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NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Manatū Aorere

International Treaty Making Guide

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

Introduction

Prepared by the Ministry of Foreign Affairs and Trade (MFAT), this guide outlines the key processes and considerations for New Zealand's engagement in the negotiation, drafting, and conclusion of international treaties and less-than-treaty-status arrangements.

This guide has been drafted with the intention of improving Government agencies' understanding of New Zealand's practice with respect to international treaties and arrangements, domestic treaty-making process and international obligations.

Contact details for the Legal Adviser for International Treaties

The Legal Adviser for International Treaties in MFAT (usually referred to as 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 non-binding arrangements. The Treaty Officer can be contacted at treaties@mfat.govt.nz.

As required by the Cabinet Office's CabGuide, any proposal to enter into an international treaty or non-binding arrangement must be discussed with the Treaty Officer.

An important distinction: International Treaties vs 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**: international instruments that are legally binding under international law;
- **Arrangements**: international instruments of 'less-than-treaty-status'. Arrangements are not intended to be legally binding but can still create important political or moral commitments.

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

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

Proposals to enter into international treaties and arrangements require consultation with the Legal Division of MFAT at an early stage.

Treaties

New Zealand is currently party to approximately 2060 international treaties. As many treaties are only in force for a limited period of time, New Zealand has been party to almost twice that number. At any one time New Zealand is involved in a number of bilateral and multilateral negotiations involving the conclusion of new treaties or amendments to existing treaties.

The following section provides an introduction to treaty terminology and an overview of New Zealand's domestic treaty-making process.

Terminology

Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969 provides:

> *"'Treaty' means 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."*

A treaty is an **international agreement** between two or more states, or between a state and other international organisation (e.g. the United Nations, the World Bank, or the World Trade Organisation) and is **governed by international law**.

The term "treaty" is used as a generic term to describe a broad class of instruments recognised as being international agreements. Treaties have a variety of forms and names:

- **"Treaty"**, although binding international agreements are known generically as treaties, the term "treaty" is generally confined to major agreements of political importance (for instance, treaties of alliance or treaties of friendship).
- **"Agreement"** is the most common term, especially for bilateral agreements.
- **"Exchanges of Notes (or Letters)"** can be non-binding or binding. If the intent of the Notes/Letters is to *constitute an agreement*, it will be a treaty. If the intent of the Notes/Letters is to *constitute an arrangement*, it is likely a non-binding arrangement. For an Exchange of Notes/Letters, there are two documents rather than just one. The second document responds to and accepts the agreement proposed in the first. *Both* documents make up the treaty text.
- **"Convention"** is commonly used for multilateral agreements (e.g. Vienna

Convention on Law of Treaties, Nairobi Convention, and United Nation Conventions).

- **“Protocol”** is generally used for agreements that supplement a principal treaty. A Protocol might be drawn up at the same time as the principal treaty or later.

It is important to remember that any amendment to a treaty is considered a treaty in and of itself. The Treaty Officer should be consulted on all treaty amendments.

New Zealand's Treaty-Making Process

Mandate & Negotiation

Cabinet Approval & National Interest Analysis

Signature

Presentation to the House of Representatives

Select Committee Consideration

Implementation

Ratification

**The above demonstrates the process taken for multilateral treaties or a bilateral treaty of particular significance which New Zealand is negotiating.*

Overview of the treaty-making process

The following is an overview of New Zealand's domestic treaty making process for multilateral treaties and major bilateral treaties of particular significance.[1]

In New Zealand, the power to negotiate and conclude international treaties lies exclusively with the Executive branch. Cabinet is responsible for mandating negotiations, approving the final text, and determining when and how a binding treaty action is taken.

1. Mandate & Negotiation

The lead government agency must first obtain a negotiating mandate from Cabinet.[2] Following which, New Zealand officials will participate in negotiations with the other government or organisation, resulting in the text of an agreement being finalised.

During the negotiation phase, the Minister and agency participating in the negotiations will lead any domestic engagement and consultation with interested parties, the public, and Māori on the treaty.

2. Cabinet Approval & National Interest Analysis

Following finalisation of the text, the lead government agency prepares a Cabinet paper seeking approval to sign and ratify the agreement. Where the Standing Orders require a treaty to be presented to the House of Representatives for examination before the binding treaty action is taken, a National Interest Analysis ("**NIA**") must be prepared and submitted to Cabinet. The National Interest Analysis sets out the advantages and disadvantages for New Zealand of becoming a party to the treaty or deciding to withdraw.

The lead government agency is responsible for ensuring appropriate consultation is undertaken with other government agencies, Māori and third parties who may have an interest in the treaty.

Cabinet approves the final text of the agreement, giving authority for New Zealand to sign the agreement; the presentation of the agreement and NIA to the House of Representatives; and the necessary measures for entry into force (i.e. ratification/acceptance/accession) subject to satisfactory completion of parliamentary treaty examination.

[1] See page 28 for the process for bilateral treaties subject to a Parliamentary Treaty Examination waiver.
[2] Cabinet approval is required where new policy issues arise in the course of negotiations which require an update of the previously-approved mandate, or seeking updates of the mandate if new policy issues arise in the course of negotiations, or where there has been a significant delay in negotiations or a change of government, which may make it appropriate to seek confirmation of the original negotiating mandate before proceeding.

3. Signature

Once Cabinet approves the signing, officials will organise a signing ceremony. Only the Governor General, Prime Minister and Minister of Foreign Affairs have general authority to sign treaties. Other signatories must obtain an Instrument of Full Powers from the Minister of Foreign Affairs.

At this stage the treaty is agreed but not yet legally binding (unless the signature is definitive)[3].

4. Presentation to the House of Representatives

MFAT presents the treaty text and its corresponding NIA to the House of Representatives.

5. Select Committee Consideration

A select committee considers the treaty and the NIA. The committee has 15 sitting days in which to report back to the House. If the committee has recommendations, the Government must respond within 60 days of the report.

