# International Treaty Making

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

**September 2012**

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# I INTRODUCTION

New Zealand is currently party to approximately 1600 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. New Zealand is involved in a significant number of bilateral and multilateral negotiations that may involve the conclusion of new treaties or amendments to existing treaties. In addition to becoming party to international treaties, the government and government agencies also frequently conclude arrangements of less-than-treaty-status, which are not legally binding, but have political and moral weight.

These international instruments have distinct procedural, legal and constitutional requirements. This booklet has been prepared by the Ministry of Foreign Affairs and Trade in the interests of improving understanding in Government agencies of New Zealand's practice with respect to international treaties and arrangements.

While this booklet is a useful guide, any proposal to enter into an international treaty or arrangement must be discussed with the Treaty Officer in the Legal Division of the Ministry of Foreign Affairs and Trade, as required by the Cabinet Office's *CabGuide*.

## An Important Distinction: International Treaties and Arrangements

There is an **important legal distinction** between the two types of instruments that the New Zealand Government may conclude with other countries and international organisations:

- **Treaties**: these are international instruments that are legally binding under international law;
- **Arrangements**: these are international instruments that are of less-than-treaty-status (i.e. they are not intended to be legally binding, but have political and moral weight).

This distinction has significant practical implications for staff involved in the negotiation and implementation of international instruments.

Both **treaties** and **arrangements** are international legal documents. Proposals to enter into international treaties and arrangements require consultation with the Legal Division of the Ministry of Foreign Affairs and Trade at an early stage.

While arrangements are not legally binding, they nevertheless require careful drafting. New Zealand takes its commitments under international arrangements seriously.

**Contact details for the Treaty Officer**

The Treaty Officer is available to answer any questions relating to the material in this booklet, the domestic treaty making process, specific treaty actions and entering into arrangements. The Treaty Officer can be contacted on treatyofficer@mfat.govt.nz or phone (04) 439 8000.

# II TREATIES

## Terminology

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 by far the most common term and is often used for agreements regulating trade (e.g. the Marrakesh Agreement), air transport, fisheries, visa abolition and especially **bilateral** agreements.

- **"Exchanges of Notes (or Letters) Constituting an Agreement"** make up a large proportion of the previous category. As the title indicates, there are two documents rather than just one with the second document responding to the agreement proposed in the first and accepting it.

- **"Convention"** is commonly used for **multilateral** agreements.

- **"Protocol"** generally describes agreements that supplement a principal treaty. A Protocol might be drawn up at the same time as the principal treaty or later.

## 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 statutes or court decisions, they are a significant – and in terms of force, comparable – source of legal obligation for the Government and for New Zealand as a whole. As a form of law-making, therefore, they are subject to certain controls.

**It is a well-established constitutional convention that prior Cabinet approval is required before a treaty is signed, ratified or acceded to or letters constituting an agreement are initiated or exchanged** (Cabinet Manual 2008; paragraph 5.73).

It is also a fundamental constitutional principle that the Executive cannot change New Zealand's domestic law by becoming party to a treaty. If the obligations being assumed under the treaty cannot be performed under existing law, legislation will be required. As the Law Commission noted in Report 34[1]

> *[T]he reason lies in the concept of the separation of powers: if the treaty affects rights and duties under national law, then the treaty becomes the concern of the legislature and not merely of the executive (which will have negotiated the treaty).*

Where legislation is required to enable New Zealand to fulfil treaty obligations, this country's invariable practice is to pass the implementing measure *prior* to ratifying or acceding to the treaty. This is to ensure that New Zealand is not in breach of its treaty obligations when the treaty becomes binding on New Zealand.

The Minister of Foreign Affairs has the responsibility, on the basis of legal advice from this Ministry, to inform Cabinet of the international legal implications of all treaty actions.

## Application to Tokelau, the Cook Islands and Niue

New Zealand's special constitutional links with Tokelau, the Cook Islands and Niue mean that questions sometimes arise as to the application of treaties to these countries. Depending on the nature of the treaty action, consultation may need to be carried out with the governments of these countries. When considering taking a treaty action, the application of this treaty action to Tokelau, the Cook Islands or Niue should be discussed at an early stage with the Legal Division of the Ministry of Foreign Affairs and Trade (for more information on the application of treaties to Tokelau, the Cook Islands and Niue see page 44 of this booklet).

[1] "A New Zealand Guide to International Law and its Sources" NZLC R34.

## Signature of Treaties

The signature of treaties signed for New Zealand is normally done, on the Government's behalf, by Ministers or diplomatic representatives in the country concerned (e.g. if the treaty is being signed outside New Zealand). Where a treaty is signed for New Zealand by anyone other than the Governor-General, the Prime Minister or the Minister of Foreign Affairs, it is normal (and proper international practice) for a formal **Instrument of Full Powers** signed by the Minister of Foreign Affairs to be prepared beforehand. This is then handed over to the other party/parties at the time the treaty is signed. We would normally expect to receive an Instrument of Full Powers for the person(s) signing for the other party/parties.

**Full Powers** are needed only in the case of signature of a treaty (in the generic sense), including signature and exchange of letters/notes constituting an agreement. In some cases a foreign country will waive the requirement for Full Powers, but as waiver is not to be taken for granted, care should always be exercised to check whether the country in question will ask for an Instrument of Full Powers to be provided.

The Legal Division of the Ministry of Foreign Affairs and Trade assists with the processes leading up to the signing of treaties, including printing and binding the signing copy of the treaty and seeking the Instrument of Full Powers from the Minister of Foreign Affairs

## Registration of Treaties

The Legal Division of the Ministry of Foreign Affairs and Trade is responsible for carrying out the obligation which arises under Article 102 of the United Nations Charter to register all international treaties with the United Nations Secretariat:

*Article 102*

> 1. Every treaty and every international agreement entered into by a member of the United Nations after the present charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of

this article, may invoke that treaty or agreement before any organ of the United Nations.

It is therefore imperative that the original treaty documents are held by the Legal Division of the Ministry of Foreign Affairs and Trade.

Note: arrangements are not required to be registered with the United Nations; however, the Legal Division of the Ministry of Foreign Affairs and Trade keeps an archive and registry of all arrangements entered into by New Zealand (including by government agencies).

**Amendment of Treaties**

If a treaty is to be amended it is the usual practice that the parties will do so by agreement. In other words, Cabinet approval will be required and the constitutional and procedural requirements outlined in this Guide for the conclusion of a treaty must be followed. It should be noted, however, that the treaty itself may prescribe the specific rules governing the amendment of the treaty, which will need to be followed.

**The Process for Taking Treaty Actions**

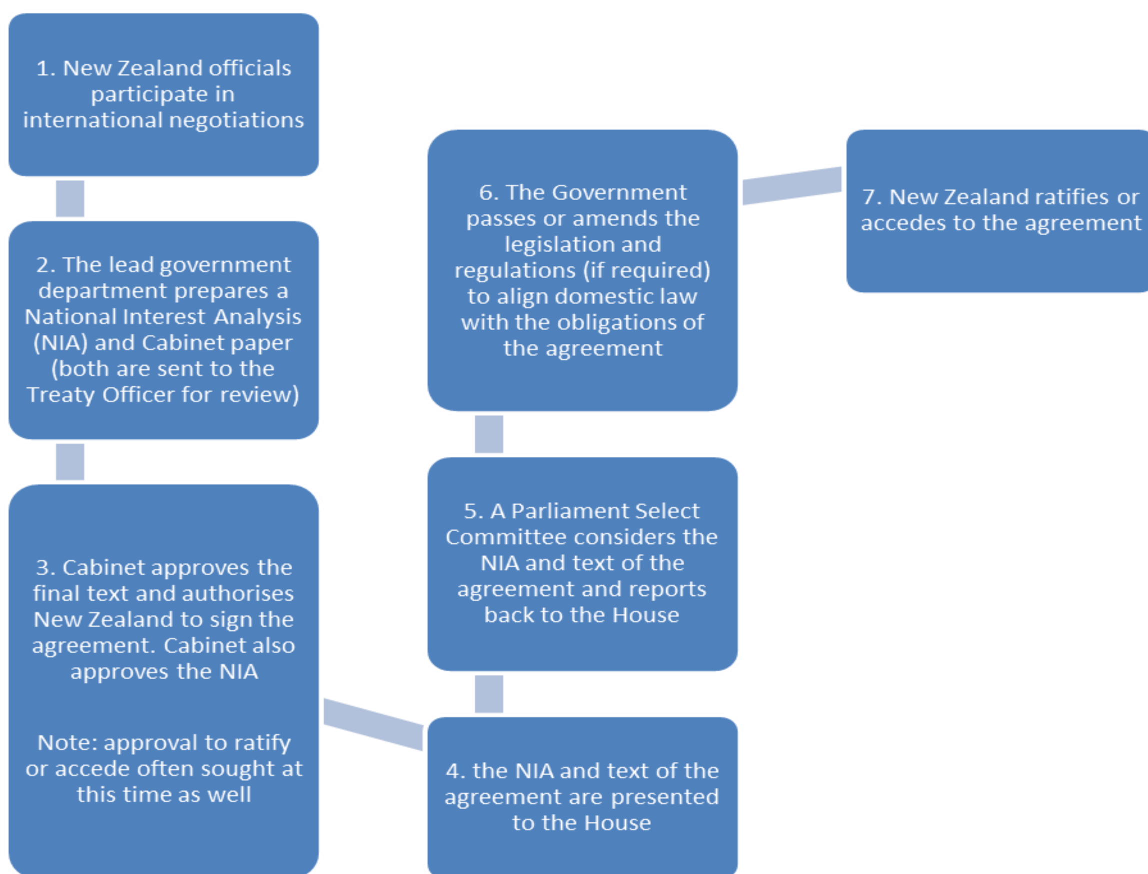
When considering taking a treaty action (e.g. ratification, accession, acceptance, definitive signature, consent to be bound, entry into force, withdrawal, termination etc.) the process and timeframe should be carefully considered at the outset. Annex A (page 58) contains a model timeline that should be filled out by the lead department at an early stage when considering the treaty action.

Given the varied nature of treaties, timelines will vary widely, however it is important to be aware that most treaty actions do take a considerable time to conclude, and this therefore needs to be factored into your work plan.

## An Overview of the Treaty Making Process in New Zealand

The following is a very basic description of what is often a complicated process. If you would like to know more about the international treaty making process, please visit the Ministry of Foreign Affairs and Trade website www.mfat.govt.nz or contact the Treaty Officer in MFAT's Legal Division.

