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One could say there is very little that happens in our daily lives which is not underpinned by some treaty provision or other. We do not stop to spare a thought about it. Every time you make a telephone call overseas, every time you get on an aeroplane, every time you post a letter, every time you mail an article to some destination overseas, there are likely to be one or more treaty provisions that guarantee that the act you have undertaken at this end is effectively completed. [1]

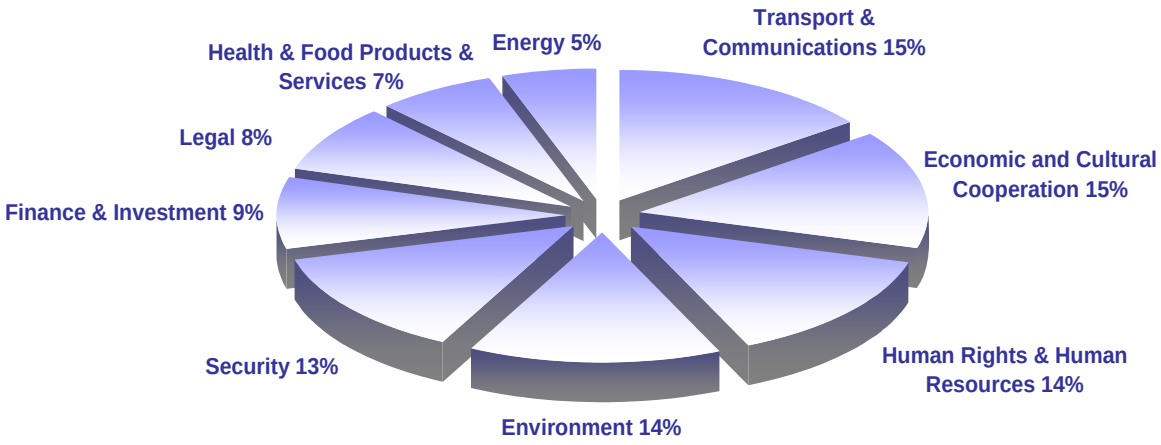
An overview of the seminar

Introduction

2.1 Seminars play an important role in the work of the Parliament by providing opportunities for Members and Senators to interact constructively with people who share a common interest, in this case, treaties. The participants in this seminar *Treaty Review: A Ten Year Review* included academics, diplomats, Commonwealth, State, Territory and New Zealand parliamentarians, public servants and parliamentary officers who support the treaty making and scrutiny process and students.

1 Dr Palitha Kohona, United Nations, *Transcript of Proceedings*, 31 March 2006, p. 116 RT, p. 57 OT.

2.2 The variety of treaties which are referred to the Joint Standing Committee on Treaties is no less diverse. Since the Committee was established in 1996 it has reviewed treaties relating to a range of issues.



2.3 The treaty making process requires that treaty actions proposed by the Government are tabled in Parliament for a period of at least 15 sitting days (or in some cases 20 sitting days) before action is taken that will bind Australia at international law to the terms of the treaty.

2.4 The term 'treaty action' has a broad meaning. It covers bilateral and multilateral agreements and encompasses a range of actions including entering into new treaties, amendments to existing treaties and withdrawal from treaties.

2.5 All treaties are tabled in both Houses of Parliament before binding treaty action is taken except where the Minister for Foreign Affairs certifies that a treaty is particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests.

2.6 In addition to the text of proposed treaty actions an accompanying National Interest Analysis (NIA) is also tabled. The NIA is prepared by the relevant department and explains why the Government considers it appropriate to enter into the treaty. A NIA includes information about:

- the obligations imposed by the treaty;

- the economic, environmental, social and cultural effects of the proposed treaty;
- the consultation that has occurred with State and Territory Governments, industry and community groups and other interested parties;
- how the treaty will be implemented domestically; and
- the financial costs associated with implementing and complying with the terms of the treaty.

2.7 Upon tabling, the treaty text and NIA for each proposed action are automatically referred to JSCOT for inquiry. The Committee advertises its inquiry in the national press and on its website, inviting comments from anyone with an interest in the subject matter of the proposed treaty action. The Committee also routinely takes evidence at public hearings from government agencies with treaty responsibility and from people who have made written submissions.