If the Government intends for the treaty to be implemented through a bill, the select committee's report is set down for debate as a Government order of the day (Standing Orders 67(d) and 254(2)(a)). The report is then debated in lieu of a debate during the first reading of the bill that implements the treaty. If the Government does not intend for the treaty to be implemented through a bill, the Select Committee's report is set down as a Members' orders of the day and will only be debated if the Business Committee selects it under Standing Order 254(5).

6. Implementation

Where legislation is required to enable New Zealand to fulfil treaty obligations, implementing legislation is enacted prior to ratifying or acceding to the treaty.

7. Ratification

Formal documents (i.e. diplomatic notes, instruments of ratification/accession/acceptance) are exchanged with the other countries or organisations involved. These documents confirm domestic procedures have been completed and that the treaty is now in force.

[3] Vienna Convention on the Law of Treaties (1969), Art 12."Consent to be bound by a treaty expressed by signature."

Legal Effect of Treaties Domestically

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

It is a fundamental constitutional principle that the Executive cannot change New Zealand's domestic law by becoming party to a treaty. If the obligations being assumed under the treaty cannot be performed under existing law, legislation will be required. As the Law Commission noted in Report 34:[4]

> *[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, the Government'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 MFAT, 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 with the governments of these countries may be required. When considering taking a treaty action, the application of the action to Tokelau, the Cook Islands or Niue should be discussed at an early stage with the Legal Division of MFAT.[5]

[4] "A New Zealand Guide to International Law and its Sources" NZLC R34.
[5] For more information on the application of treaties to Tokelau, the Cook Islands and Niue see page 44 of this guide.

Drafting Treaty Action Cabinet Papers & National Interest Analysis

Treaty Action Cabinet Papers

Treaty action Cabinet Papers are papers which seek Cabinet's approval to sign and/or take a *binding* treaty action, such as ratification, accession, acceptance, termination or denunciation of a treaty.

Agencies drafting treaty action papers should use the Template for international treaty Cabinet papers. More information on how to structure the Cabinet paper and what information should be included can be found on the Department of the Prime Minister and Cabinet (DPMC) website.

National Interest Analysis

Please see page 21 for information on regulatory analysis requirements.

A National Interest Analysis ("NIA") is a summary of why a treaty action (i.e. becoming party to, amending or withdrawing from a treaty) 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 405, an NIA must be prepared and presented in the House of Representatives for all multilateral treaties and bilateral treaties of particular significance. The Cabinet Manual requires the NIA to be presented to Cabinet before presentation to the House.

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 treaty text, the proposed treaty action, and its implications for New Zealand. This understanding must be communicated as clearly as possible in the NIA. It is very important to avoid legal terms and jargon.

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

Examples of NIAs can be found on the Parliamentary website (enter "treaty examination" in the keyword search to bring up a list of all Committee reports on New Zealand treaty actions, which annex the relevant NIA).

National Interest Analysis Drafting Instructions

These drafting instructions set out the **11 mandatory** NIA section headings which are required by Standing Order 406. 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[6] and the Cabinet Office's CabGuide.

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)**

[6] Cabinet Manual 2023, Parliamentary Treaty Examination, paragraphs 7.127 – 7.137.

1. Executive summary

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

2. Nature and timing of the proposed treaty action

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

- ***The full title of the treaty*** (it may be a Convention, Protocol, Agreement, Exchange of Letters), including the common or abbreviated name where relevant and a common term that will be used to refer to the treaty throughout the NIA (e.g. the “Agreement”). It is important to ensure the treaty is consistently differentiated from other treaties that may be discussed in the NIA.

    - Also include **when the treaty was concluded** and give dates of signature/exchange of notes if this has already occurred.

    - For a multilateral treaty action, state **whether it is in force generally** (i.e. for others) and **when it is likely to enter into force for New Zealand** and/or generally.

    - Do not annex the treaty text (it 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.). If the treaty action is related to an existing treaty, the NIA should clearly establish that relationship. If the treaty action terminates, replaces, revises, amends, or is a Protocol to, an existing treaty this should be explained. Any territorial limits or interim application of treaty provisions should also be included. In the case of multilateral treaties, include any reservations or declarations.

- ***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 of 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. Under Standing Order 406(2) this section must indicate whether or not the Government intends for the treaty to be implemented by a bill.

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, including regulatory, non-regulatory and any deregulatory options.

- Identify the criteria that will be used to compare options.

- Assess the options against the criteria.

- Analyse the costs and benefits of the preferred option.

- For the preferred option, address whether the benefits are expected to exceed the costs, the impacts on different groups and whether it is the most effective, efficient and proportionate response.

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

- Identify which obligations require legislative implementation.

- Explain how the proposal will be implemented, including legislative timetables (i.e. if it has been awarded a place in the legislative programme).

- Include plans for monitoring, evaluating and reviewing 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 this explicitly and provide justification for it (this is a mandatory Cabinet requirement[7]).

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.

[7] Cabinet paper template - submitting secondary legislation to the Executive Council | Department of the Prime Minister and Cabinet (DPMC)

- ***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 implications 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 interests at an early stage and tailor consultation accordingly.***

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

- ***The Ministry for Regulation must be consulted on all treaty actions that have regulatory impacts.***

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***, 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. However, do not attribute governmental feedback to specific government departments/ ministries.

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

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

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.

Agency Disclosure Statement Template

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.]

[Name and designation of person signing on behalf of the agency] [Signature of person] [Date]"

Regulatory Analysis Requirements

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

A Regulatory Analysis Summary ("RAS") is required for all policy work leading to the submission of a Cabinet paper that includes a "government regulatory proposal" i.e. it will require changes to legislation or regulations, unless an exemption applies.[8] If a RAS is required, the mandatory RAS processes can be found on the Ministry for Regulation's website.Cabinet requires the completion of a RAS to accompany all Cabinet papers containing government regulatory proposal.