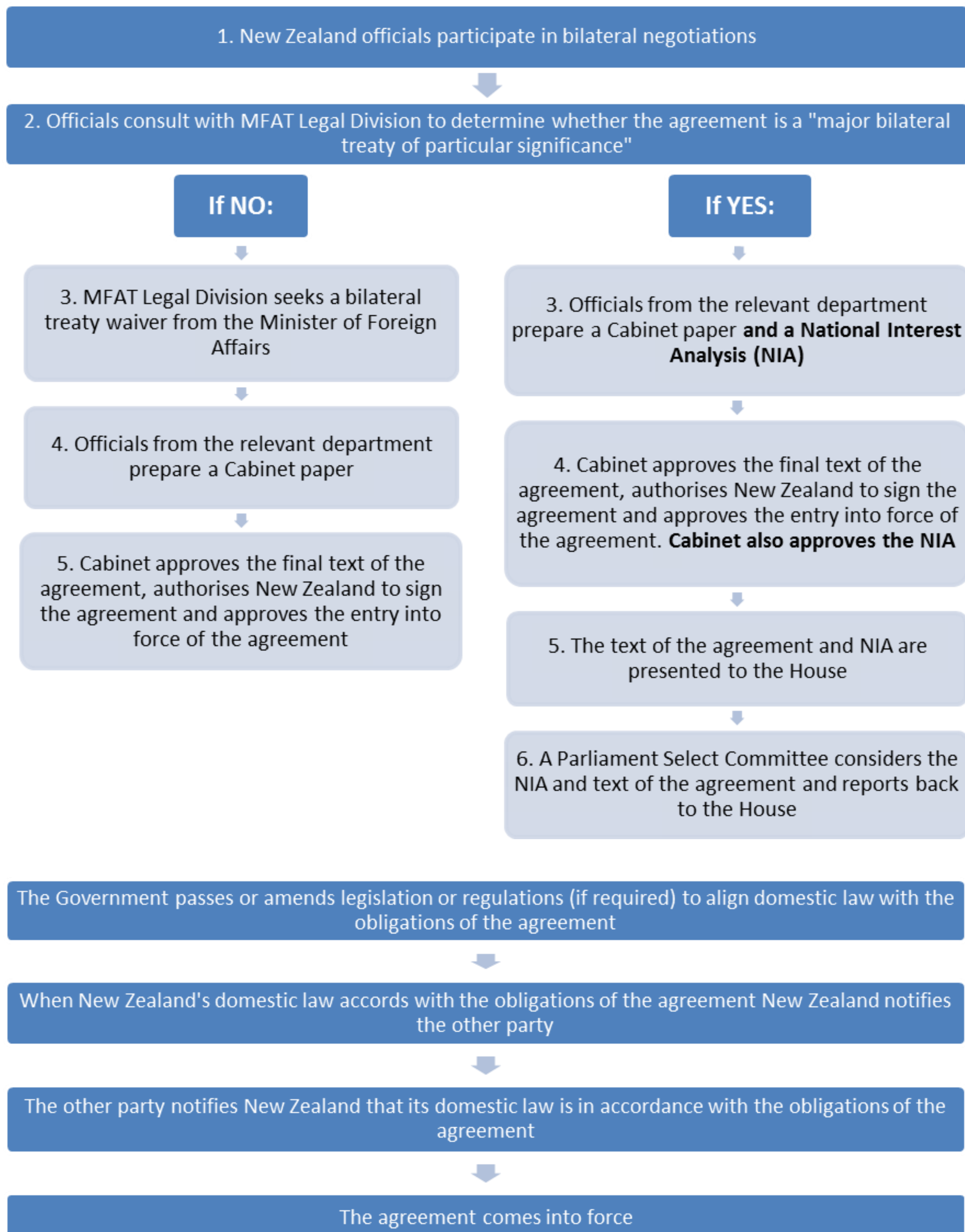
### Steps to become party to a MULTILATERAL agreement:




### Steps to become party to a BILATERAL agreement:

This outlines a standard two-step process for bilateral agreements where signature is followed by a separate action to bring the agreement into force (usually notification of completion of domestic procedures). However, bilateral agreements can sometimes follow a one-step process where the agreement

enters into force upon signature. MFAT Legal Division should be consulted on the appropriate process for a particular agreement.



**Process for an Exchange of Letters constituting an agreement:**
(where initiated by New Zealand)

It is good practice to draft the reply letter. However, this is only a suggestion for the other country. Because the reply letter is sent by the other country, that country retains the final decision on how the reply will be drafted. The other country may disregard the suggested draft and send a different letter in reply that is equally acceptable.

It is important to agree on the text of the initiating and reply letters before the formal exchange to reduce the risk of mistake and to reduce the risk that the reply letter does not fully accept the proposals of the initiating letter.

**Model Exchange of Letters constituting an agreement:[2]**

This Model should be used as an example of the format commonly used as for an Exchange of Letters, rather than as an example of how the letters should be drafted. MFAT Legal Division should be consulted regarding the drafting.

[Initiating letter]

Your Excellency,

I have the honour to refer to discussions which have taken place between our two Governments concerning [ ]. As a result of those discussions it is the understanding of the Government of [ ] that the following shall apply:

1. The Government of [ ] shall …
2. The Government of [ ] shall …

If the proposals set out above are acceptable to the Government of [ ], I have the honour to suggest that this Letter and your Excellency's reply to that effect shall constitute an agreement between our two Governments on this matter, which will come into force on [the date of your reply].

I avail myself etc.

[Reply letter]

Your Excellency,

I have the honour to acknowledge receipt of your Letter dated [ ] concerning [ ] which reads as follows:

[*Text of the initiating letter set out in full, if necessary in translation*]

I have the honour to confirm that the above proposals are acceptable to the Government of [ ], and that your Letter and this reply shall constitute an agreement between our two Governments on this matter, which will come into force [today].

I avail myself etc.

[2] Based on model Notes set out in: Aust, *Modern Treaty Law and Practice,* Appendix F, p 495.

**Bilateral Treaties: Criteria for Parliamentary Examination**

The Parliamentary treaty examination process requires **all multilateral** treaties and all "**major bilateral treaties of particular significance**" to be presented to the House for examination by a select committee, before binding treaty action is taken (Standing Order 394, Cabinet Manual paragraph 5.83). What might constitute a "major bilateral treaty of particular significance" is a matter for the Minister of Foreign Affairs to determine.

The Minister of Foreign Affairs uses the following criteria to help in the decision of which bilateral treaties qualify as "major bilateral treaties of particular significance":

- the subject matter of the treaty is likely to be of major interest to the public;
- the treaty deals with an important subject upon which there is no ready precedent (i.e. it is an original treaty dealing with possibly a one-off situation);
- the treaty deals with an important subject and departs substantively from previous models relating to the same subject;
- the treaty represents a major development in the bilateral relationship;
- the treaty has significant financial implications for the government;
- the treaty cannot be terminated, or remains in force for a specified period, thus binding future governments permanently or for a specified time;
- the treaty is to be implemented by way of overriding treaty regulations (i.e. regulations that implement a treaty by way of regulations that override primary legislation);
- the treaty is a major treaty that New Zealand seeks to terminate; and
- the Foreign Affairs, Defence and Trade Committee indicates its interest in examining the treaty.

Note: These criteria are intended to help the Minister exercise discretion. They do not replace that discretion.

Consultation with the Legal Division of the Ministry of Foreign Affairs and Trade **at an early stage** is essential whenever officials are contemplating bilateral treaty action that may be subject to the procedure for presenting a treaty to the House. The Legal Division can provide guidance on the above criteria, the presentation process, and the required format and content of the National Interest Analysis (see also Section III in this Guide). The Treaty Officer in the Legal Division is the main point of contact on these issues (treatyofficer@mfat.govt.nz).

# III NATIONAL INTEREST ANALYSIS

## What is a National Interest Analysis?

A National Interest Analysis ("NIA") is a summary of why a treaty action (i.e. becoming party to a treaty, amending a treaty, withdrawing from a treaty etc) is in the national interest. NIAs are the key working document used by Parliamentary Select Committees to scrutinise New Zealand treaty actions.

In accordance with Standing Order 394, a NIA must be prepared and presented in the House of Representatives for all multilateral treaties, and bilateral treaties of particular significance. Before presentation, NIAs must be approved by Cabinet.

Once presented in the House, NIAs are valuable public reference documents, and are available publicly on Parliament's website. It is important that drafters of NIAs have a good understanding of the proposed treaty action, the treaty text, and the implications of the action for New Zealand – and that they communicate this understanding as clearly as possible in the NIA. It is very important to avoid legal terms and jargon in a NIA.

Every NIA must be reviewed and cleared by the Treaty Officer at MFAT before it is submitted to Cabinet for approval. Two weeks must be allowed for this. Drafters of NIAs are also encouraged to contact MFAT's Treaty Officer with any queries in the drafting process.

Examples of NIAs can be found at: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/ (enter "treaty" in the keyword search to bring up a list of all Committee reports on New Zealand treaty actions, which annex the relevant NIA).

## Applying the RIA requirements to Cabinet papers on international treaty negotiations and binding treaty actions

Regulatory Impact Analysis ("RIA") is required for all policy work leading to the submission of a Cabinet paper that will potentially require changes to legislation or regulations. If RIA is required, the mandatory RIA processes are described in the *Treasury Regulatory Impact Analysis Handbook*. In particular, Cabinet requires the completion of a regulatory impact statement ("RIS") to accompany all Cabinet papers.

In the case of international treaties (including treaty negotiations), RIA may be required for papers seeking Cabinet approval to enter into negotiations, to renew or update a negotiating mandate, to sign the final text of a treaty, or for a treaty to enter into force for New Zealand.

This paper explains how the RIA requirements apply to Cabinet papers being prepared in relation to negotiating and taking binding action on international treaties.

### Cabinet papers seeking to take a binding treaty action

When Cabinet approval is sought for New Zealand to take a binding treaty action[3] that will have regulatory implications for New Zealand, RIA will always be carried out.

All multilateral treaties and "major bilateral treaties of particular significance" are required to undergo the Parliamentary treaty examination process. This requires presentation of a National Interest Analysis ("NIA") in the House of Representatives. Where these treaties have regulatory implications, an extended NIA will be prepared that includes the required RIA. **An extended NIA includes the information set out in section 6(B) to (E) and the Adequacy Statement in part 12 of the NIA drafting instructions** (see below). The extended NIA must comply with all the requirements of a regulatory impact analysis.

Bilateral treaties that are not "major bilateral treaties of particular significance" do not need to undergo the Parliamentary treaty examination process. Where

[3] Examples of binding treaty actions include signature and ratification, amendment, accession, and withdrawal.

there are regulatory implications for these treaties, the required RIA will be included as part of the Cabinet paper seeking the binding treaty action.

If taking a binding treaty action has *no* regulatory impacts (i.e. it will not require any changes to legislation or regulations), the RIA requirements will not apply.