2.8 At the completion of an inquiry the Chair on behalf of the Committee presents a report to Parliament containing advice on whether Australia should take binding treaty action and on any related issues that have emerged during the inquiry.

2.9 A few days prior to this seminar the Committee tabled its 72nd report. Since 1996, the Committee has reported on approximately 365 treaty actions, which equates to one treaty reviewed every 10 days.[2]

The seminar program

2.10 The seminar addressed four main themes:

- reflections on a decade;
- treaty making and review in a federal system;
- new developments in treaty making and review; and
- perspectives from abroad.

2 Dr Andrew Southcott MP, *Transcript of Proceedings*, 31 March 2006, p. 50 RT, p. 3 OT.

Reflections on a decade

2.11 The first session brought together three very different perspectives on the first ten years of JSCOT. The Hon Dick Adams MP, who has been a member of the Committee since it was established, highlighted treaties which he regarded as having particular interest or significance, or a direct relationship to the lives of constituents. Ms Devika Hovell presented a critical analysis of the effectiveness of the Committee while Mr Neil Roberts MP provided a perspective from the State of Queensland.

2.12 A series of High Court decisions have confirmed Parliament's power to legislate to implement treaties domestically under section 51(xxix) of the Constitution which empowers the Parliament to legislate with respect to external affairs.[3] The *Tasmanian Dams*[4] case has particular significance to Mr Adams, as it was as a result of the political fallout from this decision that he lost his seat in the Tasmanian Parliament, and became interested in the treaty making process.

> I started to get interested in treaties because of my experience in the Tasmanian parliament. I lost my seat, with four other cabinet ministers, over the Franklin Dam issue…There was not a parliamentary committee of scrutiny so nobody understood this treaty, how it came about and where it fell from. It was interesting to get here 10 years later and then some time after that to take a role on this committee. It was good to be interested in and to scrutinise the making of treaties.[5]

2.13 In Australia and other countries that have inherited a constitutional tradition from the United Kingdom, treaty making is a function of the Executive, and not the Parliament. This enables the Executive to

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3 The Executive's power to enter into treaties comes from Section 61 of the Constitution. See also Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to make and Implement Treaties*, Parliament of Australia, November 1995, pp 62-85.

4 *Commonwealth v Tasmania* (1983) 158 CLR 1. The Commonwealth Parliament enacted the *World Heritage Properties Conservation Act 1983* using the external affairs power and the *World Heritage (Western Tasmania Wilderness) Regulations* which, among other things, prohibited the construction of a dam on the Franklin River in Tasmania without the consent of the Commonwealth Minister.

5 The Hon Dick Adams MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 52 RT, p. 5 OT.

enter into treaties without the consent of the Parliament.[6] The Committee was established in 1996 as part of a package of reforms designed to make the treaty making process more open, accountable and democratic. In assessing the Committee's effectiveness in this regard, speakers and participants asked whether the Committee had actually remedied the 'democratic deficit' in treaty making.

2.14 Ms Devika Hovell, Director of the International Law Project at the Gilbert and Tobin Centre of Public Law, critically assessed the Committee's performance in reducing the democratic deficit in treaty making against three criteria: transparency, scrutiny and democratic accountability.[7]

2.15 While acknowledging the achievements of the 1996 reforms, which created a more open and transparent treaty making process, Ms Hovell argued that the Parliament more generally should have a role in acting as a check on the power of the Executive, as:

> The JSCOT process … cannot be said to provide a real check on executive power. The committee tends not to produce detailed analysis of executive decisions and has a record, which would likely be the case whichever side of politics was in power, of falling into line with government policy. Members of the public and non-government organisations regularly make submissions to JSCOT and the committee plays a very important role as a forum through which the electorate can voice opinions about international treaties. Yet, the depth and timing of the JSCOT's scrutiny means that in most cases the submissions of members of the public to JSCOT have had little impact on government decisions about international law. The JSCOT process legitimises government decision making about treaties without offering genuine scrutiny or criticism of government policy.[8]

