CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

I. TREATIES

INTRODUCTION

THE process of constitutional reform in the United Kingdom instituted by the present Labour government has been considerable but it has proceeded on a piecemeal basis. Its aim is to reinforce accountability for the exercise of public power but, in the absence of a comprehensive scheme of reform, the achievement of this ambition has the same lack of coherence as the reform programme itself. Some matters remain untouched by the process, centrally and crucially the domination of the House of Commons and therefore effectively the legislature, by the Executive, a condition exaggerated by the massive majority enjoyed by the government.[1] The justification for this arrangement, which so infringes the separation of powers, lies in the claim that it produces effective, stable and accountable government. This is not the place to assess the accuracy of these claims but to note the importance of recognising the particular relationship between executive and legislature which characterises the British Constitution when considering the likely impact of proposals for its reform.

This relationship has an immediate bearing on one area of power which has largely escaped reform: that is the prerogative powers of the Crown, powers under which a great deal of the foreign relations of the United Kingdom are conducted.[2] It is true that, in the absence of legislative initiative, the courts have taken some steps to reduce the unlimited claims with respect to the exercise of some prerogative powers, including one or two which have an impact on foreign policy,[3] but largely the courts have been content to affirm Lord Wilberforce's dictum in *Nissan*, that,

> The subject has unquestionably left the Crown or the executive a free hand in the conduct of foreign affairs ....[4]

The orthodoxy asserted itself in *Butt*,[5] where the Court of Appeal held that there was no jurisdiction to order the government to take any particular measure by way of diplomatic protection of nationals; a power which lies within the realm of the

1. Recently, the partially reformed House of Lords has been asserting its negative role in the legislative process by refusing to endorse government legislation, an indication that established generalisations are coming into question as the reform process proceeds.

2. F.A. Mann, *Foreign Affairs in English Courts* (1986), Ch.1.

3. *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. Everett* [1989] 1 All E.R. 655.

4. *Attorney-General* v. *Nissan* [1969] 1 All E.R. 629, 657.

5. *R.* v. *Secretary of State for Foreign Affairs, ex p. Butt* C.A. (1999) (unreported).

prerogative on foreign affairs. The courts have not always shown the same restraint where there is a statutory impact on a decision with foreign relations implications[6] but these examples are rare and adventitious and do not seriously call into question the general proposition of "arbitrary" (in the sense of legally unconstrained) authority under the prerogative. Any control of governmental power is political and is exerted by means of ministerial accountability to Parliament. One power under the prerogative is the power to make (and break) treaties.[7] Even when the House of Lords was first asserting the reviewability of certain acts under the prerogative in the *G.C.H.Q.* case, it gave as an example of a power not so circumscribed the power to make treaties.[8] The power is non-justiciable in the sense that there are no justiciable standards against which its exercise might be measured (though when such standards were provided by legislation, the Crown would be obliged to take them into account as they would any other statutory provision binding on it[9]). There are no entrenched constitutional limitations on the making of particular treaties (but the impact of the Human Rights Act 1998 on this and other exercises of the prerogative has still to be worked out).[10] International law is not available to supplement domestic law either, because the power to make treaties in international law is also a power practically without limit (considerations of *ius cogens* are hardly likely to be germane, though binding decisions of the Security Council are a possible limitation). So long as treaties remain, as it were, "out there" in the international legal system, then the principle so long adopted by the United Kingdom might not seem to do much constitutional harm. Where treaties require domestic legal consequences, parliamentary sanction in the form of legislation is needed to bring those results about. Accordingly, the prospect of the executive finding a form of non-parliamentary legislative power is avoided and the element of democratic accountability is satisfied.

THE PRINCIPLE IN PRACTICE

THERE are two difficulties with this simple dichotomy between the international and domestic legal environments. Whether or not treaties demand implementing legislation, they may be of intense political interest. Treaties of alliance, for instance, will not ordinarily require legislation but may, at some unspecified future date, impose duties of service on military personnel and impose expensive costs on the exchequer. There is, then, a legitimate public interest in the State's participation in these agreements.[11] Considerations of this kind prompted Bruce

6. *R.* v. *Secretary of State for Foreign Affairs, ex p. World Development Movement* [1995] 1 W.L.R. 386.

7. 1 Blackstone's Commentaries (14th ed) 256.

