The Portfolio Committee on International Relations and Cooperation (the Committee) held a workshop on the role of Parliament in treaty-making processes on 9 May 2012 at the 15 On Orange Hotel, Cape Town. The
Committee has been entrusted to oversee issues relating to the mandate of the Department of International Relations and Cooperation (the Department). It was mandated to scrutinise foreign policy issues including those pertaining to international treaties. The power to negotiate and sign treaties, on the one hand, and to ratify treaties, on the other, remained shared between the executive and the legislature respectively.

The role of Parliament in the process is stipulated under section 231(1) of the 1996 Constitution of the Republic of South Africa. To this effect, the holding of negotiations and the signing of international agreements were within the competency of the Executive. Nevertheless, the approval of Parliament is required so that these agreements shall be binding. The approval should be granted by the two Houses of Parliament (section 231(2)) thereto. Although Parliament has the power to ‘agree to’ or ‘approve’ treaties, the actual ratification is undertaken by the Executive. The latter also signs the Instrument of Ratification and deposits it with a requisite organisation/state.

To understand these processes further, the Committee held a workshop in conjunction with the Select Committee on Trade and International Relations. It invited both the legal experts in the field (in academia and the private sector) as well as the Department.

In attendance were the House Chairperson on International Relations, Hon F Hajaig, the Chairperson of the Select Committee on Trade and International Relations, Hon D Gamede, and members of the Select Committee. The facilitators for the discussions were Professor H Strydom (University of Johannesburg), Ms Y Dwakira (the Department) and Mr E Durojaye (Community Law Centre University of Western Cape).

2. Statement of objectives: Chairperson Mr HT Magama MP

The workshop was held to explore options for early involvement of Parliament in the treaty-making processes in South Africa and to discuss modalities for enhancing current mechanisms for scrutinising treaties and oversight on their implementation. Members were reminded that the issues around the role of Parliament in treaty-making had been dealt with in previous engagements. The Committee was well aware of the provisions of the Constitution and also of the different responsibilities bestowed upon the different arms of state for treaty-making processes. Parliament was by no means laying a claim to a negotiating mandate, nor seeking one. It remained the task of the Executive to negotiate treaties in the international arena.

However, the 20th century has brought about many global changes and multilateral cooperation. Nations were interdependent, and international organisations have become platforms where governments adopt decisions and treaties. The majority of parliaments were not consulted during
negotiations. Consequently, parliaments have taken the resolve to step beyond the traditional executive prerogative in international affairs, especially with treaties, and subject governments to the same degree of oversight as in the domestic policy arena.

The implications of such developments to democracy were regarded as very clear. Majority of decisions that mattered to the lives of country’s citizens, including their security, were taken beyond national borders, or by international institutions that were not subject to any national democratic control or accountability. Parliaments have had to ensure that greater national democratic accountability is maintained. There should be adequate national dialogue on treaties that South Africa would enter into.

However, it was not clear how Parliament, as representative of the people, related to the Executive in the process. South Africa’s role in the negotiation of treaties and the domestic implementation of treaty obligations was regarded as having aroused considerable interest in Parliament, including civil society, business and other sectoral formations. Parliament has no influence over the outcome of treaties, much as the desire would be to be able to monitor the negotiations by being kept fully informed as they unfold, and by having an opportunity to express to the Executive, their political views. As it was, Parliament would come in at the very end for approval needed for the ratification or otherwise of these treaties.

Parliament itself was reported to have no framework or common approach for dealing with treaties. It was said to have an uncoordinated system where each committee dealt with relevant treaties the way it deemed fit. That practice in itself posed challenges for the institution regarding how to approach and enhance oversight on treaties.

The experts were called in to make input regarding what options the Committee would have, within the provisions of the Constitution, in enhancing oversight over the Executive regarding obligations created by international instruments. The constitutional mandate to approve treaties should be complemented by some power to influence the outcome of these treaties before they are finalised.