2.16 Treaty making can often directly or indirectly impact on the States and Territories. Processes have developed to ensure their parliament and government officials are involved in the treaty making process. Mr Neil Roberts MP, the Member for Nudgee in the Queensland Parliament and Parliamentary Secretary to the Deputy Premier, pointed out that 'a treaty may require a state or territory to amend its legislation or policies, it may remove powers in areas which have

6 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 57 RT, p. 9 OT.
7 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 58 RT, p. 10 OT.
8 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 61 RT, p. 12 OT.

been the responsibility of a state or territory, or it may impose costs in relation to implementation.'[9]

2.17 Following the previous JSCOT seminar, held in Canberra in 1999[10], Queensland developed a process requiring the tabling of treaty actions, the NIA and correspondence from JSCOT to the Premier in the Queensland Parliament within 10 days of their receipt.[11] Through this process, the Queensland Parliament is able to refer a treaty to a parliamentary committee for inquiry and report on it if considered necessary.[12]

2.18 Mr Roberts identified three areas of the treaty making process which could be improved. First, advice should be provided at first minister level or central agency chief executive officer level at the time when the Commonwealth takes the decision to enter into treaty negotiations which could have implications for a State or Territory.[13] Second, NIAs should be provided earlier.[14] Finally, revival of the Treaties Council process as a number of premiers, including Queensland Premier Peter Beattie have unsuccessfully called for meetings of the Treaties Council which has met only once since it was established and met in 1997.[15]

Treaty making and review in a federal system

2.19 As stated above, Australia's federal system of government allows the Commonwealth to enter into treaties which will impose obligations upon the States and Territories. Indeed, the concerns of the States and Territories were central to the Senate Legal and Constitutional References Committee's report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* and in the development of the 1996 Reforms which followed it.

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9 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 64 RT, p. 14 OT.

10 Joint Standing Committee on Treaties, *Report 24: A Seminar of the Role of Parliaments in Treaty Making*, August 1999. Available from the JSCOT website: <www.aph.gov.au/house/committee/jsct/reports/report24/report24.pdf>

11 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 65 RT, p. 15 OT.

12 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 65 RT, p. 15 OT.

13 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 66 RT, p. 16 OT.

14 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 16 OT.

15 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 17 OT.

2.20 Ms Anne Twomey, who was the Secretary of the Senate Legal and Constitutional References Committee (the Senate Committee) at the time it undertook its review of the treaty making process, addressed seminar participants on the conduct of the inquiry which led to the *Trick or Treaty?* Report. She observed that the States provided an unanimous and measured submission to the Senate Committee's inquiry. This meant it was

> far more likely to achieve true reforms and practical reforms to the treaty system. That is indeed what happened.[16]

2.21 The States and Territories sought better information, better consultation, greater transparency and greater political accountability.[17] In assessing whether these objectives have in fact been attained, Ms Anne Twomey noted that the creation of the Committee and the provision of NIAs are two successful outcomes of the *Trick or Treaty?* report.[18] However, in terms of consultation and political accountability, the success of the 1996 reforms are more uncertain.

2.22 Providing a partial remedy to this shortcoming, the Commonwealth, State and Territory Standing Committee on Treaties (SCOT) plays a key role in the treaty making and review process, providing a formal process for information and consultation on treaties between the Commonwealth and the States and Territories. Ms Petrice Judge, a former member of SCOT from Western Australia, considered how SCOT is established, its purpose and its effectiveness.

2.23 Although SCOT existed before JSCOT was established and the other 1996 reforms were implemented, it was limited in its capacity to influence the treaty making process.[19] Under the current arrangements, SCOT meets twice a year enabling State and Territory representatives to discuss with their federal counterparts a schedule of current treaty actions. It can also request written briefings on treaties of particular interest.[20] In this sense, SCOT has 'established an information flow' between the Commonwealth and the States

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16 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 80 RT, p. 27 OT.

17 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, pp 80-81 RT, pp 27-28 OT.

18 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, pp 82-83 RT, p. 29 OT.

19 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 75 RT, p. 24 OT.