**Cabinet papers for ongoing treaty negotiations: a two-track process**

Treaty negotiations require Cabinet decisions prior to the binding treaty action stage in order to establish, and sometimes update, the negotiating mandate. Given that the RIA requirements, designed primarily for domestic policy making processes, do not fit naturally with the particular nature of the policy process for negotiating international treaties, a two-track approach will be used to give effect to RIA requirements for Cabinet papers on treaty negotiations.

**Where proposals in a treaty negotiation will have regulatory impacts either Track I or Track II will apply. This is summarised in the below flowchart**.

The basic principle that would be applied in terms of decisions about RIA is that those decisions should be taken based on the significance of the Cabinet decisions being sought.

**Track I treaty negotiations**

Cabinet papers seeking decisions on treaty negotiations, regardless of whether they are for bilateral or multilateral treaties, will fall into Track I only if they satisfy the test set out below:

- the treaty negotiations will not have significant or wide-reaching regulatory implications for New Zealand (e.g. a multilateral treaty negotiation to establish a new international agency may require only minor amendments to the Diplomatic Privileges and Immunities Act); *or*

- regulatory implications arising from the treaty negotiations are consistent with established policy (for example, amending a tariff schedule to implement a regular Free Trade Agreement).

The second category may require further explanation. It covers essentially all Cabinet papers for treaty negotiations with direct regulatory implications (i.e. requiring changes to legislation or regulations), but where those regulatory

implications stem from established policy settings. For example, Working Holiday Schemes, Double Tax Agreements, SPS agreements, Film Co-production agreements, some Free Trade Agreements, and other such (usually bilateral) instruments all have regulatory implications that stem from established policy choices.

For example, in a bilateral film co-production treaty negotiation, the policy choices (to promote cultural exchanges; to permit the duty-free entry of equipment or the movement of personnel associated with an official co-production; and other such benefits) are already well established and uncontroversial. This is also the case for Free Trade Agreements negotiated within the bounds of existing domestic policy, where the principal adjustments to the New Zealand regulatory environment are a change to tariff settings or customs excise rules.

For these Track I treaty negotiations, RIA (most often in the form of a Regulatory Impact Statement, "RIS") need not be provided until the final Cabinet paper seeking authority to take binding treaty action.

A standard Cabinet paper paragraph for a Track I treaty negotiation might read as follows:

*For multilateral treaties and major bilateral treaties of particular significance*

> "An extended National Interest Analysis (incorporating a Regulatory Impact Analysis) will be presented to Cabinet when negotiations have concluded and approval is sought to become party to [name of treaty]. In the interim, if and when decisions from Ministers are sought that require consideration of legislative or regulatory options for implementation, assessments of regulatory impact will be provided. Depending on the progress of negotiations, this may occur as more specific negotiating mandates are sought."

*For bilateral treaties that are not major bilateral treaties of particular significance*

> "A Cabinet paper incorporating Regulatory Impact Analysis will be presented to Cabinet when negotiations have concluded and approval is sought to become party to [name of treaty]. In the interim, if and when decisions from Ministers are sought that require consideration of legislative or regulatory options for implementation, assessments of regulatory impact will be provided. Depending on the progress of

negotiations, this may occur as more specific negotiating mandates are sought."

Most treaty negotiations will fall into Track I. If it is not clear, a judgment will be made following discussion between the agency, MFAT Legal Division and the Treasury policy team.

*Changing from Track I to Track II*

For some treaty negotiations it may be clear from the outset that it does not belong in Track I. Other treaty negotiations that start on Track I may require Cabinet decisions updating the negotiating mandate as negotiations progress. At this point, if it becomes clear that the decisions have substantive regulatory implications, the treaty negotiation will move to Track II. (e.g., if in the course of negotiations it becomes clear that an FTA will have regulatory implications beyond established policy settings, Cabinet papers seeking decisions on this will be Track II.)

**Track II Treaties**

Track II applies to treaty negotiations that do not fall within Track I.

For Track II treaty negotiations, RIA is required to accompany any Cabinet paper that seeks material decisions regarding New Zealand's negotiating position when the outcome of negotiations may have significant or wide-reaching regulatory implications for New Zealand or where the regulatory implications arise from changes to existing policy.

The RIA should be commensurate with the potential nature and magnitude of the regulatory impacts, and will be subject to realistic constraints on the analysis at the early stages of negotiation (i.e. uncertainty and lack of information). The RIA can be presented as a RIS, or within the body of the relevant Cabinet paper, or in annexes.

As set out in the RIA Handbook, the Treasury RIA Team ("RIAT") may undertake the Quality Assurance of the RIS (whether in the Cabinet paper or extended NIA[4]). RIAT is only involved with proposals that are likely to have a

[4] For proposals that meet "significance criteria", RIAT is required to provide the Quality Assurance of the RIS, or in this case the RIS elements that are incorporated into the extended NIA at the end of the negotiation process. In making this assessment, RIAT will focus on the implications and impacts of the regulatory aspects of the Treaty. However, they will also

significant impact or risk.[5] Treaties on Track II may well meet the significance criteria, and warrant RIAT involvement. Track I treaties are unlikely to meet the criteria for RIAT involvement.

***An extra note on multilateral treaties***

Multilateral treaty negotiations are unique because:

- New Zealand may have little control or influence over the development of policy decisions in the negotiations, including those that will impact on New Zealand's regulatory framework, and so the final outcome of a multilateral treaty may not be informed by New Zealand's particular regulatory framework;
- Participating in negotiations does not necessarily mean that New Zealand will ratify the resulting treaty, and even if the policy settings in the treaty differ from New Zealand's established regulatory framework it may ultimately, therefore, have no regulatory impact for New Zealand in practice; and
- New Zealand may wish to become Party to multilateral treaties without having ever participated in the negotiations.

This means that New Zealand can only accurately consider the full regulatory impact of such a treaty after the negotiations have concluded and at the point that New Zealand is considering taking a binding treaty action; this will be covered as part of an extended National Interest Analysis.

For Cabinet papers seeking or updating a multilateral negotiating mandate, the above factors pose challenges to undertaking full RIA, and limit both the scope of the analysis and the certainty with which impacts can be assessed. When material decisions regarding New Zealand's negotiating position are sought in these Cabinet papers, and the outcome of negotiations may have significant or wide-reaching regulatory implications for New Zealand from changes to

---

consider the wider context within which trade-offs regarding regulatory impacts are being made.

[5] A regulatory initiative is considered to trigger the significance criteria if any of the options being considered are likely to have significant direct impacts or flow-on effects on New Zealand society, the economy, or the environment; or significant policy risks, implementation risks or uncertainty. Refer: http://cabguide.cabinetoffice.govt.nz/procedures/regulatory-impact-analysis.

existing policy, RIA is required even if it will not be possible to prepare a comprehensive RIA.

*Interim Regulatory Impact Analysis*

For all Track II treaty negotiations, an interim RIA should be prepared, subject to realistic constraints on the analysis (i.e. uncertainty and lack of information), that focuses, to the extent possible, on:

- the regulatory implications of the positions taken in the negotiating mandate (for instance, identifying areas of legislation and regulation that may be affected by the mandate positions, and if known, whether primary, secondary or tertiary changes may be needed);[6]
- the types of issues that will need to be worked through (for instance, briefly outlining regulatory barriers to compliance); and
- highlights any risks these may pose.

A standard Cabinet paper paragraph for a Track II treaty negotiation might read as follows:

> "The RIA requirements apply as this paper seeks decisions from Ministers that set the parameters of New Zealand's negotiating position in negotiations of a treaty which may have regulatory implications for New Zealand. As the negotiations are still in the early stages, there were some constraints and uncertainties in the analysis. Therefore an interim regulatory impact assessment has been provided in this paper.
>
> [Identify paragraphs containing RIA in the Cabinet paper, for example relating to particular legislation that may be affected and the current state of that legislation.]
>
> If and when further decisions are sought from Ministers that require consideration of legislative or regulatory options for implementation,

---

[6] An example from a recent Cabinet paper relating to negotiations for a new legally binding instrument on Mercury is:

> This paper has no immediate legislative implications. If a mercury treaty is agreed, there are potentially implications for the Resource Management Act 1991, Hazardous Substances and New Organisms Act 1996, the Imports and Exports (Restrictions) Prohibition Order (No 2) 2004, Waste Minimisation Act 2008 and possibly other legislation if New Zealand chose to ratify the mercury treaty.

> assessments of regulatory impact will be provided. Depending on the progress of negotiations, this may occur as more specific negotiating mandates are sought. An extended National Interest Analysis (incorporating a full Regulatory Impact Analysis) will be presented to Cabinet if the Government proposes to sign and ratify the [treaty] after negotiations have concluded."

**PIRA – Preliminary Impact and Risk Assessment**

The purpose of completing a PIRA is to determine at the outset whether the RIA requirements apply and whether RIAT involvement is required. Because the generic PIRA template does not reflect the treaty process, MFAT Legal may advise that a PIRA is not required prior to commencing a particular treaty negotiation. If this is the case you **must**, however, discuss your treaty process with the Treasury, MFAT and RIAT and agree how the RIA requirements will apply to the treaty process.

**Step-by-step guide**

Consider at the outset of commencing treaty negotiations whether a PIRA would assist in the determination of whether RIA will apply.

**Step 1: Determine whether the RIA requirements apply**

Will the proposal require potential changes to legislation or regulations?

| If yes, or if it is unclear at this stage, RIA may apply.<br><br>Go to Step 2. | If no, RIA does not apply at all. |
|---|---|

**Step 2: Determine whether the RIA requirements apply**

Is the proposal being prepared in relation to a binding treaty action with regulatory impact (i.e., signature, amendment, accession or ratification) or a treaty negotiation?

| If for a binding treaty action, RIA is required (either as part of an Extended NIA or as part of a Cabinet paper as appropriate) | If for a treaty negotiation, go to Step 3. |
|---|---|

**Step 3: Determine whether the proposal is Track I or Track II**

(a) Will the proposals in the paper have significant or wide reaching regulatory implications for New Zealand?

If yes or unclear, go to Question 3(b)

If no, this is a **Track I Treaty**. RIA is not required until the binding treaty action stage (either incorporated in an extended NIA or within the body of the relevant Cabinet paper as appropriate).

3(b) Would the implementation of the proposals in the paper require changes to existing policy?

If yes or unclear, this is a **Track II Treaty**. The elements of a full or partial RIS may need to accompany key Cabinet papers seeking mandates, as well as at the binding treaty action stage (either incorporated in an extended NIA or within the body of the relevant Cabinet paper as appropriate).

If **no**, this is a **Track I Treaty**. RIA is not required until the binding treaty action stage (either incorporated in an extended NIA or within the body of the relevant Cabinet paper as appropriate).

Please consult with the Treaty Officer at MFAT and Treasury's Policy Team to determine whether any particular treaty is Track I or Track II.

