bound to take measures which become necessary within their autonomous sphere of operation for the implementation of international treaties; should a Land fail to comply punctually with this obligation, competence for such measures, in particular for the issue of the necessary laws, passes to the "Bund". In the implementation of treaties with foreign states, the "Bund" also has the right of supervision too in matters which belong to the autonomous sphere of operation of the "Länder". In such a case the Bund has the same rights with respect to the "Länder" as "in matters pertaining to indirect Federal administration" (Art. 102). It follows, from articles 10 paragraph 1 sub-paragraph 2 and 16 that treaties can only be concluded by the Bund, but that the Länder have certain rights and obligations in the implementation of international treaties.

Furthermore the position is, that the treaty, if it is "constitutionally amending", supersedes previous constitutional provisions in the matter.

Treaties approved by statute cannot supersede the constitution (including the constitutional provisions concerning the powers of the "Länder"), but only previous federal statutes. It follows that legislative enactments of the member states ("Länder") as such cannot be superseded, unless by a "constitutionally modifying" treaty which as an integral part of the (overall) federal constitution takes precedence over federal as well as provincial statutes. As for the question whether the federal legislature and/or administration is empowered to take the necessary legislative and/or administrative measures in order to implement treaties dealing with matters within the competence of the members units, this can be done only if the "Länder" fail to take measures which become necessary within their autonomous sphere of operation for the implementation of international treaties.

Although Belgium is not a federal state the Constitution allows for a certain degree of autonomy to communities. A law determines that the approval for each treaty or agreement concerning cooperation some matters, specified in the Constitution and the law, has to be given by either the Council of the French community, or the Felmish Council, or by these two councils, if they are both concerned.

In Canada the procedure for treaty making which has been in effect since *The Labour Convention Case* is that the central government concludes a treaty even if it affects provincial powers, but the implementation of the treaty through legislation is under the aegis of the provincial governments. In the usual case, the central government will consult with the provinces before assuming treaty obligations which require provincial implementation. If all the provinces, or all of the affected provinces agree to implement a treaty, then the central government may proceed without reservation. The process of consultation is informal and usually conducted by letters exchanged between the central government and provincial

governments. A multilateral treaty dealing with matters within provincial jurisdiction would be signed by Canada only after consultation with the provinces had indicated that they accepted the basic principles and objectives of the treaty. Assurances would be obtained from the provinces that they are in a position, under provincial laws and regulations, to carry out the treaty obligations dealing with matters falling within provincial competence, before action is taken by the Government of Canada to ratify or accede to such a treaty. On occasion, the central government may adhere to a treaty, if it contains a "federal states clause". Under such a clause a federal state undertakes to perform only those obligations, which are within central executive or legislative competence, and undertakes merely to bring the notice of the provinces, with a favourable recommendation for action those obligations which are within regional competence. In the case of some bilateral treaties, the conclusion of federal provincial agreements or formal undertakings from certain provinces may be essential to enable the Canadian Government to fulfill its obligations under a treaty. As the only agency empowered to enter into treaties, the central government will on occasion enter into international treaties that affect matters of provincial jurisdiction. However, treaties entered into by the Government of Canada cannot supersede the Constitution or affect the distribution of powers between the federal and provincial governments. In the normal course of activity, the central government is not entitled merely because of the fact that it has entered into a treaty to deal in a legislative fashion with subject matters within the competence of the provinces.

However, it is perhaps conceivable that the central government may in a time of crisis enter into a treaty which deals with some subject matters within provincial competence of the obligations imposed by the treaty and the crisis situation which prevails, it could be argued that these two factors would entitle the central government to legislate in relation to a matter which normally would be classified within provincial powers. The fact of entering into the treaty would be evidence of the crisis and be the basic upon which the central government would seek to legislate in relation to a provincial subject matter.

In the Federal Republic of Germany the constituent states—"Länder" —may, with the consent of the Federal Government, conclude treaties with foreign states, in so far as these states have power to legislate. According to constitutional practice they may also conclude treaties with public international organizations. The Basic Law permits—subject to the preconditions set out in the Basic Law— the Federal Government to enter into treaties dealing with matters which are otherwise within the powers of the constituent states ("Länder"). In an agreement concluded with the "Länder" the Federal government has undertaken to obtain the approval of the "Länder" for an international treaty on a matter in which the "Länder' are wholly competent. It must obtain this approval before the treaty becomes binding under international law. If the treaty requires the approval of the "Länder" at the latest when it submits the treaty to the Bundesrat. But in general participation of the "Länder" should occur at the earliest possible stage. Before the Federation concludes an international treaty within the scope of its competence, but affecting the special circumstances of a "Land", it must formally consult the Land beforehand. Treaties dealing with matters within the competence of the member states do not—in so far as they are directly applicable within the national

legal system—supersede the constitution of the Federal States, but they do supersede the implementing laws and ordinances of the states for their own treaties. They do not, however, supersede the states' own treaties which remain in force under international law. Moreover, treaties of the Federal Government dealing with matters otherwise within the competence of the member states can provide that sovereign rights of the Federation and the "Länder" (particularly also law-making powers of the "Länder") are transferred to international organizations (e.g. Article 189 of the EC-treaty) as a result, certain acts adopted by international organizations supersede the corresponding legal provisions form becoming effective.