20 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 77 RT, p. 25 OT.

and Territories.[21] However, discussion at the seminar suggests that while consultation has improved since the 1996 Reforms, it is still less than optimal.[22] In particular, a number of participants commented that there is a tendency to equate listing a treaty on the SCOT schedule with consultation.[23]

2.24 Australia's federal structure is instrumental in the treaty scrutiny process and this session of the seminar heard discussion of the role of State and Territory governments both prior to the 1996 reforms and at present, as well as discussion on the consultation between the Commonwealth and the States and Territories through the SCOT process. Finally, the seminar heard from Associate Professor Richard Herr, from the School of Government at the University of Tasmania, who posed the question - what is the role of State and Territory *parliaments* in the treaty scrutiny process?

2.25 There appear to be a number of considerations for State and Territory parliaments in determining their role in the treaty making process, such as deciding when to intervene. Associate Professor Herr notes that States are more likely to become involved at the implementation stage – that is, at the point where State legislation is required to implement Australia's obligations under the treaty. However, if States had an institutional commitment to treaty review, similar to the JSCOT process, parliamentary involvement could occur earlier on and with more consistency.[24]

> …More polished, consistent and coherent advice to JSCOT would be forthcoming if state parliamentary committees were involved and promoted debate and community involvement through parliamentary hearings on issues of importance—again not all treaties are going to require that but the ones that do would certainly be advantaged by this process and this involvement.[25]

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21 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 77 RT, p. 25 OT.

22 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 77 RT, p. 25 OT; Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 68 RT, p. 17 OT.

23 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 16 OT. Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 77 RT, p. 25 OT. Ms Dianne Yates MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 125 RT, p. 64 OT.

24 Assoc. Professor Richard Herr, *Transcript of Proceedings*, Friday 31 March 2006, p. 91 RT, p. 36 OT.

25 Assoc. Professor Richard Herr, *Transcript of Proceedings*, Friday 31 March 2006, p. 92 RT, pp. 36-37 OT.

New Developments in treaty making and review

2.26 The rise in free trade agreement (FTA) negotiations has been stimulated by the uncertainty concerning the Uruguay round of World Trade Agreement negotiations, held between 1986 and 1994.[26] In addition to the FTAs Australia has concluded with the United States of America, Singapore and Thailand,[27] Australia is currently negotiating or considering free trade agreements with China, Malaysia, Japan and the Gulf Cooperation Council, the Association of South East Asian Nations (ASEAN) and New Zealand.[28] Mr Michael L'Estrange, Secretary of the Department of Foreign Affairs, sees these negotiations as part of a 'comprehensive strategy of promoting growth through multilateral, bilateral and regional negotiations'.[29]

2.27 The World Trade Organisation (WTO) remains Australia's highest trade policy priority. However, bilateral FTAs have become 'an important element of Australia's trade negotiating agenda.'

> FTAs can make an important contribution to enhancing the momentum for wider reform and liberalisation. They can also address issues not fully dealt with in multilateral trade processes. They can build a constituency for extending the reach of multilateral trade rules. Comprehensive FTAs also have the potential to deliver deeper, faster and broader liberalisation in specific cases than through the multilateral system.[30]

2.28 Seminar participants were informed that Australia's FTAs need to meet four basic criteria:

- an FTA should have the potential to deliver substantial commercial and wider economic benefits to Australia in a shorter time frame than multilateral trade negotiations;

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26 Mr Michael L'Estrange, *Transcript of Proceedings*, Friday 31 March 2006, p. 96 RT, p. 41 OT.

27 JSCOT Reports 61, 52 and 63 respectively.

28 See Department of Foreign Affairs and Trade website accessed 28 June 2006 <www.dfat.gov.au/trade/>

29 Mr Michael L'Estrange, *Transcript of Proceedings*, Friday 31 March 2006, p. 96 RT, p. 40 OT.

30 Mr Michael L'Estrange, *Transcript of Proceedings*, Friday 31 March 2006, p. 96 RT, p. 41 OT.

- FTAs should be fully consistent with WTO principles and rules and, where possible, should deliver WTO-plus outcomes;
- FTAs should be comprehensive and deliver substantial liberalisation across goods, services and investment and should ensure all sectors are considered at the start of negotiations; and
- FTAs should significantly enhance Australia's broader economic, foreign policy and strategic interests.[31]

2.29 In addition to the increasing number of FTAs Australia has with its regional neighbours, there are other discernible trends in treaty-making. Associate-Professor Greg Rose, from the Faculty of Law at the University of Wollongong, looked at the type and frequency of Australia's treaty making with its neighbours in the Pacific and amongst ASEAN[32] countries.