3. **Presentation by Professor H Strydom (University of Johannesburg)**

The law governing treaties was mainly located in the 1969 Vienna Convention on the Law of Treaties. They were reported to be governed by international law, concluded between states, were binding on states which have ratified them and should be implemented by them in good faith. The nature of multilateral relations demanded that nations jointly address issues affecting them, hence the need for a system of rules to regulate such relations.
A comparative overview was made with other jurisdictions against the situation in South Africa in treaty-making and the role of Parliament. In the United States of America (US), the President has power to negotiate, sign and ratify treaties; however, he/she should have concurrence from Senate. The Senate’s involvement was reported not at the tail end as the case was in South Africa, it began early. The Senate would give negotiating mandates to negotiators and act as a council of advisors during the negotiations. In some instances, implementing legislation was required before Senate could concur to a ratification of a treaty.

In order to make informed decisions on whether the US should or should not ratify a treaty, the Senate was supported by a Congressional Research Service, which provides policy and legal advice on a non-partisan basis. Senate could withhold approval or approve a treaty under certain conditions. In South Africa, Parliament could propose a reservation, as long as it was not impacting on the core objective of the treaty.

Consideration and processing of trade agreements followed a different approach in the US. A pre-authorisation legislation would be adopted which gives the President a negotiating mandate. That legislation would specify national interest being pursued; provide for regular consultation as negotiations continue and allow Senate to solicit reports from relevant committees on the subject matter of the treaty being processed (public hearings).

The practice in Germany required that government should inform parliament at its earliest and comprehensively before it engaged in treaty-making processes. With regard to the European Union (EU) matters, the executive would seek the advice of parliament before participating in the legislative processes of the Union. The executive would take into consideration the position of parliament.

In Austria, treaties that would have been approved by parliament have the full force of law without having to be domesticated by a piece of legislation. In South Africa, approval by Parliament of a treaty would not render it enforceable in the courts of law. It should first be domesticated through an Act of Parliament. Austria has established a Foreign Policy Council, comprising on a proportional basis, all political parties and should be consulted in all foreign affairs matters. The executive was therefore compelled to continuously consult with the Council on matters relating to foreign policy. Parliament could formulate conditions and interpretative explanations to be taken up in the text of a treaty.

The Committee was satisfied with the comparison made. However, its concern was whether Parliament has the adequate capacity to effectively deal with treaties.
4. Presentation by Advocate YM Dwarika (the Department)

Treaty making practice in South Africa was reported governed by the 1996 Constitution. Pursuant to section 231(1) thereto, negotiating and signing of all international agreements was reported the responsibility of the national executive. There were two frameworks for concluding international agreements. Section 231(2) was quoted to provide for agreements which need the approval of both Houses of Parliament before ratification or accession of such agreements could take place. These would normally be multilateral agreements, agreements with financial obligations or legislative implications.

Provisions of section 231(3) catered for agreements of a technical, administrative or executive nature. This category of agreements would normally not require ratification or accession, as they have no extra-budgetary implications, and do not have legislative implications. They should be tabled in Parliament within a reasonable time for information only. All international agreements have to be approved by the national executive, by means of a President’s Minute. All agreements have to be tabled in Parliament. The Department would play a coordinating role during treaty negotiations through to the completion of the process.

4.1. Observations by the members of the Committee

The members sought information on the following:

- Ratification of treaties would be effected once the contracting parties communicate through ‘a diplomatic note’, compliance with their respective constitutional requirements. An elaboration as to the contents of a ‘diplomatic note’ was sought.
- The criteria for determining ‘reasonable time’ within which a treaty could be tabled in Parliament for information only.
- The force and effect of a reservation levelled against a clause in a negotiated treaty.
- The manual of executive action in treaty-making processes seemed to prescribe the role of Parliament in a way that compromised oversight functions.
- Parliament should explore modalities for its involvement in the process of treaty-making at an earlier stage.
- The Committee should enhance its oversight on the implementation of treaties.
4.2. Response by the Department

- A diplomatic note would inform parties to an agreement that all domestic procedures have been followed, thus allowing an agreement to come into force.
- The concept of ‘reasonable time’ presupposed that Parliament should be informed as soon as possible of the contents of a treaty by line-function departments.
- Some agreements would not allow reservations to be included.
- Treaties were tabled in Parliament as negotiated texts, thus reservations should not compromise the core objective of the agreement.