8. *Council of Civil Service Unions* v. *Minister for the Civil Service* [1984] 3 All E.R. 935, per Lord Roskill at 956e.

9. *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] 1 All E.R. 457; on which, R. Rawlings, "Legal Politics: the United Kingdom and the Ratification of the Treaty on European Union", (1994) *Public Law* 254, 367.

10. See, for instance, *Bennedoun* v. *France* E.Ct.H.R. A/284 on the conclusiveness of executive certification in civil proceedings.

11. A more significant issue is the complete absence of accountability for non-binding instruments, such as memoranda of understanding (MOUs), on the procedures for which see, A. Aust, *Modern Treaty Law and Practice*, Ch.3.

George MP, the Chairman of the Commons Select Committee on Defence, to write to the Committee on Procedure about the operation of the Ponsonby Rule.[12] He was concerned about the procedure for considering the three treaties of accession to the NATO Treaty by the Czech Republic, Poland and Hungary. The requirements of the Ponsonby Rule had been satisfied in that the treaties had been laid before both Houses of Parliament before ratification but no government time had been allocated on a positive motion to approve the agreements.[13] The other departure from the principle of the separation of the international and domestic effects of treaties arises because the courts have not rigidly maintained the firewall between unimplemented treaties and domestic law. There is a long-established principle of statutory interpretation which says that Parliament is not to be presumed to legislate in contravention of the State's international obligations. The presumption applies to all legislation (not merely implementing Statutes) and to all obligations, which includes those arising under treaties.[14] Until recently, the presumption has not been of great practical significance but that has changed where human rights treaties are involved. The United Kingdom has usually not legislated to make part of domestic law the terms of human rights treaties following ratification of the general human rights treaties (the position has, of course, changed with the enactment of the Human Rights Act 1998, a substantial plank in the platform of constitutional change referred to above). Nonetheless, the courts have been increasingly receptive to arguments based on international human rights treaties, particularly the European Convention on Human Rights, and, although it is hard to point to examples of cases where the international obligation was decisive, the practice in general has undoubtedly affected the way in which human rights cases have been considered.[15]

This practice has its supporters, even though the question of ratification of human rights treaties has seldom been brought by the government before Parliament (nor did governments do so about decisions to accept optional procedural obligations under such agreements).[16] However, the perceived greater impact of unimplemented human rights treaties was a substantial reason for the recent upsurge in interest in the treaty process, which began with Lord Lester's Treaties (Parliamentary Approval) Bill which was considered on second reading by the House of Lords in February 1996.[17] Another item of concern to Lord Lester was the prospect of extended second and third pillar agreements, following the Maastricht Treaty, with respect to which, upon conclusion, the pressure to enact any necessary implementing legislation would be irresistible. So Lord Lester

12. On the Ponsonby Rule, see below pp.947–948.

13. George's letter was accompanied by one from Donald Anderson MP, Chairman of the Select Committee on Foreign Affairs, who had similar concerns but suggested slightly different remedies, see Procedure Committee of the House of Commons, Minutes of Evidence, 1 February 2000 at www.publications.parliament.uk/cm199900/cmselect/-cmproced/210/0020102.htm (afterwards "Evidence").

14. See, R. Higgins, "United Kingdom", in F.G. Jacobs and S. Roberts (eds), *The Effect of Treaties in Domestic Law* (1987) 123, 131–135.

15. M. Hunt, *Using Human Rights Law in English Courts* (1997), Ch.1.

16. See Lord Lester, "UK Acceptance of the Strasbourg Jurisdiction: What went on in Whitehall in 1965" (1998) *Public Law* 237.

17. HL debs. vol.569, col.1530, 26 Feb. 1996.

sought that there should be prior approval by Parliament of any treaty before ratification to "reduce the democratic deficit".[18] There were then, clearly, two different respects in which Lord Lester detected a deficiency: the one, the EU treaties,[19] where Parliament was excluded from the negotiation process until it was presented with a *fait accompli* at its completion[20] and the other where, though nothing was required of Parliament, there could be legal consequences domestically because of the receptive attitude of the judges to some unimplemented treaties.

The government was opposed to the Bill on the ground that it would do little to increase scrutiny but would absorb considerable amounts of parliamentary time.[21] The government stood by the practice of seeking any legislation required to give effect to the treaty before ratification (but, while there had been some close calls on the legislation required by the Maastricht Treaty, it is hard to think of a recent occasion when Parliament has denied a government the legislation it was proposing[22]) and the "Ponsonby Rule", a practice which it is necessary to describe.