In the case of international treaties (including treaty negotiations), RAS 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, if it will have regulatory implications for New Zealand.

Government regulatory proposals

A government regulatory proposal is a proposal that will ultimately require changes to primary or secondary legislation (e.g. Acts of Parliament, regulations etc.).

Once a treaty negotiation has concluded, it should be clear from the text whether it will have regulatory implications for New Zealand. However, during treaty negotiations it is often not clear whether the outcome of the negotiations will have regulatory impacts for New Zealand. This is particularly the case for multilateral treaties (see below) and in the early stages of negotiations. Negotiation mandate papers for treaties include government regulatory proposals where the likely outcome of a treaty negotiation will have regulatory impacts for New Zealand.

If a treaty action Cabinet paper does not contain a government regulatory proposal, then the RAS requirements do not apply.

If a treaty action Cabinet paper contains a government regulatory proposal, the RAS requirements apply, unless an exemption is available. All proposed treaty actions with regulatory impacts should be submitted to the Ministry for Regulation through RIA Online, following the guidance on the Ministry for Regulation's website.

Exemptions from RAS requirements

If a Cabinet paper seeking approval for a treaty negotiation mandate or binding treaty

[8] CO (26) 2: Expectations for Good Law-making.

action includes a "government regulatory proposal", the RAS requirements will apply unless an exemption is available. As outlined in the guidance on the Ministry for Regulation's website, the exemption categories are:

- Minor or limited impacts exemption: the economic, social or environmental impacts are minor, or the impacts are limited and easy to assess;

- Duplication exemption: preparing a RAS for the proposal would substantively duplicate existing impact analysis or policy analysis in other forms. (This category includes papers accompanied by an extended National Interest Analysis (NIA) that includes the requirements of a RAS.);

- Technical exemption: the proposal makes technical, non-substantive changes, or the Government has limited decision-making discretion or responsibility for the content of the proposal;

- Emergency exemption: the proposal is an urgent, temporary response to a declared emergency.

Agencies are responsible for determining whether any of the exemption grounds apply to a treaty action paper. Further information about exemptions can be found in the guidance on the Ministry for Regulation's website.[9] Agency decisions on whether a proposed treaty action with regulatory impacts is exempt from RAS requirements must be recorded in RIA Online.

Cabinet papers for treaty negotiations

Treaty negotiations require Cabinet decisions prior to the binding treaty action stage in order to establish, and sometimes update, the negotiating mandate. Because RAS requirements were designed primarily for domestic policy making processes, they do not fit naturally with the policy process for negotiating international treaties.

Does the negotiation mandate paper contain a government regulatory proposal?
As above, consideration should first be given to whether the negotiation mandate paper includes a government regulatory proposal. A negotiation mandate paper for a treaty will include a government regulatory proposal where the likely outcome of a treaty negotiation will have regulatory impacts for New Zealand. In the early stages of negotiation and for multilateral treaties (**see below**) this may not be clear.

Negotiation mandate papers where exemptions are available
Exemptions may be available for Cabinet papers seeking decisions on treaty negotiations

[9] Ministry for Regulation. Regulatory Analysis Summary Process Guidance Note (2026). The-Regulatory-Analysis-Summary-Process-Guidance-Note.pdf

that include government regulatory proposals, regardless of whether they are for bilateral or multilateral treaties. This may include negotiations where there are no real (non-regulatory) choices for how to implement the treaty's obligations; the likely outcome of the treaty negotiations will not have significant or wide-reaching regulatory implications for New Zealand; *or* regulatory implications arising from the treaty negotiations are consistent with established policy. Examples may include a conventional Free Trade Agreement (requiring minor legislative changes), double-taxation agreements or film co-production agreements.

Treaty negotiation mandate papers are most likely to fall into the minor or limited impacts or technical exemption categories. Lead agencies should determine whether any of the exemptions apply to a treaty negotiation mandate paper that includes a government regulatory proposal. If an agency determines that an exemption applies, a RAS is not required until the final Cabinet paper seeking authority to take binding treaty action.

Most treaty negotiation papers will therefore be exempt from RAS requirements.

Negotiation mandate papers where exemptions do not apply
Treaty negotiation mandate papers that include government regulatory proposals where exemptions do not apply should be accompanied by an interim RAS. This may include negotiations where the likely outcome will have regulatory impacts that enable regulatory or non-regulatory choices, may have significant or wide-reaching regulatory implications for New Zealand; or the regulatory implications arise from changes to existing policy. These papers are rare.

Interim Regulatory Analysis Summary

For treaty negotiation mandate papers that contain government regulatory proposals and are not exempt from the RAS requirements, an interim RAS should be prepared. The interim RAS should be commensurate with the potential nature and magnitude of the regulatory impacts. It is recognised that the interim RAS will be subject to constraints at the early stages of negotiation, such as uncertainty and lack of information. The interim RAS can be presented in the RAS template[10] or in an annex. To the extent possible, the interim RAS should focus 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 or secondary changes may be needed);

- The anticipated impacts of the regulatory change (e.g. costs to regulators, compliance cost, or any other social, environmental or economic costs or benefits);

[10] Regulatory Analysis Summary (RAS) template

- Types of issues that will need to be worked through (for instance, briefly outlining regulatory barriers to compliance); and

- Highlighting any risks these may pose.

The interim RAS should take into account the requirements for RAS, as outlined in the guidance on the Ministry for Regulation's website.

Standard paragraphs for a treaty negotiation interim RAS might read as follows:

> "An interim Regulatory Analysis Summary has been prepared as the likely outcome of these negotiations will have regulatory implications for New Zealand. As the negotiations are still in the early stages, there were some constraints and uncertainties in the analysis.
>
> The interim Regulatory Analysis Summary is attached at Appendix X.
>
> [Insert comment from the QA panel]
>
> If and when further decisions are sought from Ministers 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. An extended National Interest Analysis (incorporating regulatory analysis) will be presented to Cabinet if the Government proposes to sign and ratify the [treaty] after negotiations have concluded."