4.3. Response by Professor Strydom

- Parliament has ratification powers but not treaty-making powers, which were a function of the executive.
- South Africa has inherited the Westminster system which happened to accord much more power to the executive on treaty-making.
- Pre-authorisation legislation might be a useful tool that South Africa should consider.

5. Presentation by Ebenezer Durojaye (Community Law Centre)

5.1. Distinguishing between treaties and human rights treaties

Human rights treaties, though ratified by states, could be invoked by individuals to seek redress before regional or international human rights bodies. While most treaties did not require a state to submit a report on progress made, human rights treaties required states parties to submit periodic reports on progress made regarding a particular treaty.

5.2. Nature of human rights treaties

It was highlighted that human rights treaties/instruments seek to protect and promote human rights of all individuals regardless of their nationality, sex, gender, sexual orientation, class, religion, political affiliations or other status. Sometimes they would deal with specific groups or categories of people. They would impose obligations on states to take adequate steps and measures, so as to ensure the protection of individuals’ rights. They would provide individuals with the avenues or means of redressing violations of human rights.
Monitoring of human rights treaties

Most human rights treaties would have a monitoring/supervisory body. The body would examine State Party reports, issue General Comments/Recommendations/Guidelines and sometimes receive individual communications.

5.3. South Africa’s reporting obligations to treaty monitoring bodies

South Africa was under the obligation to submit reports to treaty monitoring bodies on the steps it has taken to ensure the implementation of the provisions of different treaties it has ratified. In return, the treaty monitoring bodies were expected to issue what was known as ‘Concluding Observations’ on such reports.

5.4. Parliament’s envisaged role in implementing human rights treaties

Parliament was requested to encourage ratification of treaties not yet ratified such as the:

- International Covenant on Economic, Social and Cultural Rights (ICESCR) – economic social and cultural rights issues;
- Optional Protocol to ICESCR – communications procedure thereto;
- Optional Protocol to the Convention Against Torture (OPCAT) – establishment of a National Preventative Mechanism (NPM);
- International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW) – issues concerning migrant workers and their families;
- International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) - providing for issues relating to enforced disappearance; and

- Use international human rights standards and principles (General Comments/Recommendations and Concluding Observations) as benchmarks in drafting laws or scrutinizing legislative proposals (practices in Finland and United Kingdom were given as examples).
- Through ensuring public participation in law making, it could also promote human rights.
- Use its law making powers to increase awareness about the Treaty Bodies.
- Request the Department of International Relations and Co-operation and responsible government departments to keep the Committee informed on the status of South Africa’s reporting obligations.
Facilitate the domestication of human rights treaties in South Africa.
- Publicise and drive awareness campaigns domestically on the proceedings before the Treaty Body and the Concluding Observations and Recommendations.
- Monitor the implementation by government of Concluding Observations issued by treaty monitoring bodies.

5.5. Observations by the members of the Committee

It was emphasised that departments should develop a coordination mechanism for compilation of national reports regarding implementation of treaties in the country. Efforts should be made to collaborate with civil society on reporting. The Chairperson urged members to apply their minds on the suggestions made by the experts and formulate their own approach for submission to the relevant authorities in Parliament.

6. Subsequent discussions by the Committee

On 14 August 2013, the Committee deliberated on the suggestions made by the experts and identified the following:

6.1. Identified challenges

The following were some of the challenges facing Parliament in general regarding processes for consideration of treaties:

- There was a perception that Parliament is treated as a rubber stamp in treaty-making processes. There was a need to be informed of the treaty processes before the stage of approval for ratification or otherwise.
- Often departments made late submissions of international agreements/treaties for consideration by Parliament.
- Parliament was not afforded enough time to duly scrutinise and consider treaties tabled, especially those that require approval of Parliament before they bind the Republic.
- The Rules of Parliament were silent (National Assembly Rule 307) on the tabling period for treaties that require approval of Parliament. Such a period would allow Members of Parliament time to debate a treaty, while requiring departments to observe a waiting period of a minimum number of days needed for a tabled treaty to be considered in Parliament.
There was no definition of what constituted ‘reasonable time’ within which the Executive should be compelled to table agreements that do not require Parliament’s approval (Rule 308 ibid). These would be agreements tabled for information (section 231(3) of the Constitution).

