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International Treaty Making

Guidance for government agencies on practice and procedures for concluding international treaties and arrangements

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II TREATIES

Terminology

New Zealand is currently party to approximately 2010 international treaties. As many treaties are only in force for a limited period of time, New Zealand has been party to almost twice that number. At any one time New Zealand is involved in a number of bilateral and multilateral negotiations involving the conclusion of new treaties or amendments to existing treaties.

A treaty is an international **agreement** between two or more states or other international entities (including, for example, bodies such as the United Nations, the World Bank, or the World Trade Organisation) and is **governed by international law**. The term "treaty" is used here as a generic term to describe a broad class of instruments recognised as being international agreements. Treaties have a variety of forms and names:

- **"Treaty"**, although binding international agreements are known generically as treaties, the term "treaty" is generally confined to major agreements of political importance (for instance, treaties of alliance or treaties of friendship).
 - **"Agreement"** is the most common term, especially for **bilateral** agreements.
 - **"Exchanges of Notes (or Letters) Constituting an Agreement"** make up a large proportion of the previous category. There are two documents rather than just one. The second document responds to and accepts the agreement proposed in the first.
 - **"Convention"** is commonly used for **multilateral** agreements.
- "Protocol"** is generally used for agreements that supplement a principal treaty. A Protocol might be drawn up at the same time as the principal treaty or later.

Overview of the Treaty-making Process

A general overview of the process, for multilateral treaties and major bilateral treaties of particular significance, is explained below.

1. **Negotiation:** New Zealand must first obtain a negotiating mandate. Following which, New Zealand officials will participate in international negotiations resulting in the text of an agreement being finalised.

2. **National Interest Analysis:** the lead government agency prepares a Cabinet paper and a National Interest Analysis (NIA), which sets out the advantages and disadvantages for New Zealand of becoming a party to the agreement or deciding to withdraw. The lead government agency is responsible for ensuring appropriate consultation is undertaken with other government agencies, Māori and third parties who may have an interest in the treaty.
3. **Signing:** Cabinet approves the final text of the agreement, giving authority for New Zealand to sign the agreement; the presentation of the agreement and NIA to the House of Representatives; and the necessary measures for entry into force (i.e. ratification/acceptance/accession). (Cabinet Manual 2017, paragraph 5.79). At this stage, the treaty is agreed but not yet legally binding.
4. **Presentation:** MFAT presents the treaty and its corresponding NIA to the House of Representatives.
5. **Consideration:** a select committee considers the treaty and the NIA. The committee has 15 sitting days in which to report back to the House. If it has recommendations to Government, a Government response to these must be tabled within 60 days of the report.
6. **Debate:** if the Government intends for the treaty to be implemented through a bill the select committee's report is set down for debate as a Government order of the day (Standing Orders 67(d) and 254(2)(a)). The report is then debated in lieu of a debate during the first reading of the bill that implements the treaty. If the Government does not intend for the treaty to be implemented through a bill the select committee's report is set down as a Members' orders of the day and will only be debated if the Business Committee selects it under Standing Order 254(5).
7. **Ratification:** formal documents are exchanged with the other countries or organisations involved, to bring the treaty into force for New Zealand. These documents confirm domestic procedures have been completed and that the treaty is now in force.

Legal Effect

Treaties (in the generic sense), like statutes, are a form of law-making by New Zealand. They embody solemn international commitments and are binding at international law on parties to them. Like domestic law, treaties are a significant source of legal obligation for the New Zealand Government. The obligations in treaties (where domestic implementation is required) need to be incorporated into New Zealand domestic law.

It is a fundamental constitutional principle that the Executive cannot change New Zealand's domestic law by becoming party to a treaty. If the obligations being