Changing from an exemption to an interim RAS during the course of treaty negotiations

For some treaty negotiations it may be clear from the outset that an exemption does not apply. Other treaty negotiations that start with an exemption from completing a RAS may require Cabinet decisions updating the negotiating mandate as negotiations progress. At this point, if it becomes clear that Cabinet decisions have substantive regulatory implications, an interim RAS should be prepared (e.g., if in the course of negotiations it becomes clear that a Free Trade Agreement will have regulatory implications beyond established policy settings, Cabinet papers seeking decisions on this should be accompanied by an interim RAS).

An extra note on multilateral treaties

Multilateral treaty negotiations are different to other treaty negotiations 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. Therefore, 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 (i.e. the treaty will 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 a full RAS, and limit both the scope of the analysis and the certainty with which impacts can be assessed. When a multilateral treaty does not fall within an exemption, an interim RAS is required even if it is not possible to prepare a comprehensive one.

Quality assurance

As set out in the Regulatory Analysis Summary Process Guidance Note, the Ministry for Regulation determines who will be responsible for Quality Assurance of a RAS, based on the information provided in RIA Online. The Ministry for Regulation considers a range of possible arrangements for carrying out the quality assurance. Whether the Ministry for Regulation is involved in a joint panel is guided by the following criteria:

- Whether the proposal is significant.
- The potential impacts and how it fits with the Government's strategic priorities.
- Whether the Ministry for Regulation can add value through QA.

Cabinet papers seeking to take a binding treaty action

Does the binding treaty action paper contain a government regulatory proposal?

When Cabinet approval is sought for New Zealand to take a binding treaty action, consideration should first be given to whether the binding treaty action paper includes a government regulatory proposal i.e. a proposal that will ultimately require creating, amending, or repealing primary or secondary legislation. If taking a binding treaty action has no regulatory impacts (i.e. it will not require any changes to legislation or regulations), the RAS requirements will not apply. If it will have regulatory implications for New Zealand, a RAS must be carried out, unless an exemption applies.

Multilateral treaties and "major bilateral treaties of particular significance"

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 RAS.

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 RAS. Where a Cabinet paper seeking approval for a binding treaty action with regulatory impacts is accompanied by an extended NIA, a duplication exemption from the RAS requirements is available. Agencies should seek and approve the exemption and record this in RIA Online.

Other bilateral treaties

Bilateral treaties that are not "major bilateral treaties of particular significance" do not need to undergo the parliamentary treaty examination process and are not accompanied by a NIA. Where there are regulatory implications for these treaties, the RAS requirements apply, unless another exemption is available. If regulatory impacts are significant the treaty will likely be considered a "major bilateral treaty of significance" and you can refer to the process above.

If regulatory impacts are minor or limited, an exemption is available. It is rare for bilateral treaties to be accompanied by a RAS. Agencies should determine whether an exemption is available and record the exemption in RIA Online.

Cabinet papers seeking approval for implementing legislation

Following parliamentary treaty examination, any legislation necessary to implement a treaty's obligations must be passed before the treaty can enter into force for New Zealand. When seeking approval to introduce legislation to incorporate into New Zealand law a treaty's obligations, the requirements set out in the Regulatory Standards Act 2025 and the Cabinet circular *Expectations for Good Law-making* [CO (26) 2] apply.

The requirements are to assess the legislation for consistency with the principles in section 9 of the Regulatory Standards Act, and produce a Consistency Accountability Statement (CAS), Summary of Underpinning Analysis, and (if an inconsistency is identified) a Minister/maker statement of reasons. Further information about these requirements is available on the Ministry for Regulation's website [Consistency assessments for new legislation | Ministry for Regulation].

Step-by-step guide

<table>
<tr><th colspan="2">Step 1: Does the Cabinet paper contain a government regulatory proposal i.e. will the treaty/likely outcome of treaty negotiations ultimately require changes to primary or secondary legislation?</th></tr>
<tr><td>If yes, RAS requirements may apply. Go to negotiation mandate papers or binding treaty action papers.</td><td>If no, or if it is unclear at this stage, the RAS requirements do not apply.</td></tr>
<tr><th colspan="2">Step 2: Is an exemption available?</th></tr>
<tr><th colspan="2">Negotiation mandate papers where the likely outcome includes a government regulatory proposal</th></tr>
<tr><td>If an exemption is available, for example, if the likely outcome of the negotiation involves regulatory impacts that are minor or limited or if New Zealand has limited decision-making discretion or responsibility for their content, an exemption should be sought internally and then recorded in RIA Online.

Once exempted, a RAS is not required until the binding treaty action stage.</td><td>If no exemption is available, prepare an interim RAS to accompany the negotiation mandate paper that reflects the likely significance of the regulatory impacts and degree of certainty.</td></tr>
<tr><th colspan="2">Binding treaty action with regulatory impacts (binding signature, amendment, accession or ratification)</th></tr>
<tr><td>Is it a “multilateral or major bilateral treaty of particular significance”?

If yes, it must be accompanied by an extended NIA that includes the requirements of a RAS. A RAS duplication exemption should be sought internally and then recorded in RIA Online.

If it is bilateral treaty that is not “a major bilateral treaty of particular significance”, is another exemption ground available? (e.g. minor or limited impacts or technical)

If yes, an exemption should be sought and recorded in RIA Online</td><td>If no exemptions are available, the RAS requirements apply and a RAS would need to be prepared.</td></tr>
<tr><td colspan="2">Please consult with MFAT’s Treaty Officer (treaties@mfat.govt.nz) and the Ministry for Regulation’s Regulatory Impact Analysis Team (RMS@regulation.govt.nz) if further advice is needed</td></tr>
</table>

Bilateral Treaties: Criteria for Parliamentary Treaty Examination

All multilateral treaties and all “major bilateral treaties of particular significance” are presented to the House of Representatives for Parliamentary Treaty Examination (Standing Order 405, Cabinet Manual 7.128).