## National Interest Analysis Drafting Instructions

These drafting instructions set out the 11 **mandatory** NIA section headings which are required by Standing Order 395. Under each heading is a general description of what is required in each section. Bullet points then list the specific requirements that must be incorporated under each heading.

This document should be read in conjunction with the relevant sections of the *Cabinet Manual* and the Cabinet Office's *CabGuide* (the Cab Guide can be accessed at:
http://www.cabguide.cabinetoffice.govt.nz/procedures/international-treaty-making)

These headings must be used in the NIA:

| | |
|---|---|
| **1** | **Executive summary** |
| **2** | **Nature and timing of the proposed treaty action** |
| **3** | **Reasons for New Zealand becoming Party to the treaty** |
| **4** | **Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand** |
| **5** | **Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms** |
| **6** | **Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation** |
| **7** | **Economic, social, cultural and environmental costs and effects of the treaty action** |
| **8** | **The costs to New Zealand of compliance with the treaty** |
| **9** | **Completed or proposed consultation with the community and parties interested in the treaty action** |
| **10** | **Subsequent protocols and/or amendments to the treaty and their likely effects** |
| **11** | **Withdrawal or denunciation provision in the treaty** |
| **12** | **Agency Disclosure Statement (only required if the proposal has legislative or regulatory implications)** |

*1. Executive summary*

This section should provide a brief (maximum one page), high-level contextual statement about the proposed treaty action, including the purpose of the proposed action and a summary of why it is in the national interest.[7]

*2. Nature and timing of the proposed treaty action*

This section should provide a general introduction to the treaty and the treaty action. This section must include:

- ***The full title of the treaty*** (it may be a Convention, Protocol, Agreement, Exchange of Letters, etc). Include date concluded and the common or abbreviated name where relevant. Give dates of signature/exchange of notes if this has already occurred. For a multilateral treaty action, state whether it is in force generally and when it is likely to enter into force for New Zealand and/or generally. Also include a common term that will be used to refer to the treaty throughout the NIA (e.g. the "Agreement"). It is important to make sure the treaty is consistently differentiated from other treaties that may be discussed in the NIA. Do not annex the treaty text. The treaty text will be presented to the House along with the NIA.

- ***The nature of binding treaty action***. Refer to relevant articles of the treaty to explain what treaty action is proposed (e.g. ratification, accession, acceptance, definitive signature, consent to be bound, entry into force through an exchange of notes or letters, withdrawal, termination, denunciation etc). Explain if the treaty action terminates an existing treaty upon entry into force. If the treaty action is a revision of, or a Protocol or amendment to, an existing treaty or will replace an existing treaty, this should be explained. The NIA should clearly establish the treaty action's relationship to the existing treaty. Include any territorial limits or any interim application of treaty provisions. In the case of multilateral treaties, include any reservations or declarations.

[7] Note that the purposes of the Executive Summary in a NIA and a treaty action Cabinet paper are different. The Executive Summary in a Cabinet paper can be much shorter than in a NIA.

- ***The date by which the Government proposes to complete binding treaty action*** (e.g. before .../ after .../ as soon as practicable after...), and when it will enter into force for New Zealand.

- ***Application to Tokelau, the Cook Islands and Niue***, note whether consultation with Tokelau, the Cook Islands or Niue is required. If it is, note whether this has been conducted and whether, as a result, the treaty action will apply to Tokelau, the Cook Islands or Niue.

### 3. *Reasons for New Zealand becoming Party to the treaty*

This section should provide a broad overview of the reasons for New Zealand to take the proposed treaty action. It should justify the decision to take the treaty action and may refer to material in other sections of the NIA. This section must include the following:

- ***The key background to the treaty.***

- ***A brief, high-level summary of key features of the current situation,*** including, if applicable, a summary of the nature and magnitude of the problem that the treaty action seeks to address (the root cause of the problem should be identified, not just the symptoms), how the proposed treaty action will address the problem and why the proposed treaty action is the preferred option (as opposed to New Zealand not taking the treaty action, or taking an alternative action).

- ***Key reasons why New Zealand should take the proposed treaty action.***

- ***The policy objective(s) the government wishes to achieve by taking the treaty action.***

- ***Major and like-minded parties to the treaty*** (i.e. states that have already signed and/or ratified the treaty).

### 4. *Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand*

This is the key section of the NIA. It should address in detail the advantages of proceeding and the disadvantages of not taking the action. In weighing these pros and cons, canvass the potential economic, political, social, cultural and

environmental effects arising from the proposed treaty action. Put it in the context of the domestic policy environment. Reference should be made to how any disadvantages will be managed or overcome, and whether they are a justifiable trade-off in light of the advantages.

If it is a bilateral treaty action, New Zealand's relationship with the proposed treaty partner should be considered. In the case of a multilateral treaty, New Zealand's interests in the international organisation under whose auspices the treaty has been negotiated should be canvassed.

This section must include an outline of the specific advantages and disadvantages *to New Zealand* in completing and implementing the treaty action (not to Parties to the treaty in general). This section should establish that, in light of the options available to New Zealand, the proposed treaty action is the best policy option and will achieve the Government's policy objective(s) set out in the previous section.

***5. Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms***

This section should identify all the substantive legal obligations that will be imposed on New Zealand as a result of the proposed treaty action. An obligation is, in essence, something that New Zealand will be required by the treaty to do, or refrain from doing.

This section should refer readers to the specific article, provision or chapter of the treaty, should they wish to read the obligation in its context. In the case of amendments, protocols etc, this may require reference to provisions of the head agreement. Include the obligations owed *to* New Zealand by other countries under the treaty, and look beyond the text to the negotiation process, and any legal advice received, to understand which of the provisions contain a noteworthy obligation. If legal advice has been sought and relied upon for this section, please attach that advice when you submit the draft NIA to MFAT for comment.

This section must:

- ***Include a description of substantive obligations in the treaty***. This must be in plain English to allow readers to understand the nature and scope of the obligations. The text of a provision containing an

obligation should not simply be repeated. It is, however, not necessary to describe all obligations article by article. It may be more appropriate to group noteworthy obligations by type (e.g. financial, government, private sector).

- ***Identify the substantive variations to template text*** (if applicable). If the treaty action is based on a model-type text or 'template' treaty (e.g. double tax, social security or air services), identify any substantive variations to the template or text.

- ***Include a reservation statement***, specifying whether the treaty allows Parties to make a reservation upon ratification. If so, specify whether New Zealand will use this mechanism in respect of any of the obligations.

- ***Include a dispute resolution statement***, specifying whether the treaty contains a dispute resolution mechanism. If so, include an explanation of the resolution process.

- ***Include a statement as to any continuing obligations from the head treaty*** (if applicable). If the treaty action is a withdrawal from, or a denunciation or termination of, an existing treaty, describe the obligations of the head treaty and identify any of those obligations that will remain in effect after the treaty action enters into force.

### *6 Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation*

New Zealand's approach to all international treaties is that ratification/ accession is only considered where there is strict compliance of law, policy and practice with all the provisions of the treaty.

Accordingly, this section should describe succinctly what will be done to implement the obligations that will be imposed on New Zealand by the treaty action (i.e. the obligations identified in the previous section). Implementation options available to the government should be discussed. If relevant, provide detail on the government's preferred implementation option.

**A** ***If no new measures are required to implement the obligations resulting from the treaty action, this section must:***

- Identify how the obligations in the treaty are met by existing legislation.

**B** ***If measures are required, this section must:***

- *Provide a summary of the range of options available for implementing the treaty action.*
- *Include a description of why each option is preferred/not preferred,* including the benefits and costs (including risks) of alternative options.

**C** ***If the measures required have legislative implications, this section must:***

- *Identify which obligations require legislative implementation.*
- *Explain how the proposal will be given effect to,* including legislative timetables (i.e. has it been awarded a place in the legislative programme).
- *Include plans for notifying affected parties of what they need to do to comply with any new requirements* (e.g. gazetting of legislation or any specific legislative process), if applicable.
- *Explain how any implementing legislation would impact on existing regulation,* including whether the proposal overlaps and interacts with existing rules, whether the proposal makes any existing rules redundant, and whether these rules are being removed or altered as part of the proposal (e.g. is the implementing legislation stand-alone or does it impact on existing legislation by requiring consequential amendments).
- *Identify the enforcement strategy that must be implemented to ensure that the preferred option achieves the public policy objective* and plans for monitoring and evaluating the preferred option, including key dates (e.g. review clauses, meetings of the Parties and/or reporting obligations set out in the treaty), if applicable.

**D** ***If the measures required include the making of regulations, this section must:***

- *Identify the primary legislation allowing for regulations* and indicate the timeframe in which regulations are expected to be approved and gazetted.

**E** ***If the measures required include implementation by way of an overriding regulation, this section must:***

- *Refer to that explicitly and provide justification for it* (this is a mandatory Cabinet requirement).

### *7. Economic, social, cultural and environmental costs and effects of the treaty action*

This section should provide a balanced assessment of the effects and costs associated with the treaty action. It is *not* intended to provide an opportunity to advocate for the proposed treaty action. If the treaty is expected to have a large impact on society, officials should ensure that someone with the appropriate expertise carries out a cost-benefit analysis.

This section must:

- ***Specify the economic, social, cultural and environmental costs and effects of the proposed treaty action.***

- ***Identify the incidence and scope of the effects*** (i.e. are they short term, transitional or long term?). Note any likely long term environmental effects associated with the treaty action.

- ***State whether the treaty is expected to have a large impact on the economy*** (e.g. will it impact on the labour market, international trade, technology, inflation and/or economic growth?)

- ***Identify any particular groups or sectors likely to be affected directly or indirectly by the treaty action, and the impact of the treaty action***. Note whether the treaty will have a disproportionate effect on a particular ethnic or cultural group in New Zealand society. Identify the social consequences if the treaty has an effect on a particular industry or geographic location.

- Specify whether the treaty action complies with relevant resource management requirements and environmental policy trends.

8. *The costs to New Zealand of compliance with the treaty*

- ***Specify the financial costs, risks and benefits to New Zealand of compliance with the treaty action*** (even if difficult to estimate). This may include, but is not limited to, contributions to international organisations provided for in the treaty action, costs of establishing/administering any new domestic agency as a direct result of taking the treaty action, or any other financial implication for the Government, business or industry. In the case of a protocol or amendment to an existing treaty for example, such costs should also be set in the context of those of the head agreement. When estimating costs identify any major assumptions, potential deficiencies or estimates in the information relied upon. Where quantitative information is not available, qualitative information will be acceptable. Describe how any risks identified will be/are being mitigated.

- ***Identify the incidence and scope of the costs, risks and benefits*** (i.e. are the costs, risks and benefits short term, transitional or long term?). Note any likely long term environmental costs or benefits associated with the treaty action.