THE PONSONBY RULE

THE practice[23] was announced to the House of Commons by Arthur Ponsonby, a Foreign Office Minister, in April 1924. He said:

> It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified ... In the case of important treaties, the Government will, of course, take the opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion through the usual channels from the Opposition or any other party, time will be found for discussion of the treaty in question."[24]

The practice has been followed, almost without interruption, ever since. The way of doing this is to publish the text as a Command Paper in the Country, Miscellaneous or European Communities Series. The Rule applies to all treaties, that is to say, instruments intended to bind the United Kingdom in international law, and it covers, in addition to those subject to an ordinary process of ratification, treaties in which participation is established by accession, acceptance or approval. The Rule has been modified to take account of subsequent

18. *Ibid.*

19. Though Lord Lester's point would apply to the negotiation of any treaty.

20. In fact, there provision for parliamentary, pre-conclusion scrutiny with respect to EU agreements is much more developed than treaties in general, see "Evidence [of the Foreign and Commonwealth Office] to the Royal Commission on the Reform of the House of Lords, Part IV at www.files.fco.gov.uk/treaty/aug99pdf, (afterwards "FCO Evidence").

21. The government's response is reproduced in "United Kingdom Materials on International Law", LXVII *British Yearbook of International Law* (1996), pp.746–751.

22. Historically, the unwillingness of the House of Lords to approve the London Treaty on Naval Warfare is the example usually cited of parliament denying a government its treaty, see T.G. Bowles, *Sea Law & Sea Power* (1910).

23. There is inconsistency as to whether the practice is a "convention"—see Lord Chesham, HL Debs, vol.567, *col.152 (WA)*, 20 Dec. 1995.

24. HC Debs, vol.171 (5th series), col.1999, 1 April 1924.

developments in the treaty mechanism at the international level and exceptions have been established to exclude routine arrangements which will in any event be implemented by statutory instrument, such as treaties on double taxation or extradition. Not all treaties are the responsibility of the FCO: many technical matters, especially within the purview of functional international organisations fall within the remit of the corresponding national ministry.[25] Following Lord Lester's initiative with his Parliamentary Approval Bill, the government introduced a further refinement to the Ponsonby Rule process. Treaties so laid are now accompanied by an "Explanatory Memorandum" (EM), written in accordance with standards set out in "Guidelines on Explanatory Memoranda for Treaties". The EMs are sent to Parliament and the Foreign Affairs Select Committee and are easily available electronically.[26] The EMs contain standard information such as the full title of the treaty and its Command paper number. They set out in general terms the subject matter of the treaty, often quite tersely—the EM on the Statute of the ICC runs only to about 200 words—but sometimes, as with the Treaty of Amsterdam, at greater length. The policy considerations in favour of participation in the treaty are explained, as are the financial costs of doing so. The action required for implementation is set out. The consultations within government and with outside bodies are indicated. Although the EMs are laid by the FCO, they are prepared by the department with responsibility for the treaty, that department being identified in the EM, as well as others which would be involved in giving effect to the treaty. The FCO told the Select Committee on Procedure that, in 1997, 36 treaties subject to ratification were laid before Parliament and a further 51 were laid upon their entry into force. In 1998, the figures were 25 and 43 and in 1999, 54 and 36.[27]

PARLIAMENTARY SCRUTINY OF TREATIES

THE EMs are designed to make the operation of the Ponsonby Rule more effective in terms of parliamentary scrutiny of treaties, without significantly undermining the effectiveness of the treaty-making process itself. The FCO's position is that there can be no general commitment of consultation with Parliament in advance of the conclusion of treaty negotiations.[28] In exceptional cases it might be possible to do so, as it was with respect to the pre-Rome Conference debates on the draft Statute for the ICC.[29] This general position was endorsed by the Royal Commission on the House of Lords, which recommended only the proposals that there should be a scrutiny committee of a reformed House to examine treaties laid under the Ponsonby Rule.[30] The model is the scrutiny of statutory instruments, so technical rather than policy recommendations would be expected to emerge from the Committee. Any significant matters could be drawn

25. See "FCO Evidence", above n.20, Parts II and III.

26. *Ibid.*

27. Second Report of the House of Commons Select Committee on Procedure—Parliamentary Scrutiny of Treaties, para.6, www.publications.parliament.uk/cm199900/cmselect/cmproced/210/21003htm, afterwards "Report".

