

# STATES OF JERSEY



## ASSEMBLY CONSIDERATION OF THE BILATERAL TREATY WITH THE UAE (P.6/2023): AMENDMENT

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Lodged au Greffe on 21st February 2023  
by Deputy P.M. Bailache of St. Clement  
Earliest date for debate: 28th February 2023

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STATES GREFFE

ASSEMBLY CONSIDERATION OF THE BILATERAL TREATY WITH  
THE UAE (P.6/2023): AMENDMENT

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**1 PAGE 2, PARAGRAPH (b) –**

- (i) For the words “Council of Ministers” substitute the words “Legislation Advisory Panel”;
- (ii) For the words “a process” and substitute the word “legislation”;
- (iii) Delete the words “Bilateral Investment”;
- (iv) After the word “Treaties” insert the words “and International Agreements signed by a Minister under entrustment from the United Kingdom Government or to be extended to Jersey under the United Kingdom’s ratification process”; and
- (v) For the words “full consultation with, and approval” and substitute the word “ratification”.

DEPUTY P.M. BAILACHE OF ST. CLEMENT

**Note:** After this amendment, the proposition would read as follows –

**THE STATES are asked to decide whether they are of opinion –**

- (a) to request the Minister of External Relations and Financial Services to take the necessary steps to ensure the Bilateral Investment Treaty with the United Arab Emirates does not come into force until such time as the Treaty has been considered by the States Assembly;
- (b) to request the **Legislation Advisory Panel**, in consultation with the Privileges and Procedures Committee, to bring forward **legislation** by which all **Treaties and International Agreements signed by a Minister under entrustment from the United Kingdom Government or to be extended to Jersey under the United Kingdom Government’s ratification process**, are subject to **ratification** by the States Assembly before they come into force.

## REPORT

### Introduction

1. I am grateful to Deputy Mézec for drawing attention to an important constitutional issue, and I agree in essence with most of the points that he makes in his report. My amendment is designed to substitute a slightly different terminology and to request that the procedure for dealing with ratification of all treaties is given a proper legislative basis.
2. The fundamental issue is whether it is desirable to introduce a negative resolution procedure for certain types of international agreement, as the Minister for External Relations (“the Minister”) has done in R.6/2023. A negative resolution procedure means that a treaty or international agreement can be ratified without any active involvement by the States Assembly if it is lodged *au Greffe* and, after a period of time, no member objects to the proposed ratification. It is to be distinguished from an affirmative resolution procedure which means that the States Assembly must debate and positively adopt a resolution to authorise ratification.

### The Minister’s negative resolution procedure

3. The Minister’s negative resolution procedure has been set out in R.6/2023 entitled Notification of the Conclusion of the Bilateral Agreement for the Promotion and Protection of Investments between the Government of Jersey and the United Arab Emirates. This is in itself unusual, because a report to the States is not legislation and the introduction of such a procedure would, indeed should, ordinarily be achieved by a legislative provision. Certainly, that was the case in the United Kingdom, Canada, Australia and most democratic states with an independent and functioning legislature.
4. There are several problems with the Minister’s procedure, some of which have been identified by Deputy Mézec. It is not clear how it is to be established that “no issues have arisen” which should prevent the BIT from entering into force. The 14-working day period between lodging and entry into force is very short and does not give members sufficient time to consider the matter. Safeguards built into the negative resolution procedure in other jurisdictions are not replicated in the Minister’s scheme. It is also true that in other states where a negative resolution procedure operates there are party political systems which ensure that a proposed treaty is scrutinised.
5. There is a lack of clarity as to the ambit of the Minister’s negative resolution procedure. Does it apply only to the Jersey/UAE Bilateral Investment Treaty, as the heading to the relevant section of the report might imply, or is it to apply to all BITs or indeed other treaties? The Minister asserts that “it is globally commonplace for Bilateral Investment Treaties, or equivalent agreements, to be ratified through a negative consent procedure”. But what is an “equivalent agreement”? The Minister drew attention to the fact that BITs do not (generally) require legislation to support their implementation. But that is true of many other international agreements (e.g., UN Convention on the Rights of the Child). Is the Minister’s procedure to embrace all treaties or international agreements which do not require legislation for implementation? That would be a very substantial change.