Parliament itself has no framework or common approach for dealing with treaties. It has an uncoordinated system where each committee deals with relevant treaties the way it deemed fit.

Parliament could not make changes to a negotiated treaty; could only note concerns; it was limited to reservations whose effect was not even clear.

Each agreement relinquished policy space.

There was no analysis as to which laws would be affected or impacted upon by a treaty to be entered into.

The currently used Explanatory Memorandum did not give all the necessary information; it lacked a National Interest Analysis (NIA).

There was inadequate capacity to deal with treaties in Parliament. The institution was slowly building potential capacity in the form of Content Advisers and Researchers to assist committees in these matters.

Oversight by committees of Parliament over the implementation of international obligations as created by treaties was regarded still weak.

6.2. Governance arrangements

As a measure for enhancing capacity to scrutinise treaties, the Committee explored whether it would be expedient for Parliament to create a dedicated parliamentary/institutional mechanism such as a Joint Standing Committee on Treaties, a treaty sifting committee so to say. Details such as its location, resources its modus operandi, could be explored further. The mandate of such a committee would be to inquire and report on:

- Matters arising from treaties and related National Interest Analyses, proposed treaty actions and related Explanatory Statements presented or deemed to be presented to Parliament;
- Any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee.
- Such matters as may be referred to the Joint Standing committee through requisite Parliamentary processes.
- The Joint Standing Committee would consider referred treaties within a stipulated timeframe and report to the House.
The Joint Standing Committee would consider treaties which require approval by Parliament before they bind South Africa; and those treaties that would be tabled for noting/information only.

6.3. National Interest Analysis (NIA)

When tabled in Parliament, the text of the proposed treaty is normally accompanied by an Explanatory Memorandum. The Committee observed that the Explanatory Memorandum as required under the National Assembly Rule 306 (2) would at times lack other pertinent issues. The document should be enhanced to include a National Interest Analysis which explains why the Government considers it appropriate to enter into the treaty, and other associated documents. NIA should include information relating to:

- Why becoming a party to the treaty would be in South Africa’s interest.
- Details of any upcoming dates or events that make the ratification a matter of priority.
- The economic, environmental, social and cultural effects of the proposed treaty.
- The expected purpose of the agreement, and its relation to existing agreements.
- The potential foreign policy implications.
- The possible domestic impact and how the agreement would be implemented domestically.
- The obligations imposed by the treaty.
- The potential national security implications where necessary.
- An analysis as to how the obligations contained in the treaty, as well as its implementation by government departments would be consistent with Government policies.
- A brief description of how the treaty would be implemented in South African law, including a description of the legislative or other authority under which it would fall.
- A description of any reservations and declarations to the treaty.
- Information regarding how the treaty could be terminated.
- A determination of whether the obligations in the treaty relate in part or in whole to matters under other spheres of Government; and the possible impact of the treaty on Cooperative Government relations.
- A listing of Ministers whose spheres of responsibility were implicated by the contents of the treaty.
- A brief description of the consultations undertaken with other departments, non-governmental organisations, entities, civil society groups, Cooperative Government structures and other interested stakeholders prior to the conclusion of the treaty, as appropriate.

- The financial costs associated with implementing and complying with the terms of the treaty.

7. Conclusions

The Committee, having applied its mind on the information and suggestions from experts, concluded as follows:

7.1. Tabling period

There should be a timeframe requiring that all treaty actions proposed by Government are tabled in Parliament for a period of at least a number of sitting days to allow adequate and thorough discussion before action is taken that bind South Africa at international law to the terms of the treaty. An exception to this trend, of tabling treaties well in advance, would be where the Minister of International Relations and Cooperation certifies that a treaty is particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests. Relevant rules of the National Assembly (especially Rules 307 and 308) would need to be revisited.