- ***Note whether any compliance costs will be imposed or reduced for businesses in New Zealand as a result of compliance with the treaty action.*** If there are, address sources of compliance costs; the firms affected, by sector and size; estimates of the compliance costs identified (where quantitative data is not available qualitative information will be acceptable), indicating on whom they impact and the impact on different sized firms; and steps taken (if any) to minimise compliance costs.

- ***Identify any hidden administrative costs on government agencies in the implementation of the treaty*** (e.g. additional health and safety requirements, data recording or information sharing requirements).

## *9. Completed or proposed consultation with the community and parties interested in the treaty action*

This section should set out in full the consultation process and the results. In relation to consultation, note that:

- ***It is for the government department leading the proposed treaty action to determine what consultation is required.*** The manner and degree of consultation will depend on the issues under consideration. Consultation should be commensurate with the impact of the treaty on current policy and existing law. The Minister and department concerned should ensure that adequate consultation has taken place.

- ***Departments should identify Māori concerns at an early stage*** and tailor consultation accordingly.

- ***The Treasury must be consulted on all treaty actions that have financial implications.***

This section must identify:

- ***Who has been consulted*** (e.g. government departments, iwi, industry, NGOs, academics).

- ***At what stage they were consulted.***

- ***The nature of consultation.***

- ***Key feedback from those consulted*** (however, do not attribute governmental feedback to specific government departments/ ministries) with particular emphasis on any significant concerns that were raised about the proposed treaty action, how the lead department addressed the concerns, and if they did not alter the proposal, why not.

- ***If there was no consultation, the reasons why***.

## *10. Subsequent protocols and/or amendments to the treaty and their likely effects*

This section should describe the amendment procedures set out in the treaty. This section must:

- ***Describe the amendment procedures set out in the treaty.*** If the proposed treaty action (such as an amendment or annex) is made under an existing treaty, refer also to the amendment provisions in the existing treaty.

- ***Identify whether amendments enter into force automatically for the Parties***, or whether they require separate approval. Include details of the likely type and frequency of any automatic amendments, and the process and timeframes set out in the treaty.

- ***Identify whether the treaty action provides for the negotiation of future related legally binding instruments,*** such as protocols, annexes, rules or standards. If possible, indicate what areas these future instruments are likely to address and the possible effects of this. Describe how such future instruments are to be made binding on the parties (e.g. would approval be automatic/by provision of the treaty/by executive action/require legislative approval?). Explain if such future instruments could expand or contract our obligations under the treaty, whether they would have domestic implications and whether future instruments would be subject to the New Zealand treaty process.

### *11. Withdrawal or denunciation provision in the treaty*

This section should indicate whether the treaty action provides for withdrawal or denunciation and, if so, what procedures apply and under what conditions. Where known, include the reason behind the notice period specified in the treaty (i.e. why is the notice period one year, five years, etc). If any provisions/obligations continue after withdrawal or denunciation, mention them here.

This section must:

- ***Identify how New Zealand may withdraw from or denounce its obligations under the treaty***.

- ***Identify any provisions/obligations that continue after withdrawal or denunciation*** and the period for which they will apply to New Zealand.

- ***If there is no express withdrawal or denunciation provision***, indicate that withdrawal is possible only with the consent of all/both the parties (Article 54, Vienna Convention on the Law of Treaties).

- ***If the proposed treaty action (such as an amendment or annex) is made under an existing treaty***, set out any withdrawal or denunciation provisions in the treaty.

*12. Agency Disclosure Statement*

This section should only be included if the proposed treaty action involves any legislative or regulatory proposals.

This section should describe the nature and extent of the analysis undertaken, including any significant constraints, caveats or uncertainties and whether or not any of the policy options are likely to have effects that the government has said will require a particularly strong case before regulation is considered. The template Agency Disclosure Statement is as follows:

**"AGENCY DISCLOSURE STATEMENT**

*[A paragraph describing the nature and extent* of *the analysis undertaken, explicitly noting:*

- *Key gaps, key assumptions, key dependencies, and any significant constraints, caveats or uncertainties concerning the analysis; and*

- *Any further work required before any policy decisions could be implemented.]*

*[A paragraph identifying whether or not any* of *the policy options are likely to have effects that the government has said will require* a *particularly strong case before regulation is considered - namely it could:*

- *impose additional costs on businesses during the current economic recession;*

- *impair private property rights, market competition, or the incentives on businesses to innovate and invest; or*

- *override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines)*

*[Name and designation of person signing on behalf of the agency]*

*[Signature of person]* *[Date]”*

In addition, the related Cabinet paper seeking approval for the extended NIA needs to include a **Quality of the Impact Analysis** and a statement as to **Consistency with the Government Statement on Regulation** (for more information please refer to the section on the Format of International Treaty Action Papers in the Cabinet Office’s *CabGuide* and the *Regulatory Impact Analysis Guidelines* available from the Treasury website or the Regulatory Impact Analysis Team on ria@treasury.govt.nz).

## IV ARRANGEMENTS

Governments and international organisations often choose to express arrangements negotiated with other governments or international organisations as **understandings** rather than legally binding obligations. Such instruments are termed "arrangements of less than treaty status". They are intended by the participants to give rise to commitments of a moral and political, rather than legal, nature. Arrangements are often expressed as being concluded between government departments. The fact that an arrangement is concluded by a government department and not the "Government of New Zealand" does not change its status or importance as it still creates commitments for New Zealand.

Despite arrangements not being legally binding, the New Zealand government takes its commitments embodied in arrangements seriously. The negotiation and conclusion of arrangements should therefore be carefully considered. The most appropriate form of such an instrument is in the form of an "arrangement". Instruments entitled Heads of Agreement, joint communiqués, exchanges of notes or letters recording understandings and records of discussions, are also common.

Since arrangements are not intended to embody international legal obligations they are not agreements in the legal sense at all. To avoid disputes over the status of the instrument, the intention not to create legally binding rights and obligations needs to be borne out by the actual wording used in the instrument. The drafting of these documents therefore requires the same close scrutiny as the drafting of treaties. Legal obligations may otherwise creep in and give rise to the same order of dispute as a treaty.

As the words used are evidence of the intention of whether the two (or more) countries are concluding legally binding obligations or not, special care must be taken to observe drafting conventions which distinguish arrangements from treaties. Thus, in arrangements of less than treaty status:

- There should be a reference to the fact that the arrangement embodies the understandings or arrangements of the participants.

- The words "agree", "agreement" and "agreed", which in New Zealand practice signify a treaty should be avoided. Constructions such as "mutually arrange", "mutually decide", and "mutually consent" should be used instead.

- The mandatory “shall” used in treaties should be avoided, and “will” used instead.

- Arrangements should avoid formal preambles, although informally phrased opening recitals may be appropriate.

- Sub-divisions of the instrument should not be referred to as articles but rather as paragraphs.

- The arrangement should be expressed to “come into effect” rather than “enter into force”.

Although these are the drafting rules that are generally adhered to by New Zealand and many other countries, they are not universally followed. The status of the document should, therefore, be clarified with the other participants to the negotiation during the negotiations themselves, i.e. you need to discuss whether the countries/international organisations are intending to conclude an “agreement”, which of its own force imposes rights and obligations under international law (i.e. a treaty), or not (i.e. an arrangement of less than treaty status)? It is imperative that the record of the negotiation of these instruments should be as clear about the intention of the participants as the records of negotiations of treaties.

In dealing with international arrangements it is important that the Legal Division, and any other relevant divisions of the Ministry of Foreign Affairs and Trade, are consulted early in the process (treatyofficer@mfat.govt.nz).

**Arrangement vs. Memorandum of Understanding**

We have used the term “arrangement” rather than “memorandum of understanding” (MOU). The reason is that for some years now New Zealand has sought to avoid concluding MOUs. This is because MOUs have given rise to a good deal of confusion, with departments sometimes being misled into believing that the mere title of an intergovernmental instrument, regardless of what was said in substance, would determine whether or not it was to be regarded as of treaty status. MOUs can in some circumstances be treaties. Therefore, to avoid the potential confusion, any document not intended to be of treaty status should be referred to as an arrangement, and not as a MOU.

**Express Provisions as to the Status**

New Zealand's practice is not to include express provisions as to the status of an international instrument in arrangements (for example, *"this Arrangement is not intended to be legally binding"*). Such provisions are unnecessary as the status of an international instrument should be clear from the form and language used in the text, and to include such provisions in some, but not all, arrangements could cause potential interpretation issues for New Zealand.

**Terminology to be used in Arrangements**

An arrangement should not be described, termed or referred to as an 'Agreement'. The word 'agree' and its derivatives should be avoided (including in press statements and any emails, speeches or other communications). Instead, Governments are said 'to enter into the following arrangements' or to 'have reached the following understanding'.

The terms of the arrangement should be cast as expressions of intent in order to avoid it being classed as an international treaty. Certain words should not be used. Some alternatives are suggested below:

| DO NOT USE: | USE INSTEAD: |
|---|---|
| 'article' | 'paragraph' |
| 'agreed' | 'accepted'<br>'approved'<br>'decided' or<br>'consented' |
| 'agreements' or<br>'undertakings' | 'arrangements' or<br>'understandings' |
| 'authoritative' or<br>'authentic' | 'having equal validity' |
| 'be entitled to' | 'enjoy' |
| 'bound to (or by)' | 'covered by' |
| 'clause' | 'paragraph' |
| 'commitments' | 'arrangements' |
| 'constitute an obligation' | 'continue to apply to' |

| | |
|---|---|
| 'continue in force' | 'continue to have effect' |
| 'crown' | 'Governments' or<br>'Participants' |
| **DO NOT USE:** | **USE INSTEAD:** |
| 'disagreement' or<br>'dispute' | 'difference' |
| 'done' | 'signed' |
| 'enter into force' | 'come into operation'<br>'come into effect' |
| 'mutually agree' | 'jointly decided' |
| 'obligations' | 'conditions'<br>'terms' or<br>'duties' |
| 'Parties' | 'Governments'<br>'Participants' |
| 'rights' | 'benefits' |
| 'shall'<br>'undertake to'<br>'agree to' or<br>'undertake' | 'will' or<br>'decide' |
| 'undertake' | 'carry out' |
| 'undertakings' or<br>'agreements' | 'understandings' or<br>'arrangements' |

For further information please contact the Treaty Officer in the Legal Division of the Ministry of Foreign Affairs and Trade (treatyofficer@mfat.govt.nz).

## V TREATY CONSULTATION

### MFAT Strategy for Engagement with Māori on International Treaties

*Objectives*

- To identify areas of developing international law of relevance to Māori interests and the Crown's Treaty of Waitangi relationship, and in particular, new international treaties which may make a potential impact on Māori.
- To ensure that issues of relevance to Māori in international treaties are identified early, and that engagement with Māori on a particular treaty is appropriately tailored according to the nature, extent and relative strength of the Māori interest.
- To ensure that engagement with Māori is effective and efficient in its use of government resources.