In the case of treaties concluded by the Federal Republic of Germany on subject matters falling within the non-exclusive (so-called concurrent) legislative competence of the member states, the legislature of the Federation may take the necessary legislative measures in order to implement such treaties. In the case of treaties concluded by the member states of subject matters falling within their exclusive legislative competence, however, the Federal legislature is not so empowered (e.g. in the case of cultural agreements). The Federal administration is also empowered to take administrative measures (administrative regulations) on matters falling within the member states' concurrent, i.e. non-exclusive legislative competence.

In India, the treaty-making power belongs exclusively to the Union Executive, even when the suject matter is otherwise within the competence of the States. The division of powers between the Union and the States does not in any way restrict the power of the Government of India to enter into treaties. The Constitution does not require consultation with the States or prior consent of the States.

The Constitution confers on the Union of India legislative and executive powers covering the entire field of foreign affairs. In the federal scheme devised by the Constitution, the power to make and implement treaties rests exclusively with the Centre (Union) although the distinction between treaty-making and treaty-implementing power is maintained. Under the Constitution, Parliament has exclusive power to make any law for the whole or any part of the territory of India with a view to implementing treaties and international agreements, notwithstanding the fact that they refer to subjects which under the Constitution are assigned to the constituent units for legislative purposes. The Executive is also competent to adopt the necessary administrative measures for the implementation of treaties dealing with matters within the competence of the constituent units i.e. States of the Union.

The Netherlands are not a federal state in the restricted sense, but it does have some resemblance to it. The Kingdom of the Netherlands consists of two equal parts: the Netherlands in Europe and the Netherlands Antilles in the Caribbean. The constitutional relations between the two parts are set out in the Charter for the Kingdom of the Netherlands of 29 December 1954. The Charter is the highest source of law in the Kingdom and the Netherlands Constitution is subordinate to the Charter. By virtue of the Charter, however, provisions of the Netherlands Constitution often apply to matters that are of concern to the Kingdom as a whole and not only to the Netherlands in Europe. Only the Kingdom as a whole has a

treaty making power. Also, according to the Charter, the foreign relations, i.e. the conclusion of treaties, constitute a matter of concern to the Kingdom as a whole.

The application of treaties, however, may vary: they may apply to the Kingdom as a whole, or their application may also be limited to one part of the Kingdom only. The Charter in particular states that the Netherlands Antilles cannot against its will be bound by a treaty of an economic or financial character, nor can existing treaties in those fields be denounced without its consent. If the Netherlands Antilles express the desire to enter into treaties in those fields, the Government of the Kingdom shall cooperate in concluding such treaties. This provision on cooperation, however, is applied with considerable latitude and cooperation is lent in respect of every kind of treaty the Netherlands Antilles wish to conclude.

Furthermore, the Netherlands Antilles will be involved in the negotiations and implementation of treaties which are deemed to affect it within the meaning of the Charter. In order to avoid any dispute as to whether or not a treaty will affect the Netherlands Antilles, the Government of that country is informed about any intention to negotiate and conclude a treaty. It is then left to that Government to decide whether the application of a treaty to the Netherlands Antilles is desirable.

Depending on the application of a treaty within the Kingdom of the Netherlands the necessary legislative or administrative measures in order to implement treaties are taken by the Kingdom as a whole or by the administration of the Netherlands or the Netherlands Antilles.

The same is true in Spain, but as the treaty becomes part of the domestic law its execution and application touches the authority of the Comunidades Autónomas which are competent on the subject.

Spain is not a federal state in the strict sense, but its structure shows some similarity to such a state. The national State is competent to enter into treaties dealing with matters which are otherwise within the competence of the autonomous regions. Although the Constitution does not have any provision on this point, some of the Statutes of the "Comunidades Autónomas" (these Statutes are separate State acts which contain their regulation) provide that these communities are to be informed by the Government of the conclusion by the State of treaties which affect matters within their own competence. The Statute of the Pais Vasco provides that those treaties cannot modify its provisions without observing the special procedure for the reform of this Statute, except for the treaties which transfer to an international organisation the exercise of functions derived from the Constitution. However, the application of this provision has not yet been fixed by constitutional practice.

In the United States of America the Constitution absolutely prohibits the constituent States from entering into treaties. However, the separate States are permitted, with the consent of Congress to enter into an "Agreement or Compact... with a foreign power". No authoritative distinction between the two classes of agreements has emerged and no agreement between a State and a foreign power has been challenged as a forbidden treaty.