The Minister of Foreign Affairs uses the following criteria to help determine which bilateral treaties are “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 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.

The above criteria are intended to help the Minister exercise discretion, but it does not <u>replace</u> that discretion.

Consultation with the Treaty Officer 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 of Representatives.

Step-by-step guides for concluding agreements

Steps to become party to a multilateral agreement which has not entered into force

1
New Zealand officials participate in international negotiations.

2
The lead government department prepares a National Interest Analysis (NIA) and Cabinet paper (both reviewed by the Legal Adviser for International Treaties).

3
Cabinet approves the final text, NIA and authorises New Zealand to sign the agreement.

4
If necessary, an Instrument of Full Powers is sought from the Minister of Foreign Affairs.

5
The NIA and text of the agreement are presented to the House of Representatives.

6
A Parliamentary Select Committee considers the NIA and text of the agreement and reports back to the House of Representatives.

7
If the Government intends the treaty to be implemented by a bill, the Select Committee's report is debated in the House of Representatives.

8
The Government passes or amends legislation and/or regulations (if required), to align domestic law with the obligations of the agreement.

9
New Zealand ratifies or accedes to the agreement, usually through an instrument signed by the Minister of Foreign Affairs.

Steps to become party to a multilateral agreement which has already entered into force:

1
The lead government department prepares a National Interest Analysis (NIA) and Cabinet paper (both reviewed by the Legal Adviser for International Treaties).

2
Cabinet approves the NIA and authorises New Zealand to become party to the agreement.

3
The NIA and text of the agreement are presented to the House of Representatives.

4
A Parliamentary Select Committee considers the NIA and text of the agreement and reports back to the House of Representatives.

5
If the Government intends the treaty to be implemented by a bill, the Select Committee's report is debated in the House of Representatives.

6
The Government passes or amends legislation and/or regulations (if required), to align domestic law with the obligations of the agreement.

7
New Zealand accedes to the agreement, usually through an instrument signed by the Minister of Foreign Affairs.

8
The Treaty enters into force for New Zealand.

Steps to become party to a bilateral agreement where that agreement takes the form of a single instrument:

New Zealand officials participate in bilateral negotiations.

Officials consult with MFAT Legal Division to determine whether the agreement is a "major bilateral treaty of particular significance".

NO

- The Minister of Foreign Affairs decides that the treaty is not of particular significance through a parliamentary treaty examination waiver
- Officials from the relevant department prepare a Cabinet paper.
- Cabinet approves the final text of the agreement, authorises New Zealand to sign the agreement and approves the entry into force of the agreement.

YES

- The Minister of Foreign Affairs decides the treaty is of particular significance.
- Officials from the relevant department prepare a Cabinet paper and a National Interest Analysis (NIA).
- Cabinet approves the final text, authorises New Zealand to sign, approves entry into force of the agreement and approves the NIA.
- The text of the agreement and NIA are presented to the House of Representatives.
- A Parliamentary Select Committee considers the NIA and text of the agreement and reports back to the House.

If the Government intends the treaty to be implemented by a bill the Select Committee's report is debated in the House of Representatives.

The Government passes or amends legislation or regulations (if required) to align domestic law with obligations of the agreement.

When New Zealand's domestic law accords with the obligations of the agreement New Zealand notifies the other party.

The other party notifies New Zealand that its domestic law is in accordance with the obligations of the agreement.

The agreement comes into force

Steps to become party to a bilateral agreement, where that agreement takes the form of an Exchange of Letters (initiated by New Zealand):

1
New Zealand officials participate in bilateral negotiations and decide to create or amend an agreement through an exchange of letters.

2
New Zealand officials draft both the initiating letter and reply (see example) in consultation with MFAT Legal Division.

3
New Zealand informally shares the draft with the other country, and the text is agreed on.

4
Where appropriate as detailed above, MFAT Legal Division seeks a parliamentary treaty examination waiver from the Minister of Foreign Affairs.

5
Officials from the relevant department prepare a Cabinet paper. If initiated by New Zealand, only the initiating letter is attached to Cabinet paper (if not, only the reply letter is attached).

6
Cabinet approves the final text of New Zealand's letter, authorises New Zealand to sign the letter and approves the entry into force of the agreement contained in the letters.

7
Instrument of Full Powers sought if the letter is not to be signed by Minister of Foreign Affairs or Prime Minister (contact MFAT Legal Division).

8
New Zealand's letter signed and exchanged (send photocopy/scan to MFAT Legal Division).

9
New Zealand receives reply letter where applicable (send to MFAT Legal Division).

10
The Agreement enters into force according to the letter.

Exchange of Letters/Notes

It is good practice to draft the reply letter. However, this is only a suggestion for the other country. Ultimately, the other 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

This Model should be used as an example of the format commonly used for an Exchange of Letters, rather than as an example of how the letters should be drafted. The Legal Adviser for International Treaties 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 should 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].

Treaty Practicalities

Signing treaties

At international law only the Head of State (the Governor-General), the Head of Government (the Prime Minister), and the Minister of Foreign Affairs have the full powers (authority) to sign international treaties. However, as is often the case, other Ministers or diplomatic representatives can sign treaties if the full powers are delegated to them by an **Instrument of Full Powers**.

The Instrument is prepared beforehand by the Legal Adviser for International Treaties and is signed by the Minister of Foreign Affairs.

It is also important to ask the other party/parties for such an Instrument if their representative is not the Head of State, Head of Government or the Minister of Foreign Affairs. It should always be determined whether the country in question will need an Instrument to be provided.

Full powers are not required for signing arrangements of less-than-treaty-status. See page 45 of this guide for more details.

Signing ceremonies

Signing ceremonies for both treaties and arrangements will typically require a physical copy of the instrument to be signed and an instrument of full powers if this is required.