*Nature of engagement*

The onus is on the lead agency to identify at an early stage, on the basis of consultation with Te Puni Kōkiri if necessary, whether there is a need for engagement with Māori. (The government department or agency that leads New Zealand's involvement in respect of a particular international treaty will be determined largely according to the subject matter of the treaty.)

If it is considered that Māori involvement is required, the lead agency will be responsible for establishing the appropriate degree and nature of this involvement based on the nature, degree and strength of Māori interest. To ensure the most efficient use of resources, both for government and Māori, the appropriate form of engagement will need to be considered on a case by case basis for each international treaty where there is a Māori interest. Such engagement will range from raising awareness of the issues involved through the dissemination of information papers, right through to full consultation with Māori.

In developing the government's position on international treaties, other interested parties as well as Māori will need to continue to be engaged and have their interests considered. In some cases Māori concerns will be one of the most

important factors in developing the government's position (for example international treaties dealing with the rights of indigenous peoples).

It is recognised that there will not be a need to involve Māori in discussions on all treaties but that the focus must be on ensuring that this occurs on international treaties concerning issues of relevance to Māori. In general terms, Māori involvement would be expected on any treaty action affecting the control or enjoyment of Māori resources (te tino rangatiratanga) or taonga as protected under the Treaty of Waitangi.

The following list provides an indication of the matters that are likely to be of interest to Māori in respect of these resources or taonga:

- Intellectual and cultural property
- Foreign investment
- Genetic resources
- Koiwi tangata and Mokomokai
- Employment
- Education
- Indigenous rights
- National language
- Human rights
- Immigration
- New Zealand flora and fauna
- Use of natural physical resources

*Opportunities for engagement*

Opportunities for Māori involvement in international treaties exist during all phases of treaty making. The following opportunities arise at each of the principal phases of the treaty-making process:

- on relevant issues in **proposed new treaties and agreements currently under consideration** - bilateral and multilateral;
- when **preparing mandates** for the negotiation of treaties in which Māori have interests;
- on developments of likely relevance to Māori **before and during the negotiation** of treaties relevant to Māori, including efforts to protect Māori interests;

- on any **legislation** necessary to enable New Zealand to give effect to obligations assumed under the treaty;
- on **Cabinet Papers**, including the paper proposing ratification or accession to the treaty (and any legislation needed to implement it);
- through the **Parliamentary Treaty Examination Process** including on the National Interest Analysis (NIA) which accompanies the treaty when it is tabled in the House pursuant to Standing Orders394-397; and
- on any aspects of the **implementation** of an international treaty that impact on Māori.

*Ongoing engagement*

The Ministry of Foreign Affairs and Trade distributes to iwi and Māori organisations, a **six monthly report** on international treaties currently under negotiation or consideration as a means of ensuring that Māori are, wherever possible, kept informed of developments in the government's participation in the international legal framework. This list is also forwarded to the Foreign Affairs Defence and Trade Select Committee.

In order to be able to furnish an accurate and complete report of treaties under negotiation, departments are required to inform MFAT of all negotiations in which they are involved.

Engagement with Māori on particular treaties will enable the development of an ongoing relationship with Māori on matters of interest to them. It should extend beyond initial consideration of international treaties by the government to the implementation of such treaties. As part of this development of an ongoing relationship, iwi are invited to provide feedback to the lead agency responsible for a particular treaty.

*Summary of key elements of the strategy*

- Lead agency to identify whether proposed treaty is of interest or relevance to Māori, in consultation with Te Puni Kōkiri if necessary.
- Where Māori involvement is considered appropriate, lead agency to draw attention to matters of likely significance for Māori and to establish the appropriate nature, extent and timing of engagement with Māori.

- Lead agency to ensure the appropriate engagement with Māori occurs.
- Agencies to inform MFAT of all international treaty negotiations in which it is involved. MFAT produces and distributes to Te Puni Kōkiri, iwi and Māori organisations a six monthly list of international treaties currently being negotiated.

**Consultation with Tokelau, the Cook Islands and Niue**

New Zealand has special constitutional links with three countries in the South Pacific: Tokelau, the Cook Islands and Niue. Questions arise from time to time as to the application of treaties to those countries.

**Tokelau** is a dependent territory of New Zealand, a non-self-governing territory for the purposes of the Charter of the United Nations, and "part of New Zealand" under the Tokelau Act 1948. While substantially self-governing in practice, it does not have its own international legal personality. Any treaty making in respect of Tokelau is done by the New Zealand Government, on the basis of consultation with the Government of Tokelau. An express statement will typically be made as to whether or not the treaty action in question applies to Tokelau.

Much progress has been made in recent years towards an act of self-determination in Tokelau and a move to self-government in free association with New Zealand. Two referenda on this issue have been conducted in Tokelau in February 2006 and October 2007; however, both failed to produce the necessary majority for a change in status, so for the time being, Tokelau remains a dependent territory of New Zealand.

**All departments leading treaty actions will need to consult the Legal Division of the Ministry of Foreign Affairs and Trade at an early stage to determine the nature and scope of consultation with Tokelau.**

**The Cook Islands and Niue** are self-governing states in free association with New Zealand. They obtained that status as a result of acts of self-determination under United Nations auspices, in 1965 and 1974 respectively. While not fully independent, the Cook Islands and Niue are recognised as "states" at international law. Since the mid-1980s they have generally conducted their own treaty making. In 1988 the New Zealand Government declared to the Secretary-General of the United Nations that thenceforth particular New Zealand treaty actions would not extend to the Cook Islands or Niue unless expressly done on

their behalf. Treaties extended to the Cook Islands and Niue by New Zealand during the pre-1988 period (and, in a few cases, since 1988) continue to apply to those associated states by virtue of New Zealand's treaty action.

Resolution of treaty application questions often requires consultation with the Governments of Tokelau, the Cook Islands and Niue. Departments considering treaty actions which may have implications for Tokelau, the Cook Islands or Niue should contact the Legal Division of the Ministry of Foreign Affairs and Trade (treatyofficer@mfat.govt.nz).

# VI INFORMATION SOURCES FOR INTERNATIONAL TREATIES

**MFAT 6-monthly Treaties List ("the International Treaties List")**

Every six months the Ministry of Foreign Affairs and Trade publishes a list of all treaties New Zealand is currently involved in negotiating, concluding, ratifying or amending. The lead government agency for a treaty is responsible for providing information to the Ministry of Foreign Affairs and Trade, which is then collated and distributed to all select committee members, government departments, iwi and academics.

The International Treaties List:

- arranges treaties by subject area;
- provides a contact point for every treaty action;
- indicates what stage each treaty is at and whether implementing legislation is required; and
- is free of charge and available in both PDF and HTML on the Ministry of Foreign Affairs and Trade website, and in hard copy from the Legal Division of the Ministry of Foreign Affairs and Trade.

**MFAT Consolidated Treaty List**

The two-volume Consolidated Treaty List is a historical list of treaties which have applied to New Zealand in the period from 1840 to 31 December 1996, including those concluded by the Government of the United Kingdom in respect of New Zealand as a colony or self-governing dominion, and binding, or potentially binding, on New Zealand as a successor state.

The Consolidated Treaty List comes in two parts:

- Part One: Multilateral (to 31 December 1996); and
- Part Two: Bilateral (to 31 December 1996);

Hard copies of Part One and Part Two are available free of charge from the Legal Division of the Ministry of Foreign Affairs and Trade. The Consolidated

Treaty List is supplemented by electronic reports from the MFAT Treaty Register.

### MFAT Treaty Register

The Treaty Register is the New Zealand government's official record of New Zealand's binding legal obligations at international law. It is maintained by the Legal Division of the Ministry of Foreign Affairs and Trade and is designed to supplement the Consolidated Treaty List. The register can produce reports by subject; by responsible department; by year; by status; by form. Please contact the Treaty Officer at the Ministry of Foreign Affairs and Trade if you would like information from the Treaty Register (treatyofficer@mfat.govt.nz).

*To find out if a country other than New Zealand is party to a multilateral treaty,* first check the website of the depositary or secretariat (e.g. UN, IMO, WTO) and look for the 'status of ratifications'. If your question relates to a UN treaty, information is available on the United Nations Treaty Series website (see details below).

### MFAT website

The Ministry of Foreign Affairs and Trade website (www.mfat.govt.nz) provides basic information on the treaty-making process and certain treaties of particular interest.

### Other relevant websites

*New Zealand*

Select Committee Reports (including recently tabled NIAs):

http://www.parliament.nz/en-NZ/PB/SC/

Cabinet Office:

www.dpmc.govt.nz

New Zealand Legal Information Institute:

http://www.nzlii.org/databases.html#nz_misc

*United Nations*

United Nations Treaty Handbook:

http://treaties.un.org/doc/source/publications/THB/English.pdf

United Nations Treaty Series:

http://treaties.un.org/Home.aspx

*Other Commonwealth jurisdictions*

Australian Treaty Library:

www.austlii.edu.au

UK Foreign and Commonwealth Office Treaty Section:

http://www.fco.gov.uk/en/publications-and-documents/treaties/

Canadian Treaty Section (Foreign Affairs Canada):

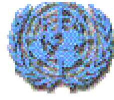
www.treaty-accord.gc.ca

*International Treaty Law*

Vienna Convention on the Law of Treaties:

untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

Please contact the Treaty Officer in the Legal Division of the Ministry of Foreign Affairs and Trade for further information (treatyofficer@mfat.govt.nz).





## VII GLOSSARY

This section provides a guide to terms commonly used in relation to treaties and employed in the practice of the United Nations Secretary-General as depositary of multilateral treaties, as well as in the Secretariat's registration function. Where applicable, a reference to relevant provisions of the Vienna Convention on the Law of Treaties 1969 is included.

### Acceptance

See **ratification**.

### Accession

Accession is the act whereby a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an "instrument of accession". Accession has the same legal effect as ratification, acceptance or approval. The conditions under which accession may occur and the procedure involved depend on the provisions of the relevant treaty. Accession is generally employed by States wishing to express their consent to be bound by a treaty where the deadline for signature has passed. However, many modern multilateral treaties provide for accession even during the period that the treaty is open for signature. See articles 2(b) and 15 of the Vienna Convention 1969.

### Adoption

Adoption is the formal act by which negotiating parties establish the form and content of a treaty. The treaty is adopted through a specific act expressing the will of the States and the international organisations participating in the negotiation of that treaty, e.g., by voting on the text, initialling, signing, etc. Adoption may also be the mechanism used to establish the form and content of amendments to a treaty, or regulations under a treaty. Treaties that are negotiated within an international organisation are usually adopted by

resolution of the representative organ of that organisation. For example, treaties negotiated under the auspices of the United Nations, or any of its bodies, are adopted by a resolution of the General Assembly of the United Nations. Where an international conference is specifically convened for the purpose of adopting a treaty, the treaty can be adopted by a vote of two thirds of the States present and voting, unless they have decided by the same majority to apply a different rule. See article 9 of the Vienna Convention 1969.