Treaties are by virtue of the Supremacy Clause of the Constitution declared to be the supreme law of the land and will supersede inconsistent state law. Treaties have imposed on one state international regulation of migrating birds; invalidated another state's law sequestering debts of its citizens to British creditors; denied alien rights to inherit local lands; or required a city to permit Japanese to run pawn shops. If the federal government is empowered to enter into treaties dealing with subject matters otherwise within the competence of the member states, those treaties—provided that they are directly applicable within domestic law—supersede the constitution, statutes and other legislative enactments of the member states.

Only the federal state is empowered to take the necessary legislative or administrative measures in oder to implement treaties.

ANNEX

THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE
and its part in the preparation and application of European Conventions

The Parliamentary Assembly, in legal terms, is a consultative body composed of parliamentarians delegated by the national parliaments of the 21 member States.[1] Thus, it has no constitutional role in the conclusion of international treaties. For this reason, it has not been taken into account in the foregoing report. However, in view of the establishment and progressive development of a number of international parliamentary assemblies in Europe and elsewhere, since the second world war, it may not be without interest to add a brief description of the role of the Parliamentary Assembly of the Council of Europe in the preparation and application of multi-lateral European conventions concluded within the framework of the Council of Europe.[2]

Since its creation in 1949, more than 120 international legal instruments (conventions, agreements, protocols) have been elaborated in the Council of Europe. For about one-third of these, the initiative came from the Parliamentary Assembly.

In some cases, the Assembly simply recommended that the Committee of Ministers should draw up a convention between its member States on a given subject. In others, it adopted a recommendation enumerating the principles to be incorporated in the convention.

In quite a number of cases, however, the Assembly submitted to the Committee of Ministers a complete draft Convention, the conclusion of which it recommended. Some of the more important examples are the following:

— the European Convention on Human Rights and Fundamental Freedoms (1950),
— the European Convention for the peaceful settlement of disputes (1957),
— the European Convention on Extradition (1957),
— the European Social Charter (1961).

Recently, the Assembly submitted the text of a draft convention (not yet decided upon by the Committee of Ministers) on the Protection of detainees from torture and from curel, inhuman or degrading treatment or punishment.

[1] Whereas the Council of Europe Statute refers to it as the *Consultative Assembly,* the Assembly itself adopted the name *Parliamentary Assembly* in 1974.

[2] Under Article 1 (b) of the Statute, the Council is to pursue its aim "by agreements and common action in economic, social, cultural, scientific, legal and administrative matters". According to Article 15 (a), it is "on the recommendation of the Consultative Assembly or on its own initiative" that "the Committee of Ministers shall consider the action required... including the conclusion of conventions or agreements...".

Of course, when the Assembly prepares a full text, this does not imply that the Committee of Ministers has to accept the draft as it stands. The text which is finally submitted to the signature of member States (and, in some cases, non-member states) is prepared by a committee of government experts and adopted by the Committee of Ministers, the Council's governing body, by a two-thirds majority. The opening for signature requires a consensus (in the sense of a non-objection by a member State).

In all cases, the Committee of Ministers may decide, before adopting the text of the Convention to formally consult the Assembly. While this procedure is not oligatory, it has become more frequent during recent years.

The Parliamentary Assembly also plays a part in ensuring the *application* of Council of Europe conventions. It can exercise pressure, in order to speed up the signature or ratification of conventions—either by addressing itself to the Committee of Ministers or through action by Assembly members within their national parliaments. Some governments now submit regular reports to their parliaments, giving reasons why, in certain cases, they have not yet signed conventions or initiated ratification procedures.

In some cases, the Assembly urges governments to lift reservations or to accept optional clauses. Thus, over the years, it has persistently appealed to those who had not yet done so to accept the optional clauses in the Human Rights Convention concerning the right of individual petition (Article 25) and the jurisdiction of the Court of Human Rights (Article 46). In 1985, only a few member States are not yet bound by these clauses.

Finally, there are a few conventions which provide for a precise role of the Assembly in their implementation. The best-known examples are the Social Charter, under which (Articles 28 and 29) the Assembly plays a part in the control machinery for the application of the Charter's provisions in member states. Under the Human Rights Convention, the Assembly elects the judges of the Court (Article 39) and proposes the. candidates for the Commission of Human Rights (Article 21). Furthermore, under a Committee of Ministers' resolution, the Assembly must be informed of any derogation by member States from rights guaranteed by the convention, a possibility allowed for in emergency situation (Article 15).

In order to ensure the adaptation of existing texts to changed circumstances or progress in European cooperation, the Assembly has also often taken the initiative to propose the revision or further development of Conventions.

In conclusion, while the Assembly is not a legislative body and has no formal share of treaty-making power, it does in fact play a genuine and important role in the drafting and application of European multi-lateral treaties contributing to the progressive harmonisation of legal standards in Europe.

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