6. It is also unclear how and when the negative resolution procedure is complete. The report states that after 14 days “provided that no issues have arisen that the ... Minister determines should prevent the Bilateral Investment Treaty’s entry into force – Jersey’s procedure enabling the entry into force of the treaty is complete”. But how are the public to know what the Minister has determined? What are the issues that might prevent the BIT from entering into force? Uncertainty could continue indefinitely after the expiry of the 14-day period. Suppose that Deputy Mézec’s proposition is adopted unamended. The States Assembly will have “considered” the Treaty between Jersey and the UAE. Does that mean that the Minister can now bring the BIT into force? In other jurisdictions where there is a negative resolution procedure there is clarity through legislation as to when the procedure is complete.

### **An affirmative resolution procedure**

7. The first advantage of an affirmative resolution procedure is that there is clarity about when ratification has taken place. There is a public debate and if the States Assembly adopts the resolution there is an official record of the ratification. Nothing could be simpler.
8. Furthermore, so far as I am aware, an affirmative resolution is what has preceded every ratification of a treaty or international agreement since ministerial government was introduced in 2005. It is true that under the committee system of government ratification was sometimes authorised by officials and not by the States or a Committee of the States, but that has not happened for at least 20 years. The first Tax Information Exchange Agreement (with the USA) was ratified by the States in 2002. Since then, some 38 other such agreements have been ratified in the same way. Many Double Taxation Agreements have been ratified by the States, and none by any other process. Where it has been proposed that Conventions or Agreements should be ratified by the UK on behalf of the Island, there has invariably been a resolution of the States. Indeed, it is now arguable, in my view, that there is a custom that an affirmative resolution is required for the ratification of treaties and international agreements.
9. There is a more fundamental reason for requiring that treaties and international agreements should be ratified by the States Assembly. That is that our system of ministerial government is still immature. It has been in existence for less than 20 years. The current Minister for External Relations is a highly competent politician who can be expected to take sensible decisions. But that may not always be so. It is not impossible that a future Minister for External Relations might be a person who is not reliable. Incurring obligations under international law is a serious matter which reflects upon the Island’s reputation. It is something which should not be left within the power of a single minister. The safest course is to continue the current practice which has served the Island well for more than two decades and to require that the States Assembly itself is content to enter the treaty or international agreement.
10. Jersey is unlikely to enter so many such agreements in the foreseeable future that it would cause practical difficulty to require an affirmative resolution. Although I understand that there are plans to enter more Bilateral Investment Treaties, the number can be counted on the fingers of one hand.

11. It is possible that some special arrangement may have to be envisaged for the extension to Jersey of Free Trade Agreements entered into by the United Kingdom. The Assembly agreed such an approach by adopting the Principles for Jersey's Participation in United Kingdom Free Trade Agreements ([P.94/2021](#)) on 25th November 2021. This would need to be considered carefully by all relevant parties if this amendment is adopted.

### **Conclusion**

12. The amendment seeks to substitute for the words "Council of Ministers" the words "Legislation Advisory Panel" (LAP). The LAP is a creature of the Chief Minister and is accountable to her. It has a general responsibility for what is sometimes termed "lawyers' law" and seems the appropriate body to prepare legislation for the consideration of the Council of Ministers.
13. The amendment seeks to embrace all treaties and international agreements, whether or not entered under entrustment, but not of course Memoranda of Understanding, Exchanges of Letters and other diplomatic documents which do not create obligations under international law. Such documents remain within the exclusive preserve of the Executive.
14. Entering a treaty or international agreement which creates obligations for the Island under international law is a serious matter. Such a treaty or international agreement can be concluded and signed by a Minister but should be ratified by the States Assembly before it comes into force. Whether or not such a constitutional rule should be established in law is a political matter for determination by the Assembly.

### **Financial and manpower implications**

There are no direct financial and manpower implications arising from this amendment.