2.30 Australia's neighbours in the Pacific depend on natural and marine resources and as a result multilateral treaties relating to the environment and fisheries are common.[33] In the future, we might see agreements negotiated on

> law and order within Pacific island countries, most of which are multilateral arrangements rather than bilateral, lending a patina of legitimacy rather than imperialism to the interventions that might be necessary.[34]

2.31 With ASEAN counties, Associate Professor Greg Rose predicted an increasing focus on treaties relating to commercial matters, criminal justice, cooperation and bilateral free trade and less on symbolic treaty making, such as cultural exchange.[35] As a corollary, greater cooperation between different legal systems which would facilitate the acceptance of evidence across legal systems and transfer of proceedings, might eventuate in the near future.

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31 Mr Michael L'Estrange, *Transcript of Proceedings*, Friday 31 March 2006, p. 97 RT, p. 41 OT.

32 The Association of South East Asian Nations (ASEAN) has 10 Member States: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam.

33 Assoc. Professor Greg Rose, *Transcript of Proceedings*, Friday 31 March 2006, p. 101 RT, p. 44 OT.

34 Assoc. Professor Greg Rose, *Transcript of Proceedings*, Friday 31 March 2006, p. 106 RT, p. 48 OT.

35 Assoc. Professor Greg Rose, *Transcript of Proceedings*, Friday 31 March 2006, p. 106 RT, p. 48 OT.

2.32 Treaties relating to the environment, and climate change in particular, often attract a high level of public and parliamentary interest. Professor Aynsley Kellow, from the School of Government at the University of Tasmania, assessed Australia's 'scorecard' in relation to the three multilateral environment agreements: the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Asia-Pacific Partnership on Clean Development and Climate, or 'AP-6' as it is also known, concluding that:

> The framework convention has largely succeeded as a first step; Kyoto, in my view, has failed; and AP6 holds much promise but requires much more flesh to be added to a very promising skeleton.[36]

2.33 Professor Kellow contends that Australia's move away from the Kyoto Protocol towards AP6 is a recognition of several mistakes with the Kyoto Protocol.[37] Whereas the Kyoto Protocol is a large, multilateral treaty which slows negotiations and can result in lowest common denominator outcomes, AP6, in contrast, with only 6 partners - Australia, China, India, Japan, the Republic of Korea and the United States - 'is an exercise in … minilateralism'.[38]

2.34 Professor Kellow suggests further that AP6 recognises Australia's role within the region and the resource endowments of the parties; AP6 commitments are voluntary; and AP6 has sought to engage the business community from the beginning.[39]

2.35 In this regard, the contribution of the Committee's inquiry into the Kyoto Protocol in stimulating discussion on a topic which is both complex and controversial, helped to direct debate onto what is in the national interest.[40]

> Scrutiny by JSCOT can therefore be seen as having contributed to the process by which we have come to place

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36 Professor Aynsley Kellow, *Transcript of Proceedings*, Friday 31 March 2006, p. 108 RT, p. 50 OT.

37 Professor Aynsley Kellow, *Transcript of Proceedings*, Friday 31 March 2006, p. 109 RT, p. 51 OT.

38 Professor Aynsley Kellow, *Transcript of Proceedings*, Friday 31 March 2006, p. 109 RT, p. 51 OT.

39 Professor Aynsley Kellow, *Transcript of Proceedings*, Friday 31 March 2006, pp 110-111 RT, pp 51 -52 OT.

40 Professor Aynsley Kellow, *Transcript of Proceedings*, Friday 31 March 2006, p. 112 RT, p. 53 OT.

> our faith in the minilateralism of AP6, an experiment that might prove valuable for future negotiations if it were then expanded into a wider-reaching agreement.[41]

Perspectives from abroad

2.36 Looking at treaties from a global perspective, Dr Palitha Kohona provided participants with valuable insights into the role of the Secretary-General of the United Nations, who acts as the depository for over 500 multilateral treaties.