7.2. Governance arrangements

On the governance issue the Committee concluded that the Department of International Relations and Cooperation coordinates all treaty-making processes for government. In order to have a matching oversight structure in Parliament for treaty processes, the Committee could take the responsibility of dealing with treaties itself. Relevant rules of the National Assembly (including Rule 307) would need to be revisited.

7.3. National Interest Analysis

The Explanatory Memorandum accompanying treaties though non-exhaustive, needed to be more structured and include a National Interest Analysis and other pertinent issues for consideration by Parliament. The process would have impact on the obtaining National Assembly Rules (including Rule 306 (2) thereto).
7.4. Frameworks/negotiating mandates

The obtaining practice has been that Parliament featured at the very end of treaty-making processes. However, the Committee was well aware that constitutionally, the negotiation of a treaty is carried out under the responsibility of the Executive (the Minister of International Relations and Cooperation, or another Minister in close cooperation with the former). In order for Parliament not to be perceived as a rubber stamp in the treaty processes, there was a need identified for early involvement by Parliament. However, a regular flow of information from the Executive to Parliament could assist to keep parliamentarians fully informed. That kind of practice would help build capacity of parliamentarians to tackle the increasingly complex interconnections of globalised trade and cooperation. Globally, the trend has been that parliaments were increasingly helping to define the parameters within which the executive within their countries could negotiate through issuing ‘frameworks/negotiating mandates’ to the executive branch during negotiations. The Committee felt there was a need for Parliament to propose some understanding/modalities with the Executive branch to ‘issue frameworks/negotiating mandates’ during negotiations, especially trade agreements. The understanding to be struck with the Executive should be within the confines of the Constitution.

Many citizens were becoming more concerned about what globalisation and increased trade liberalisation meant for them in their day-to-day lives. It was argued vital that elected representatives communicate to citizens how negotiations, on trade or cooperation, were developing and what impacts of any potential deal could be expected. In this matter, as in many others, Parliament could play a role by serving as a relay between the government and the people. By keeping the public informed, and by bringing any concerns to the attention of the negotiators, legislators could help respond to any apprehension that may exist concerning the trade or cooperation negotiations and their impacts. Much of the fear and antipathy directed at globalisation could be dissipated if the public perceived that their elected representatives were actively involved throughout the negotiating period.

7.5. Treaties as oversight tools

Oversight over the implementation of treaties has not been featuring prominently on the programmes of various committees in Parliament. It was therefore noted that ‘a parliamentary manual’ for consideration of treaties could be useful as a toolkit for pertinent issues to look for when committees consider treaties.
8. **Recommendations**

After lengthy deliberations on the above proposals, the Committee recommends the following:

8.1. The Portfolio Committee on International Relations and Cooperation should receive and deal with all treaties and confer with other line committees in this regard. This is in line with sub-heading 7.2 above.

8.2. Parliament should establish a treaty tabling process where a waiting period of at least twenty-one sitting days would be observed after a treaty is tabled, prior to taking action to approve or otherwise, of a treaty. This would allow Members of Parliament the opportunity to debate an international instrument before them.

8.3. For treaties that are tabled in Parliament for information only, Parliament should seek that such treaties be tabled within twenty-one days after entering into force of such treaties. This would take care of ‘reasonable time’ stated under section 231(3) of the Constitution.

8.4. The Explanatory Memorandum as required under the National Assembly Rule 306 (2), should be enhanced to include a National Interest Analysis as stipulated under sub-heading 6.3 above.

8.5. Parliament should propose the issuance of frameworks/negotiating mandates to the Executive during negotiations of all treaties that would require Parliamentary approval, and trade agreements in particular. Early involvement of and flow of information to Parliament would allow for some political input into the negotiations.

8.6. The Budgetary Review and Recommendation Report (BRRR) processes should include service delivery in terms of implementation of international agreements by departments. Parliament should prioritise the implementation of treaties as an oversight tool.

Report to be considered.