New Zealand follows a standard formatting, printing and binding style for international instruments in order to ensure consistency. It is also possible that an instrument may be signed electronically. In such cases, a different signing procedure will be followed and the signature blocks will need to be formatted to reflect the circumstances.

The Legal Division of MFAT requires adequate notice in order to format, print and bind instruments in preparation for signature. The Legal Adviser for International Treaties in the Legal Division of MFAT (treaties@mfat.govt.nz) can be contacted for any questions regarding signing ceremonies or the practicalities of signature.

The Legal Division of MFAT assists with the processes leading up to the signing of treaties, including printing and binding the signing copy of the treaty and providing an Instrument of Full Powers from the Minister of Foreign Affairs. MFAT Legal can also provide advice on how to sign treaties remotely or “virtually”.

Treaty archive

The Legal Division of MFAT maintains New Zealand's physical collection of New Zealand's treaty and non-binding arrangement archives. Once treaties have been signed, it is therefore imperative that the original treaty documents are held by the Legal Division of MFAT.

Registering treaties

The Legal Division of MFAT is responsible for registering all international treaties that New Zealand enters into with the United Nations Secretariat. This obligation arises under Article 102 of the United Nations Charter:

> *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.*

Note: arrangements are not registered with the United Nations. However, the Legal Division of MFAT keeps an archive and registry of all arrangements entered into by New Zealand (including by other government agencies).

Amending treaties

Treaties often prescribe specific rules governing the amendment of the treaty, which must be followed. Commonly, parties will amend a treaty by agreement.

Any amendments should be treated as a new treaty action in and of itself and the New Zealand Government must follow the same constitutional and procedural requirements outlined in this Guide for the conclusion of a treaty. The Legal Adviser for International Treaties should be consulted on this process.

Note: Tacit acceptance amendments: treaty amendments may in some cases enter into force through tacit acceptance (i.e. no notification or action by New Zealand is required before the amendments will become binding on New Zealand). In such cases, the lead department considering treaty actions should contact the Treaty Officer, who can advise on the relevant Cabinet and Parliamentary requirements.

The process for taking treaty actions

When considering taking a treaty action (such as signature, ratification, accession, acceptance, definitive signature, consent to be bound, withdrawal or termination) the process and timeframe should be carefully considered at the outset.

A model timeline is provided on page 38, which policy leads can use when considering pursuing a treaty action.

Given the varied nature of treaties, timelines will vary widely. It is important to be aware that most treaty actions take a considerable time to conclude. This needs to be factored into your work plan. The Treaty Officer can assist you in formulating a timeline.

Types of treaty actions and their processes

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:

1) 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

2) 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.

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.

Timeline for concluding and implementing a treaty

Concluding and implementing a treaty can be a lengthy process. The table below provides a guide to 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 in the early stage of considering a new treaty action. The lead agency should consult with the Legal Adviser for International Treaties at an early stage to discuss the relevant steps for any particular 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.

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

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

Cabinet Paper and NIA to Cabinet Office	Minister's Office (Lead Agency)	
Cabinet Paper and NIA to Foreign Policy and National Security Committee (or other 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 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	
Primary legislative process complete	Lead Agency	
Regulations and LEG Cabinet Paper to Ministers	Lead Agency	
Regulations to Cabinet Office	Ministers' Office	

Action	Actor	Date
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) dispatched to overseas post	MFAT (Legal Division)	
Instrument of Ratification deposited/ other document for treaty to enter into force sent	MFAT (Legal Division)	
NZ is a party	Depositary/other party confirmation	
Publicity	Lead Agency	

Domestic Consultation

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. However, government departments and agencies should be aware that the scope of what is of relevance to Māori is increasing. It should not be assumed that there is not Māori interest in a treaty solely on the basis that Māori have not been consulted on similar treaties in the past.

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 Orders 405-408; and
- on any aspects of the implementation of an international treaty that impact on Māori.

Ongoing engagement

MFAT 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.

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. This is done through an online system, “New Zealand Treaties Online”, that departments are required to update regularly.

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.

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 update New Zealand Treaties Online on a regular basis.

Inter-agency consultation

The onus rests with the lead agency to ensure appropriate consultation is undertaken. Other departments should be provided with reasonable time to comment, and those views should be accurately reflected in the paper.

Consultation with the Minister of Foreign Affairs

The Minister of Foreign Affairs <u>must</u> be consulted on all proposals relating to international treaties, including any Cabinet paper seeking approval to sign a treaty.

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. New Zealand does not take treaty action on behalf of the Cook Islands or Niue unless specifically requested to do so. Both states have the necessary international legal personality to sign and ratify treaties on their own behalf.

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, hence the ability to enter into treaties. 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.

All departments leading treaty actions will need to consult the Legal Division of MFAT 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 from that point onwards, New Zealand treaty actions would not extend to the Cook Islands or Niue unless expressly done on their behalf. New Zealand treaties that were extended to the Cook Islands and Niue prior to 1988 (and, in a few cases, since 1988) continue to apply to the Cook Islands and Niue.

Questions concerning treaty application often require 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 MFAT.

International Arrangements

Arrangements are "less than treaty status" instruments, which are not intended to be legally binding.

Governments and international organisations often choose to express arrangements negotiated with other governments or international organisations as understandings rather than legally binding obligations.

They are intended by the participants to give rise to commitments of a political, rather than legal, nature. Arrangements are often concluded between government departments. However, 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. "Arrangement" is the most common name for such instruments. However, instruments are also commonly entitled joint communiqués, exchanges of notes or letters recording understandings and records of discussions.

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 countries involved 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.
- Avoid the words "agree", "agreement" and "agreed". 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. Therefore, the status of the document should be clarified with the other participants during the negotiations. 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). As with treaties, it is imperative that the record of the negotiation for arrangements is clear about the intention of the participants.