**Amendment**

Amendment, in the context of treaty law, means the formal alteration of the provisions of a treaty by its parties. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Multilateral treaties typically provide specifically for their amendment. In the absence of such provisions, the adoption and entry into force of amendments require the consent of all the parties. See articles 39 and 40 of the Vienna Convention 1969.

**Approval**

See **ratification**.

**Consent to be Bound**

A State expresses its consent to be bound by a treaty under international law by some formal act, i.e., definitive signature, ratification, acceptance, approval or accession. The treaty normally specifies the act or acts by which a state may express its consent to be bound. See articles 11-18 of the Vienna Convention 1969.

**Contracting State**

A contracting State is a state that has expressed its consent to be bound by a treaty where the treaty has not yet entered into force or where it has not entered into force for that state. See article 2(1)(f) of the Vienna Convention 1969.

**Credentials**

Credentials take the form of a document issued by a state authorising a delegate or delegation of that state to attend a conference, including, where necessary, for the purpose of negotiating and adopting the text of a treaty. A state may also issue credentials to enable signature of the Final Act of a conference. Credentials are distinct from full powers. Credentials permit a delegate or

delegation to adopt the text of a treaty and/or sign the Final Act, while full powers permit a person to undertake any given treaty action (in particular, signature of treaties).

**Declaration**

*interpretative declaration*

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. The Secretary-General, as depositary, pays specific attention to declarations to ensure that they do not amount to reservations. Usually, declarations are made at the time of signature or at the time of deposit of an instrument of ratification, acceptance, approval or accession. Political declarations usually do not fall into this category as they contain only political sentiments and do not seek to express a view on legal rights and obligations under a treaty.

*mandatory declaration*

A mandatory declaration is a declaration specifically required by the treaty itself. Unlike an interpretative declaration, a mandatory declaration is binding on the State making it.

*optional declaration*

An optional declaration is a declaration that a treaty specifically provides for, but does not require. Unlike an interpretative declaration, an optional declaration is binding on the state making it.

**Depositary**

The depositary of a treaty is the custodian of the treaty and is entrusted with the functions specified in article 77 of the Vienna Convention 1969. The depositary accepts notifications and documents related to treaties deposited with them, 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. A depositary can be one or more states, an international organisation, or the chief administrative officer of the organisation, such as the Secretary-General of the United Nations. See articles 76 and 77 of the Vienna Convention 1969.

**Entry into Force**

*definitive entry into force*

Entry into force of a treaty is the moment in time when a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine the moment of its entry into force. This may be a date specified in the treaty or a date on which a specified number of ratifications, approvals, acceptances or accessions have been deposited with the depositary.

*provisional entry into force*

Provisional entry into force may be allowed by the terms of a treaty, for example, in commodity agreements. Provisional entry into force of a treaty may also occur when a number of parties to a treaty that has not yet entered into force decide to apply the treaty as if it had entered into force. Once a treaty has entered into force provisionally, it creates obligations for the parties that agreed to bring it into force in that manner. See article 25(1) of the Vienna Convention 1969.

**Exchange of Letters or Notes**

An exchange of letters or notes may embody a bilateral treaty commitment. The basic characteristic of this procedure is that the signatures of both parties appear not on one letter or note but on two separate letters or notes. The agreement therefore lies in the exchange of these letters or notes, each of the parties retaining one letter or note signed by the representative of the other party. In practice, the second letter or note (usually the letter or note in response) will reproduce the text of the first. In a bilateral treaty, the parties may also exchange letters or notes to indicate that they have completed all domestic procedures necessary to implement the treaty. See article 13 of the Vienna Convention 1969.

**Final Act**

A Final Act is a document summarising the proceedings of a diplomatic conference. It is normally the formal act by which the negotiating parties bring the conference to a conclusion. It is usually part of the documentation arising from the conference, including the treaty, the resolutions and interpretative declarations made by participating states. There is no obligation to sign the Final Act, but signature may permit participation in subsequent mechanisms

arising from the conference, such as preparatory committees. Signing the Final Act does not normally create legal obligations or bind the signatory state to sign or ratify the treaty attached to it.

**Full Powers**

*instrument of full powers*

Full powers take the form of a solemn instrument issued by the Head of State, Head of Government or Minister for Foreign Affairs, empowering a named representative to undertake given treaty actions. The Head of State, Head of Government and Minister for Foreign Affairs are considered as representing their State for the purpose of all acts relating to the signature of, and the consent to be bound by, a treaty. Accordingly, they need not present full powers for those purposes. See articles 2(1)(c) and 7 of the Vienna Convention 1969.

*instrument of general full powers*

An instrument of general full powers authorises a named representative to execute certain treaty actions, such as signatures, relating to treaties of a certain kind (for example, all treaties adopted under the auspices of a particular organisation).

**Party**

A party to a treaty is a state or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the state is bound by the treaty under international law. See article 2(1)(g) of the Vienna Convention 1969.

**Plenipotentiary**

A plenipotentiary, in the context of full powers, is the person authorised by an instrument of full powers to undertake a specific treaty action.

**Protocol**

A protocol, in the context of treaty law and practice, has the same legal characteristics as a treaty. The term protocol is often used to describe agreements of a less formal nature than those entitled treaty or convention. Generally, a protocol amends, supplements or clarifies a multilateral treaty. A

protocol is normally open to participation by the parties to the parent agreement. However, in recent times states have negotiated a number of protocols that do not follow this principle. The advantage of a protocol is that, while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail.

**Provisional Application**

*provisional application of a treaty that has entered into force*

Provisional application of a treaty that has entered into force may occur when a state unilaterally undertakes to give legal effect to the obligations under a treaty on a provisional and voluntary basis. The state would generally intend to ratify, accept, approve or accede to the treaty once its domestic procedural requirements for international ratification have been satisfied. The state may terminate this provisional application at any time. In contrast, a state that has consented to be bound by a treaty through ratification, acceptance, approval, accession or definitive signature generally can only withdraw its consent in accordance with the provisions of the treaty or, in the absence of such provisions, other rules of treaty law. See article 24 of the Vienna Convention 1969.

*provisional application of a treaty that has not entered into force*

Provisional application of a treaty that has not entered into force may occur when a state notifies the signatory states to a treaty that has not yet entered into force that it will give effect to the legal obligations specified in that treaty on a provisional and unilateral basis. Since this is a unilateral act by the state, subject to its domestic legal framework, it may terminate this provisional application at any time. A state may continue to apply a treaty provisionally, even after the treaty has entered into force, until the state has ratified, approved, accepted or acceded to the treaty. A state's provisional application terminates if that state notifies the other states among which the treaty is being applied provisionally of its intention not to become a party to the treaty. See article 25 of the Vienna Convention 1969.

**Ratification, Acceptance, Approval**

Ratification, acceptance and approval all refer to the act undertaken on the international plane, whereby a state establishes its consent to be bound by a treaty. Ratification, acceptance and approval all require two steps:

i. The execution of an instrument of ratification, acceptance or approval by the Head of State, Head of Government or Minister for Foreign Affairs, expressing the intent of the State to be bound by the relevant treaty; and

ii. For multilateral treaties, the deposit of the instrument with the depositary; and for bilateral treaties, the exchange of the instruments between parties.

The instrument of ratification, acceptance or approval must comply with certain international legal requirements. Ratification, acceptance or approval at the international level indicates to the international community a state's commitment to undertake the obligations under a treaty. This should not be confused with the process at the national level, which a state may be required to undertake in accordance with its own constitutional provisions, before it consents to be bound internationally. Ratification at the national level is inadequate to establish the state's consent to be bound at the international level. See articles 2(1)(b), 11, 14 and 16 of the Vienna Convention 1969.

**Registration**

Registration, in the context of treaty law and practice, refers to the function of the Secretariat of the United Nations in effecting the registration of treaties and international agreements under Article 102 of the *Charter of the United Nations.*

**Reservation**

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. A reservation may enable a state to participate in a multilateral treaty that it would otherwise be unable or unwilling to participate in. States can make reservations to a treaty when they sign, ratify, accept, approve or accede to it. When a state makes a reservation upon signing, it must confirm the reservation upon ratification, acceptance or approval. Since a reservation purports to modify the legal obligations of a state, it must be signed by the Head of State, Head of Government or Minister for Foreign Affairs. Reservations cannot be contrary to the object and purpose of the treaty. Some treaties prohibit reservations or only permit specified reservations. See articles 2(1)(d) and 19-23 of the Vienna Convention 1969.

**Signature**

*definitive signature (signature not subject to ratification)*

Definitive signature occurs where a state expresses its consent to be bound by a treaty by signing the treaty without the need for ratification, acceptance or approval. A state may definitively sign a treaty only when the treaty so permits. A number of treaties deposited with the Secretary-General permit definitive signature. See article 12 of the Vienna Convention 1969

*simple signature (signature subject to ratification)*

Simple signature applies to most multilateral treaties. This means that when a state signs the treaty, the signature is subject to ratification, acceptance or approval. The state has not expressed its consent to be bound by the treaty until it ratifies, accepts or approves it. In that case, a state that signs a treaty is obliged to refrain, in good faith, from acts that would defeat the object and purpose of the treaty. Signature alone does not impose on the state obligations under the treaty. See articles 14 and 18 of the Vienna Convention 1969.

**Treaty**

Treaty is a generic term embracing all instruments binding under international law, regardless of their formal designation, concluded between two or more international juridical persons. Thus, treaties may be concluded between: states; international organisations with treaty-making capacity and states; or international organisations with treaty-making capacity. The application of the term treaty, in the generic sense, signifies that the parties intend to create rights and obligations enforceable under international law. The Vienna Convention 1969 defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (article 2(1)(a)). Accordingly, conventions, agreements, protocols, and exchange of letters or notes may all constitute treaties. A treaty must be governed by international law and is normally in written form. Although the Vienna Convention 1969 does not apply to non-written agreements, its definition of a treaty states that the absence of writing does not affect the legal force of international agreements. No international rules exist as to when an international instrument should be entitled a treaty. However, usually the term treaty is employed for instruments of some gravity and

solemnity. See article 2(1)(a) of the Vienna Convention 1969. See generally Vienna Convention 1969 and Vienna Convention 1986.

*bilateral treaty*

A bilateral treaty is a treaty between two parties.

*multilateral treaty*

A multilateral treaty is a treaty between more than two parties.