2.37 The depositary of a treaty is its custodian and has responsibilities as specified in Article 77 of the *Vienna Convention of the Law of Treaties 1969*. The United Nations specifies that:

> …the Secretary-General, as depositary, accepts notifications and documents related to treaties deposited with the Secretary-General, examines whether all formal requirements are met, deposits them, registers them subject to Article 102 of the *Charter of the United Nations* and notifies all relevant acts to the parties concerned.[42]

2.38 The number of treaties deposited with the Secretary-General continues to grow, along with the range of treaties concluded (for example, human rights, humanitarian affairs, disarmament, trade, communications, commodities, outer space, the seas, the environment) and the number of states which constitute the international community.

2.39 Dr Kohona provided by way of background the definition of a 'treaty':

> …the term 'treaty' is defined to mean an instrument concluded between two entities capable of concluding treaties, and such instrument must create enforceable rights and obligations at international law. The entities that are

41 Professor Aynsley Kellow, *Transcript of Proceedings*, Friday 31 March 2006, p. 112 RT, p. 53 OT.

42 From the United Nations Treaty website, accessed 30 June 2006 <http://untreaty.un.org/English/TreatyHandbook/glossary.htm> The depositary of a treaty can also be one or more states, an international organisation, or the chief administrative officer of the organisation, such as the Secretary-General.

> capable of concluding treaties are governments and international organisations with that particular capacity.[43]

2.40 The Secretary-General, as depositary for treaties, has an important role where states may wish to denounce a treaty. Dr Kohona pointed to the interesting example of the Secretary-General's refusal to accept North Korea's notification of denunciation of the International Covenant on Civil and Political Rights (ICCPR) in 1996.[44] The ICCPR has no provision for withdrawal by States Parties but Dr Kohona noted that the Secretary-General's decision not to accept the withdrawal was 'risky' as the 'depositary does not normally take that sort of proactive step in relation to actions undertaken by a sovereign state'.[45] However, approximately two years later, North Korea started submitting its reports without referring to the notice of withdrawal it had submitted previously.[46]

2.41 Dr Kohona contends that it is in fact desirable that the Secretary-General takes this proactive approach as it is necessary to maintain the integrity of the multilateral treaty system.[47] The Secretary-General 'has a responsibility to the international community. In this respect, he discharges his responsibility with a great deal of caution and impartiality'.[48]

2.42 Similarly, the Secretary-General has from time to time taken a proactive approach to states wishing to lodge reservations or declarations to a treaty.[49] For instance, some states, when becoming party to a treaty, attempt to exclude territories from its operation. The exclusion usually relates to a non-metropolitan and/or geographically separate territory, such as China and Hong Kong.[50] This is problematic as Article 29 of the Vienna Convention on the Law of Treaties provides that a state becomes party to a treaty on

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43 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 117 RT, p. 58 OT.

44 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 118 RT, p. 59 OT.

45 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 118 RT, p. 59 OT.

46 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 118 RT, p. 59 OT.

47 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 119 RT, p. 60 OT.

48 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 120 RT, p. 60 OT.

49 A *reservation* is a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. An interpretative *declaration* is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a State's position and do not purport to exclude or modify the legal effect of a treaty: See the United Nations Treaty website, accessed 30 June 2006 <http://untreaty.un.org/English/TreatyHandbook/glossary.htm>

50 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 121 RT, p. 61 OT.

behalf of all its territories and the exclusion of a part of its territory is usually taken to be a reservation. However, since 1973 the Secretary-General has recognised the practical necessity of this practice as this would otherwise require extensive consultation with local legislatures and local administrations.[51]

2.43 The role of the Secretary-General as depositary for treaties continues to change and re-define itself as new challenges or issues emerge. Most recently, the Secretary-General has actively moved towards encouraging wider participation in the treaties deposited with him, writing to heads of states and governments and inviting them to undertake treaty action when they visited New York for the millennium summit in 2000.