Arrangement vs. Memorandum of Understanding

We use the term “arrangement” rather than “memorandum of understanding” (MOU). 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, not a MOU.

Express provisions as to the legal status of an instrument

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.

DO NOT USE:	USE INSTEAD:
‘article’	‘paragraph’
‘agreed’	‘accepted’ ‘approved’ ‘decided’ or ‘consented’
‘agreements’ or ‘undertakings’	‘arrangements’ or ‘understandings’
‘authoritative’ or ‘authentic’	‘having equal validity’
‘be entitled to’	‘enjoy’
‘bound to (or by)’	‘covered by’
‘clause’	‘paragraph’
‘constitute an obligation’	‘continue to apply to’
‘continue in force’	‘continue to have effect’
‘Crown’	‘Governments’ or ‘Participants’
‘disagreement’ or ‘dispute’	‘difference’
‘done’	‘signed’
‘enter into force’	‘come into operation’ ‘come into effect’
‘mutually agree’	‘jointly decided’
‘obligations’	‘conditions’ ‘terms’ or ‘duties’
‘Parties’	‘Governments’ ‘Participants’
‘rights’ (except where used to refer to “human rights” or “intellectual property rights”)	‘benefits’
‘shall’ ‘must’ ‘undertake to’ ‘agree to’ or ‘undertake’	‘will’ or ‘decide’
‘undertake’	‘carry out’
‘undertakings’ or ‘agreements’	‘understandings’ or ‘arrangements’

Arrangement Practicalities

Approval to sign

We recommend that Ministerial approval be sought to sign international arrangements. Anyone approved by the Minister leading the policy action may sign an arrangement.

It is common for a Minister or Ambassador to sign an arrangement, although senior officials also do so. The rank of the officials signing the arrangement often depends on the nature of the arrangement.

It is also important that the two signatories are of equal or similar level within each system.

For further information please contact MFAT's Treaty Officer.

Timeline for concluding and implementing an arrangement

Concluding and implementing an arrangement can also be a lengthy process. As documents embodying New Zealand's commitments, the negotiation and conclusion of arrangements should be carefully considered. The table below provides a guide for the steps that may be necessary when concluding and implementing an arrangement as a template to follow for the lead agency. The lead agency should consult with the Legal Adviser for International Treaties at an early stage to discuss the relevant steps for any particular arrangement.

Arrangement archive

The treaty officer can help print and bind arrangements for signing. We kindly request agencies send back the signed copies of the arrangement for MFAT to store in its arrangement and treaty archive.

Action	**Actor**	**Date**
Clarify the status of the document and intention of the participants (i.e. that the document is intended to be an understanding rather than legally binding).	Lead Agency in consultation with MFAT Negotiating participants	
Conduct any appropriate consultation	Lead agency	

Consult with MFAT to observe drafting conventions	Lead Agency in consultation with MFAT	
Text of the arrangement finalised	Negotiating Participants	
Ministerial approval is recommended when seeking to conclude an international arrangement. Consideration should be given as to whether Cabinet approval may be required (para 5.12, Cabinet Manual).	Lead Agency in consultation with MFAT	
New Zealand signs the arrangement	Lead Agency in consultation with MFAT	
Any additional steps required for entry into effect	Other participant confirmation	
Seek Publicity Permission	Lead Agency in consultation with Negotiating Participant	

Information sources for International Treaties

MFAT website

The MFAT website (www.mfat.govt.nz) provides basic information on the treaty-making process.

Other relevant websites

New Zealand

- Select Committee Reports (including recently tabled NIAs):

- Cabinet Office:
  www.dpmc.govt.nz

United Nations

- United Nations Treaty Handbook:
  http://treaties.un.org/doc/source/publications/THB/English.pdf

- United Nations Treaty Series:
  https://treaties.un.org/

Australian Treaty Library:

- https://www.austlii.edu.au/au/special/treaties/

UK Foreign and Commonwealth Office Treaty Section:

- www.gov.uk/guidance/uk-treaties

Canadian Treaty Section (Foreign Affairs Canada):

- www.treaty-accord.gc.ca

International Treaty Law

- Vienna Convention on the Law of Treaties:
  legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

New Zealand Treaties Online

New Zealand Treaties Online (NZTO) is a publicly accessible website (www.treaties.mfat.govt.nz) providing an up-to-date public record of New Zealand's binding legal obligations. The site details all of the treaties New Zealand is a party to, providing either a copy of the treaty or a link to the text, a summary of the treaty and other relevant information, such as when it entered into force for New Zealand.

New Zealand treaties

NZTO also maintains a 'Treaties in Progress' section, which has replaced the biannual International Treaties List. 'Treaties in Progress' contains information on all the treaties New Zealand is in the process of negotiating, concluding, ratifying or amending. The lead government agency for a treaty is responsible for keeping 'Treaties in Progress' up to date. Lead agencies should create an entry for a treaty as soon as the fact of the negotiations is public and update this entry as progress through each stage of the treaty making process.

1. In order to create an entry for a 'Treaty in Progress' lead agencies will need a login to enter the administrative website for NZTO (admin.treaties.mfat.govt.nz). Agencies can request a login by emailing treaties@mfat.govt.nz, and sending through relevant contact details (name, agency, position, mobile number, and email).

2. Once agencies have a login, a treaty can be added by clicking "add Treaty in Progress" from the header, filling in the required details, and click "Save Changes". MFAT's treaty team will then review and publish the 'Treaty in Progress' to the publicly accessible NZTO website.

3. As lead agencies update their 'Treaty in Progress' entry, they should also email MFAT's treaty team to indicate that they wish these updates to be published to the public site.

4. Once a treaty is signed, it is no longer considered 'in progress'. The lead agency should update the 'in progress' entry to reflect that New Zealand has signed the treaty and note when it will enter into force, and request that the 'in progress' entry be migrated (if there is no pre-existing treaty entry) or deleted (if there is already a pre-existing treaty entry). Treaties that are not 'in progress' become the Ministry of Foreign Affairs and Trade's responsibility to update and maintain. Agencies should notify MFAT's treaty team that the treaty has entered into force and indicate whether the agreement (including its full text) can be published to the public site.