# VIII ANNEXES

## Annex A: Timeline for concluding and implementing a treaty

Concluding and implementing a treaty can be a lengthy process. The table below provides a guide for the steps that may be necessary when concluding and implementing a treaty. To ensure that the relevant timelines are met, it is recommended that this table be used as a template that is filled out by the lead agency, consulting with the MFAT Treaty Officer as necessary, in the early stage of considering a new treaty action.

Note: that some steps may be combined for individual treaties e.g. go to Cabinet once for approval to sign, present the NIA and enter into force. Consult with the MFAT Treaty Officer at an early stage to discuss the relevant steps for any particular treaty action.

Note: the highlighted steps are only applicable if a NIA is required.

### 1. Signature and Entry into Force (Bilateral) or Ratification (Multilateral)

| **Action** | **Actor** | **Date** |
|---|---|---|
| Seek mandate to negotiate (usually required from Cabinet) | Lead Agency<br>in consultation with MFAT | |
| Conduct any appropriate consultation e.g. with Māori | Lead agency | |
| Text of the treaty finalised | Negotiating Parties | |
| If bilateral, consult with MFAT about whether a NIA is required<br><br>If not required, seek bilateral treaty waiver from Minister of Foreign Affairs | Lead Agency<br><br>MFAT (Legal Division) | |
| Complete Cabinet Paper requesting approval to sign and bring the treaty into force (bilateral) or ratify the treaty (multilateral) | Lead Agency<br>in consultation with MFAT | |
| Officials draft National Interest Analysis (NIA) | Lead Agency<br>in consultation with MFAT | |

| | | |
|---|---|---|
| Consultation period begins | Lead Agency | |
| Consultation period complete | Lead Agency | |
| Cabinet Paper and NIA to Minister for referral to Cabinet | Lead Agency<br>in consultation with MFAT | |
| Cabinet Paper and NIA to Cabinet Office | Minister's Office<br>(Lead Agency) | |
| Cabinet Paper and NIA to External Relations and Defence Cabinet Committee (ERD) (or appropriate committee?) | Cabinet Office | |
| Cabinet Paper and NIA to Cabinet for approval to sign and bring the treaty into force/ratify | Cabinet Office | |
| Minister of Foreign Affairs signs Instrument of Full Powers | MFAT (Legal Division) | |
| New Zealand signs the treaty | Lead Agency<br>in consultation with MFAT | |

If a NIA is not required skip to stage 3 below.

**2. Parliamentary process**

| Action | Actor | Date |
|---|---|---|
| Drafting Instructions submitted to PCO (if required) | Lead Agency | |
| NIA and treaty text presented in the House | MFAT (Legal Division) | |
| NIA to Foreign Affairs, Defence and Trade Committee (FADTC) | FADTC Select Committee | |
| NIA referred to subject Select Committee (if appropriate) | Subject Select Committee | |
| Select Committee consideration (can involve officials appearing before committee, submissions etc) | Lead Agency, with support from MFAT if required | |
| Select Committee Report presented | Select Committee | |
| Introduction of legislation to the House (if required) | Lead Agency | |

| Action | Actor | Date |
|---|---|---|
| Primary legislative process complete | Lead Agency | |
| Regulations and LEG Cabinet Paper to Ministers | Lead Agency | |
| Regulations to Cabinet Office | Ministers' Office | |
| Regulations to LEG Committee | Cabinet Office | |
| Regulations to Cabinet and Exec Council | Cabinet Office | |

### 3. Final Stages:

| Action | Actor | Date |
|---|---|---|
| Preparation of Instrument of Ratification or other document for treaty to enter into force (can require signature from Minister of Foreign Affairs) | MFAT (Legal Division) | |
| Instrument of Ratification or other document for treaty to enter into force (e.g. third person note) despatched to overseas post | MFAT (Legal Division) | |
| Instrument of Ratification deposited/ other document for treaty to enter into force sent | MFAT | |
| NZ is a party | Depositary/other party confirmation | |
| Publicity | Lead Agency | |

## Annex B: Cabinet Manual 2008 excerpts

Available online at: http://cabinetmanual.cabinetoffice.govt.nz.

### International treaties and Cabinet

5.73 Any proposal to sign an international treaty or agreement or to take binding treaty action must be submitted, with the text of the treaty, to Cabinet for approval. Binding treaty actions include ratification, accession, acceptance, definitive signature, approval, withdrawal, or denunciation of an international treaty or agreement.

5.74 Where a treaty or agreement is to be presented to the House of Representatives before binding treaty action is taken, a national interest analysis must also be prepared and submitted to Cabinet. Details of the approval process relating to international treaties and agreements are set out in paragraphs 7.112–7.122, and in the *CabGuide.*

### Examination of international treaties by the House

### General

7.112 In New Zealand, the power to take treaty action rests with the Executive. Any proposal to take action in relation to an international treaty that will indicate New Zealand's intention to be bound or that will bind New Zealand must be submitted to Cabinet for approval. An intention to be bound is usually indicated by signature, to be followed by the subsequent binding step of ratification. Actions that bind New Zealand (that is, that formally change New Zealand's international obligations) are steps such as definitive signature (where there is no subsequent step of ratification), ratification, accession, and approval. The requirement to seek Cabinet approval also applies to proposals to sign or become bound by an amendment to a treaty, to withdraw from a treaty, or to change a reservation to a treaty.

7.113 Within this context, certain treaty actions (essentially those related to multilateral treaties and major bilateral treaties of particular significance) must also, after Cabinet's approval, be presented to the House for examination, before the Executive takes binding treaty action. The Minister of Foreign Affairs determines whether a bilateral treaty is a major bilateral treaty of particular significance.

7.114 The process of examination of international treaties by the House takes time – departments working on international treaty actions must factor that into their planning. Commitments cannot be entered into in advance of examination by the House. Only in very rare situations may the government take urgent treaty action in the national interest before the treaty is presented to the House. Where this occurs, the treaty must be presented as soon as possible after the binding action has been taken, together with a national interest analysis (see paragraphs 7.116–7.117) and an explanation from the government as to why it was considered necessary to take urgent action.

7.115 The Ministry of Foreign Affairs and Trade is able to provide advice on all matters relating to international treaties and instruments of less than treaty status, such as non-binding arrangements with other governments. In particular, departments should consult the legal division of the Ministry at an early stage if they are considering entering into any negotiations that may result in action being taken on any international treaty or arrangement. The Ministry provides general guidance on international law issues and the process of presenting treaties to the House. It provides specific guidance on the required format and content of a national interest analysis. More information on the presentation of treaties to the House is contained in the *CabGuide.*

**National interest analysis**

7.116 Presenting a treaty to the House requires the preparation of a national interest analysis. The national interest analysis addresses:

(a) the reasons for New Zealand taking the binding treaty action;

(b) the implications for New Zealand of taking the binding treaty action; and

(c) the means of implementing the treaty action domestically.

7.117 The department with the main policy interest in the treaty, in consultation with the legal division of the Ministry of Foreign Affairs and Trade, is responsible for developing the national interest analysis according to the requirements of the Standing Orders. Drafting guidance is available from the Ministry of Foreign Affairs. The national interest

analysis must be approved by Cabinet before it is presented to the House.

**Select committee consideration**

7.118 Once a treaty has been presented to the House, the treaty is referred to the Foreign Affairs, Defence and Trade Committee. This select committee may examine the treaty, or may refer the treaty to another more appropriate select committee.

7.119 The government refrains from taking any binding treaty action on a treaty that has been presented to the House until the relevant select committee has reported, or 15 sitting days have elapsed from the date of presentation, whichever is sooner. The select committee may indicate to the government that it needs more time to consider the treaty, in which case the government may consider deferring taking binding treaty action.

7.120 The select committee may seek public submissions. In addition, the House itself may sometimes wish to give further consideration to the proposed treaty action; for example, by a debate in the House.

7.121 If the select committee report contains recommendations to the government, a government response to those recommendations must be presented within 90 days of the report. (See paragraphs 7.108–7.111, and the section entitled “Reports” in the chapter on select committees in the Standing Orders.)

**Related legislation**

7.122 Legislation necessary to bring domestic law into compliance with a treaty should not be introduced into the House until after the treaty has been presented and the time for the select committee to report has expired. Departments may, however, initiate the legislative process before that time by seeking a place on the legislation programme for the bill and issuing drafting instructions to parliamentary counsel (on a conditional basis).

## Annex C: Standing Orders 394-397 of the House of Representatives

### 394 Presentation and referral of treaties

(1) The Government will present the following international treaties to the House:

(a) any treaty that is to be subject to ratification, accession, acceptance or approval by New Zealand:

(b) any treaty that has been subject to ratification, accession, acceptance or approval on an urgent basis in the national interest:

(c) any treaty that has been subject to ratification, accession, acceptance or approval and that is subject to withdrawal or denunciation by New Zealand:

(d) any major bilateral treaty of particular significance, not otherwise covered by subparagraph (a), that the Minister of Foreign Affairs and Trade decides to present to the House.

(2) A national interest analysis for the treaty, which addresses all the matters set out in Standing Order 389, will be presented at the same time as the treaty.

(3) Both the treaty and the national interest analysis stand referred to the Foreign Affairs, Defence and Trade Committee.

### 395 National Interest Analysis

(1) A national interest analysis must address the following matters:

(a) the reasons for New Zealand becoming party to the treaty:

(b) the advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand:

(c) the obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty:

(d) the economic, social, cultural and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand:

(e) the costs to New Zealand of compliance with the treaty:

(f) the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects:

(g) the measures which could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures, including legislation:

(h) a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty:

(i) whether the treaty provides for withdrawal or denunciation.

(2) In the case of a treaty that has been subject to ratification, accession, acceptance or approval on an urgent basis in the national interest, the national interest analysis must also explain the reasons for the urgent action taken.

(3) In the case of a treaty that has been subject to ratification, accession, acceptance or approval and that is subject to withdrawal or denunciation by New Zealand, the national interest analysis must address the matters set out in paragraph (1) to the full extent applicable to that proposed action.

**396 Select committee consideration of treaties**

(1) The Foreign Affairs, Defence and Trade Committee considers the subject area of a treaty and—

(a) if that subject area is primarily within that committee's own terms of reference, retains the treaty for examination, or

(b) if that subject areas is primarily within the terms of reference of another select committee, refers the treaty to that committee for examination.

(2) If the Foreign Affairs, Defence and Trade Committee is not due to meet within seven days of the presentation of a treaty, and the subject area of the treaty is clearly within the terms of reference of another select committee, the chairperson may refer the treaty to that committee for examination.

**397 Reports by select committees on treaties**

(1) A select committee must report to the House on any treaty that has been referred to it.

(2) In examining a treaty and the accompanying national interest analysis, the committee considers whether the treaty ought to be drawn to the attention of the House—

(a) on any of the grounds covered by the national interest analysis, or

(b) for any other reason.

(3) The committee must include the national interest analysis as an appendix to its report.