> It was also thought that encouraging wider participation would raise awareness relating to the treaty framework, of which the Secretary-General was the custodian.[52]

2.44 This resulted in 274 treaty actions undertaken in three days by 84 states - a response that Dr Kohona describes as overwhelming and the decision was taken to hold the treaty event annually, in conjunction with the general debate of the General Assembly. [53]

2.45 Finally, in acknowledging the impact that treaties increasingly have on the lives of individuals, Dr Kohona stresses the importance of bodies like the Committee:

> Bodies like JSCOT play a vital role, because if these treaties are going to impact on our lives and our work, it would seem only natural that we should have some input into the development of these treaty provisions and to their eventual implementation.[54]

2.46 The Australian Parliament has established JSCOT to make treaty making more open and transparent through the establishment of the Joint Standing Committee on Treaties. However, a committee dedicated to this purpose is not the only way to achieve this. The seminar provided an opportunity to examine the New Zealand approach where the Foreign Affairs, Defence and Trade Select Committee considers proposed treaties with a view to referring them to the appropriate subject committee for scrutiny.

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51 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 121 RT, p. 61 OT.

52 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 123 RT, p. 62 OT.

53 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 123 RT, p. 62 OT.

54 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 117 RT, p. 58 OT.

2.47 In New Zealand every six months the Ministry of Foreign Affairs and Trade provides the Foreign Affairs, Defence and Trade Select Committee with a list of all the treaties that are under negotiation.[55] The Committee is then able to inquire into any of these treaties. After binding treaty action has been taken, the Committee can also inquire into the implementation of a treaty. In doing so, it typically poses questions such as:

> 'How is a certain treaty getting on? How is the implementation going? Is it working in the way that we would have expected?'[56]

2.48 Three members of the Foreign Affairs, Defence and Trade Select Committee of the Parliament of New Zealand participated in the seminar, Ms Dianne Yates MP, Chair of the Committee, the Hon Georgina te Heuheu MP, Deputy-Chair, and Mr Keith Locke MP.

2.49 Multilateral treaties are tabled in the New Zealand Parliament after signature but before binding treaty action is taken.[57] However, only significant bilateral treaties are tabled in the New Zealand Parliament. The government retains some discretion in deciding which bilateral treaties should be tabled. However, the Ministry of Foreign Affairs has developed detailed criteria for determining which bilateral treaties should be submitted to the parliamentary examination process. For instance, a bilateral treaty must be tabled where:

- the subject matter of the treaty is likely to be of major public interest;
- the treaty deals with an important subject on which there is no ready precedent;
- the treaty represents a major development in the bilateral relationship;
- the treaty has significant financial implications for the government; and
- the treaty is a major treaty that New Zealand seeks to terminate.[58]

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55 Mr Keith Locke MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 129-130 RT, p. 68 OT.

56 Ms Dianne Yates MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 128 RT, p. 66 OT.

57 Ms Dianne Yates MP, Appendix E, p. 146.

58 Ms Dianne Yates MP, Appendix E, p. 145.

2.50 During the 46th New Zealand Parliament (1999-2002), three bilateral treaties were tabled.[59]

2.51 Public input into the treaty making process occurs after a treaty is agreed to in principle by the government and before a treaty is presented to Parliament.[60] This includes the development of a National Interest Analysis (NIA) and, like the NIAs tabled in the Australian Parliament with each treaty action, the New Zealand NIA sets out:

- the reasons for New Zealand becoming a party to the treaty;
- the advantages and disadvantages of the treaty;
- the economic, social, cultural, and environmental effects of the treaty entering into force;
- the costs of compliance;
- the possibility of any subsequent protocols and their likely effects;
- the measures to be adopted in implementing the treaty;
- a statement setting out the consultation process; and
- whether the treaty provides for withdrawal or denunciation.[61]

2.52 In general, legislation implementing a treaty will not be tabled in the New Zealand Parliament prior to the completion of a committee report into that treaty.[62] Moreover, binding treaty action at an international level will not be taken until New Zealand has implemented its obligations domestically.

59 Ms Dianne Yates MP, Appendix E, p. 145.
60 Ms Dianne Yates MP, Appendix E, p. 147.
61 Ms Dianne Yates MP, Appendix E, pp 147-148.
62 Ms Dianne Yates MP, Appendix E, p. 149.