28. "Evidence", above n.13, para.39. This was endorsed by the Royal Commission, below n.30, para.8.38.

29. HL Debs, vol.601, cols.947–962, 9 June 1999.

30. Royal Commission, "A House of Lords for the Future", Cm.4534, para.8.42.

to the attention of both Houses for debate within the 21 day period. We are back again to the question of parliamentary time. The Royal Commission does not suggest where the time for debate should come from and, unless the government was prepared to concede the time on the basis of a recommendation by the Committee, things would have been moved only a little further on. At the level of general policy, it cannot easily be anticipated that a resulting debate would overturn a government's expressed intention to become a party to the treaty. Even where there was the possibility of making reservations, again it would rarely be the case that a government would be persuaded to enter a reservation which it had not contemplated or to withdraw a reservation which it had already made. Nonetheless, there is here, in theory at least, a window for parliamentary involvement in the substantive process of deciding upon the State's treaty obligations.

Beyond this, there might be the opportunity to obtain from government explanations about the effect of ratification, particularly with respect to the necessity for and the shape of any implementing legislation. That there can be differences between the government and others about whether legislation is necessary at all is shown by the change in the present government's position on the need for legislation to make criminal certain extra-territorial conduct in the field of corruption. After the government first denying that any legislation was required to give effect to the obligation arising under Article 4 of the OECD Convention, the recently published HO Consultation Document on Corruption conceded that action is necessary.[31] Another, now dated, example is the U.K.-U.S. Drug Trafficking Treaty, by which the governments agreed to allow the exercise of visit and search powers on each others' ships in certain waters.[32] There was no legislation to permit action by U.S. officers on British ships (which would have been required if the power were exercised by a British official). It does seem that it is at the implementation stage that it is possible for the government to make some concessions towards closer parliamentary involvement. The treaty may not be renegotiable at this time but whether and how it is to be implemented may be open to consideration—hence the proposal in the Queen's Speech in November 1999 that the Bill to allow ratification of the Statute of the International Criminal Court would be published in draft to permit a period of public consultation before it was introduced.[33] Such a promise is possible presumably because there is room for argument about quite what would be required in terms of domestic law by the Statute and different possibilities about who the decision-makers should be. The draft Bill had not emerged by July 2000, doubtless a tribute to the complexity of the issues involved and the need to take account of the discussions in the Preparatory Commission: so the consultation period is likely to be brief. The other factor which allows for consultation is that there is no great urgency to ratification of the Statute. Sixty ratifications are required for it to come into force; this was not immediately in prospect in November 1999 when the announcement

31. Home Office, "Raising Standards and Upholding Integrity: the Prevention of Corruption", para.2.19, www.official-documents.co.uk/document/cm47/4759/4759.htm.

32. For the treaty, see J. Siddle, "Anglo-American Co-operation in the Suppression of Drug Smuggling" (1982) 31 I.C.L.Q. 762.

33. H.C.Debs., vol.339, col.361, 22 Nov. 1999.

was made and is not now (July 2000); accordingly, there was and is space for a period of reflection without any impact on the creation of legal obligations of the State at the international level. That period diminishes as participation reduces, and vanishes with respect to those agreements which come into force on signature. Nonetheless, a precedent has been set: if extra-parliamentary consultation might sometimes be feasible, a part for Parliament ought more easily to be conceded. However, concession it would be; the government has not endorsed any arrangement which would automatically impinge on the treaty-making power and has not agreed to guarantee time for debate on any treaty, from whichever source the suggestion comes.[34]