New Zealand's arrangements

NZTO also includes many of New Zealand's unclassified arrangements, and we strongly encourage agency leads to add entries for new unclassified arrangements to the arrangements section of NZTO. Having as many arrangements publicly available on NZTO as possible facilitates public transparency and also makes it much easier for New Zealand to be consistent across agencies in understanding and implementing our commitments. It can also be important for when MFAT is providing reporting and advice at short notice.

Before you create an entry for an arrangement, please obtain publication permission from your international counterpart to the arrangement.

International Treaties List for Iwi

MFAT releases a list of international treaties New Zealand is currently negotiating or concluding every six months. This information is used as the basis for the six-monthly reports on treaties in progress that are distributed to iwi and Māori organisations and is published on MFAT's website. MFAT will be in touch with lead contacts every six months to ensure entries are up to date.

Glossary

This section, from the United Nations Treaty Collection, 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.

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:

1) 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

2) 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.

Cabinet Manual 2023 – Relevant excerpts

In accordance with **5.14(c)** Ministers are expected to consult relevant ministerial colleagues before submitting papers that deal with significant or potentially controversial matters, or that affect other Ministers' portfolio interests. Where appropriate consultation has not taken place, a paper may be deferred from a particular meeting.

In particular Ministers are required to consult the Minister of Foreign Affairs on all proposals relating to international treaties and New Zealand's strategic international interests.

International treaties and Cabinet

5.78 A treaty is a written agreement between states or international organisations that is governed by international law. Treaties (whatever their particular title) create international legal obligations for the states that have expressed their consent to be bound.

5.79 The steps required to become bound depend on the terms of a given treaty. Sometimes there are two steps: signature, followed by binding treaty action (often called ratification). Sometimes there is only the binding treaty action (for example, accession or definitive signature). Other examples of binding treaty action include changing an existing reservation to a treaty, and termination of or withdrawal from a treaty. An amendment to a treaty may also involve a new treaty (and therefore a binding treaty action).

5.80 Any proposal for New Zealand to sign a treaty or to take binding treaty action must be submitted, with the text of the treaty, to Cabinet for approval. Domestic implementation (including any legislation and consultation) must be completed before binding treaty action is taken. For detailed guidance, see the *CabGuide*.

5.81 Where the Standing Orders require a treaty to be presented to the House for examination before binding treaty action is taken, a national interest analysis must also be prepared and submitted to Cabinet. Guidance on the parliamentary treaty examination process is provided in paragraphs 7.127 – 7.137.

5.82 The Ministry of Foreign Affairs and Trade can provide advice on all aspects of the treaty making process, and on the making of non-binding international instruments (usually called arrangements). Agencies should consult the ministry's legal division at an early stage if they are considering entering into any negotiations that may result in a treaty or arrangement.

General

7.127 In New Zealand, the power to conclude treaties rests with the Executive. Any proposal to sign a treaty or to take binding treaty action must be submitted to Cabinet for approval (see paragraphs 5.78 - 5.82).

7.128 Before the government takes binding treaty action on them, multilateral treaties and major bilateral treaties of particular significance are presented to the House of Representatives for examination. The requirements for parliamentary treaty examination are set out in the *Standing Orders*. The Minister of Foreign Affairs determines whether a bilateral treaty amounts to a major bilateral treaty of particular significance.

7.129 The parliamentary treaty examination process takes time, which agencies must factor into their planning. The government may take binding treaty action before parliamentary treaty examination only where this is urgently necessary in the national interest.

National interest analysis

7.130 Presenting a treaty to the House requires the preparation of a national interest analysis, addressing such matters as the reasons for becoming a party to the treaty, the advantages and disadvantages to New Zealand, and the means of implementing the treaty.

7.131 The agency 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 preparing the national interest analysis according to the requirements of the *Standing Orders*. In cases where a treaty has regulatory impacts, an extended national interest analysis, which includes the elements of an impact statement for a regulatory proposal, must be prepared. The national interest analysis must be approved by Cabinet before it is presented to the House.

Select committee consideration

7.132 Once a treaty and accompanying national interest analysis have been presented to the House, they are referred to the Foreign Affairs, Defence and Trade Committee. This select committee may examine the treaty itself or refer it to another more appropriate select committee.

7.133 The government refrains from taking any binding treaty action in respect of 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 binding treaty action.

7.134 The select committee may seek public submissions. In addition, the House itself may sometimes wish to give further consideration to the treaty: for example, by way of a debate in the House.

7.135 If the select committee report contains recommendations to the government, a government response to those recommendations must be presented within 60 working days of the report (or such other timeframe as specified in the *Standing Orders*). For further information, see paragraphs 7.123 - 7.126, and the section entitled “Reports” in the chapter on select committees in the *Standing Orders*.

Related bills

7.136 Any bill necessary to implement a treaty domestically 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. Agencies may initiate the legislative process earlier, by seeking a place on the legislation programme for the bill and issuing drafting instructions to parliamentary counsel (on a conditional basis).

Further information

7.137 The Ministry of Foreign Affairs and Trade can provide advice on the parliamentary treaty examination process, including guidance on the required format and content of a national interest analysis. Further information is set out in the *CabGuide*.

Standing Orders for international treaties

INTERNATIONAL TREATIES

405 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 to be 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 406, 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.

406 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 relation to paragraph (1)(g), a national interest analysis must indicate whether or not the Government intends for the treaty to be implemented through a bill.

3) 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.

4) In the case of a treaty that has been subject to ratification, accession, acceptance, or approval and that is to be 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.

407 Select committee consideration of treaties

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

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

408 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.

4) If the Government intends for the treaty to be implemented through a bill, the committee must draw this to the House’s attention.