DEVOLUTION

A leading authority on the separation of the treaty-making and treaty-implementing powers in British law is, in fact, a case from Canada, which was decided by the Privy Council—*The Labour Conventions* case.[35] The case concerned the power of the Federal Parliament to enact legislation implementing treaty commitments in substantive areas reserved to the provinces by the British North America Act (which at the time served as Canada's Constitution). The Privy Council held that there was no express or implied Federal authority to legislate to implement treaty obligations in fields where, otherwise, legislative competence rested with the Provinces. Cases in other Federal States have gone the other way, notably in Australia.[36] They confirm that the precise federal arrangement will be the determinative element of the relationship between the two powers. This kind of consideration had not until recently been a concern of United Kingdom law (with the minor exception of the British Islands). The enactment of the various strands of devolution legislation for Scotland, Wales and Northern Ireland has changed the situation somewhat. It is important to note that none of the schemes established in the United Kingdom is a species of federalism in the sense that there is a division of final legislative authority between the centre and the regions. In all the instances, treaty-making is reserved to the government of the United Kingdom,[37] as is the power of the Parliament at Westminster to legislate to give domestic effect to treaties. However, the power to implement international obligations lies with the appropriate legislative authority, which means the devolved authority if the required legislation ordinarily would fall within its competence.[38] Thus there exists dual legislative competence. The relations between the administrations in Edinburgh and Belfast and the government in London are regulated by "Concordats", non-legally binding understandings, which in this case cover international relations including the making and implementation of treaties.[39] The Concordats acknowledge the interests of the devolved administrations in international policy-making on devolved matters and

34. "Evidence" above n.13, Minister's reply to qu.101.
35. *A-G for Canada* v. *A-G for Ontario* [1937] A.C. 326.
36. For example, *Commonwealth of Australia* v. *State of Tasmania* (1983) 158 C.L.R. 1.
37. E.g. Scotland Act 1998, Sch.5, para.7(1).
38. E.g. Scotland Act, Sch.5, para.7(2).
39. E.g. "Concordat on International Relations—Scotland" and *ibid.*, "Common Annex", www.scotland.gov.uk/library2/memorandum/mous-08.htm, *ibid.*, mous-10.

envisage their holding "working-level" discussions with foreign national or sub-national governments and international organisations and their representation in appropriate cases in United Kingdom negotiating teams, not excluding the negotiation of treaties. Whether involved in the negotiations or not, the devolved administrations will ordinarily have been consulted if the United Kingdom government contemplates entering into obligations which touch a devolved matter. The government will inform the devolved authorities of any new obligations in order that they might enact any necessary legislation before ratification. The day-to-day primacy of the authority of the devolved legislatures and administrations is thus preserved, so that the United Kingdom Parliament would not be asked to legislate on a devolved matter to implement an international obligation unless it were matter of urgency, the example given being the laying of Orders-in-Council under the United Nations Act 1946 to give effect to Security Council resolutions. Although these developments are of a rather particular kind and involve intra-governmental relations rather than relations between the government and Parliament, it will be interesting to see if practice under the Concordats opens up the treaty process at all, for instance by widening the range of pre-conclusion consultations or providing more space for consideration of the manner and means of implementation after signature and before ratification.

THE REPORT OF THE SELECT COMMITTEE ON PROCEDURE

BRUCE George's initiative resulted in a Report of the Select Committee on Procedure on "Parliamentary Scrutiny of Treaties".[40] The Report followed the taking of evidence from the Minister of State at the Foreign Office and some of his officials, including the Legal Adviser. The Minister evinced an attitude of co-operation with Parliament but underlined the two difficulties which had already appeared: the variety of treaties meant that generalisations about how they should be dealt with were unhelpful; and that, even where more intense Parliamentary involvement was deemed appropriate, time for debate on the floor of the House was at a premium and could not be guaranteed.[41] Where scrutiny was to occur, the Minister and the Committee appeared to agree that, initially at least, this would be a function of one or other select committee. Moreover, the Minister was prepared to concede that where there was a request from a select committee on a major question arising out of a treaty, the resistance of a government to providing time for a debate might not be as unyielding as could have been anticipated.[42] The Minister was also at pains to point out that the form that scrutiny could take would depend on each treaty and the circumstances surrounding its negotiation. The same would be true about the possible consequences of any adverse findings of a Committee or even the House itself. Treaties which entered into force on signature, an important functional category for the FCO, even if the content of such agreements were not as momentous as of those subject to ratification, could not be prevented from entering into force by subsequent disapproval by the House of Commons but, as the Legal Adviser told

40. "Report", above n.27.
41. *Ibid.*, qus.111, 112.
42. *Ibid.*, qu.104

the Committee, not that he recommended it, such treaties could be denounced according to their terms or renegotiated.[43] Scrutiny concurrent with negotiations depended crucially on the negotiating context. Where the process was secret, external involvement was not commensurate with effective negotiation but where it was prolonged and public, as some multilateral negotiations were, then the possibility of public debate without undermining the government's position was much greater. The Minister also emphasised that the end of the treaty process was the ratification of treaties, not their scrutiny, still less their defeat: he made contrast with the enormous obstacles facing the ratification of treaties by the United States in recent years because of the obstruction within the Foreign Relations Committee of the Senate. It would be fair to say that he did not regard this as a price worth paying for democratic accountability.[44]

The Committee was not convinced of the need for a specialist Commons Committee to deal with treaties, whether on political or technical grounds. Rather, it inclined to the proposal of the Royal Commission that there be a committee of a reformed House of Lords to look at the details of treaties, in a non-partisan and legally informed way. The Committee saw any role for the Commons in the scrutiny of treaties to be exercised by the select committees, which, the Committee recognised, possessed expertise that could be brought to bear on treaty texts and, exceptionally perhaps, could exercise their powers early enough to influence the treaty negotiations. Finally the Committee made the following recommendation:

> that the Government should give the following undertaking: that if a select committee request that a debate be held on the floor of the House before ratification of a treaty involving major political, military or diplomatic issues, either on a substantive or non-substantive motion, and if that request is supported by the Liaison Committee, then that request would normally be acceded to.[45]

The Committee went on:

> We believe that such an undertaking would be within the spirit of the original Ponsonby Rule, and would represent a sensible modernisation of the Rule to adapt it to the increased role of select committees in the scrutiny process.[46]

CONCLUSION

WHEN he wrote his great book on the Prerogative at the beginning of the 19th century, Chitty eulogised the virtues of the Prerogative in the field of foreign relations:

> When the rights in question are concentrated in one department of state, and the power of the state is wielded by one hand, the execution of public measures will inspire the people with confidence and strike into the enemies of the country that awe, that dread of its activity and power, which it is the constant endeavour of good policy to create.[47]

43. *Ibid.*, qu.122.
44. *Ibid.*, qu.112.
45. "Report", above n.27, para.33.
46. *Ibid.*
47. J. Chitty, *Prerogatives of the Crown* (1820), pp.39–40.

These days, when we seek the more modest aim of "punching above our weight", it is not surprising that voices are raised in favour of subjecting the mighty powers under the prerogative to some modicum of accountability: if the object of the powers is to promote the public good and the public good does not require putting the fear of God into our neighbours, the sacrifice of a little efficiency for a little accountability ought to be possible. As to whether the Procedure Committee's recommendations will be seen as "sensible modernisation" when looked at from King Charles Street, we shall have to wait for the government's response. The Chairman of the Defence Committee was scarcely encouraging when he had earlier told the Procedure Committee that he interpreted the asserted neutrality of the FCO to the reform of the treaty process when it submitted its evidence to the Royal Commission on the Reform of the House of Lords:

> as saying to us be very careful, do not try to trespass into areas which will have time and resource and constitutional implications.[48]

Any conflict about the power of Parliament would be reduced if its scrutiny role becomes a technical rather than a policy one, which is what the Royal Commission envisages. It will likely be necessary for further reform of the institutions of government before a final balance between efficacy and control of the treaty process is reached. Nonetheless, these recent developments suggest that the first tentative steps to open up the process are being taken. Other small steps would help—a more consistent technique in the drafting of legislation which implements treaties, a more disciplined approach by the courts to unimplemented treaties, a more engaged attitude by parliamentary committees. Until there is a more thorough-going look at our constitutional arrangements, it would be optimistic to expect anything more because the relationship between government and the House of Commons is at the heart of the debate. But, in the way of constitutional development in this country, it might be unwise to underestimate the ultimate consequences of the apparently minor innovations described above in combination on the development of subsequent practice on the making and implementing of treaties.

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II. FOURTEEN AGAINST ONE: THE EU MEMBER STATES' RESPONSE TO FREEDOM PARTY PARTICIPATION IN THE AUSTRIAN GOVERNMENT

I

THE participation of the Freedom Party in the Austrian government has given rise to exceptional reactions both in Austria and internationally. The imposition of a freeze in bilateral diplomatic relations by Austria's European Union partners has been particularly notable, amounting to an unprecedented response to the election of a new government in another Member State. This note seeks to

48. "Evidence", above n.13, qu.87.