

## David Wilson – Written Evidence (TWP0015)

### Political and policy context

1. New Zealand is a liberal democracy with an open economy, of which primary produce generally has been the biggest export sector. New Zealand strongly supports rules-based, multilateral international arrangements, as well as pursuing close bilateral relationships.
2. The Ministry of Foreign Affairs and Trade has articulated that, “New Zealand is pursuing its interests in a turbulent environment where the risks for small countries are acute”.<sup>1</sup> There is an increasing emphasis by the Government on engagement with, and support for, Pacific nations. Growth in Asian economies and increased global connectedness have benefited New Zealand. Clearly the COVID-19 pandemic is having a huge impact, though its duration and ongoing effect are very difficult to predict.
3. Foreign policy generally enjoys a bipartisan approach, despite an acknowledged “lack of information available to members outside the Executive”.<sup>2</sup> The Foreign Affairs, Defence and Trade Committee currently is chaired by an Opposition member.<sup>3</sup> Naturally, policy and operational matters are subject to robust discussion during question time in the House and in the course of regular committee scrutiny.<sup>4</sup>
4. Trade agreements have occasionally given rise to contention.<sup>5</sup> However, there has been consistent cross-party support for developing a network of free trade agreements, which have contributed a great deal to increased export earnings.
5. The House operates a structure of multifunctional subject select committees. This means that the same committees tend to consider bills, inquiries, and petitions, conduct financial scrutiny, and examine international treaties, within their respective subject areas.
6. Over the years, the Foreign Affairs, Defence and Trade Committee has conducted many briefings and inquiries into relationships between New Zealand and other countries and regions, including trade

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<sup>1</sup> Ministry of Foreign Affairs and Trade, [Briefing to the Incoming Minister of Foreign Affairs](#), October 2017, p 6.

<sup>2</sup> Foreign Affairs, Defence and Trade Committee, [2019/20 Estimates for Vote Foreign Affairs and Trade and Vote Official Development Assistance](#), July 2019, p 2.

<sup>3</sup> Simon O’Connor, National Party. The Deputy Chairperson, Hon Gerry Brownlee, is also a member of the National Party.

<sup>4</sup> For example, Foreign Affairs, Defence and Trade Committee, [2018/19 annual review of the Ministry of Foreign Affairs and Trade](#), March 2020.

<sup>5</sup> Report of the Foreign Affairs, Defence and Trade Committee, [International treaty examination of the Trans-Pacific Partnership Agreement](#), 4 May 2016.

relationships.

### **Crown prerogative**

7. The Crown's external relations prerogative is recognised in New Zealand. The Foreign Affairs Act 1988 provides expressly that it does not extinguish any power or authority exercisable by virtue of the Crown's prerogative.<sup>6</sup> The prerogative belongs to the Sovereign in right of the Realm of New Zealand, with external relations carried out by Ministers on behalf of the Crown.<sup>7</sup>
8. As the external relations prerogative exists in law and is exercised outside the sphere of parliamentary proceedings, the approach in New Zealand has been that the House should not attempt to use its procedures to abrogate or diminish the prerogative. An appropriate mechanism to do so would be through legislation. A Member's bill to this effect was introduced in 2000, but later defeated.<sup>8</sup>
9. On the other hand, the Government has voluntarily modified the exercise of the prerogative by supporting the examination of international treaties after they are finalised but before ratification. It has done so through Cabinet decisions to incorporate parliamentary consideration in the treaty process, which are now set out in the Cabinet Manual,<sup>9</sup> and by facilitating the House's adoption of the treaty examination procedure. This examination procedure is summarised below.

### **Domestic law**

10. While the Government's agreement to a treaty is binding at international law, treaties do not become part of the law in New Zealand without being implemented through or under an Act of Parliament:<sup>10</sup>

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.

11. New Zealand therefore can be characterised as "dualist", rather

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<sup>6</sup> [Foreign Affairs Act 1988](#), s 13.

<sup>7</sup> Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 4th ed, Thomson Reuters, at [18.4(2)].

<sup>8</sup> International Treaties Bill, introduced by Keith Locke, Green Party, in 2000.

<sup>9</sup> [Cabinet Manual](#), 2017, at [7.123–7.133].

<sup>10</sup> Ministry of Foreign Affairs and Trade, [International Treaty-making Guide](#), August 2019, pp 5–6, drawing on the Law Commission, [A New Zealand Guide to International Law and its Sources](#), (NZLC R34), May 1996, at [43].

than “monist” in its approach, requiring “the conscious and explicit translation of international law into national law for the former to have any effect within a state”.<sup>11</sup>

12. The Government’s “invariable practice” is that, where legislation is required to enable implementation of a treaty, the relevant measure will be passed “prior to ratifying or acceding to the treaty”.<sup>12</sup>

### **Committee engagement with international treaty negotiations**

13. New Zealand does not provide a model for parliamentary engagement with the Government’s conduct of treaty negotiations or with interested stakeholders. This is because there are no procedures of the House and its committees that involve systematic scrutiny of international treaty negotiations while they are taking place. The House also is not involved in providing negotiating mandates before negotiations begin. As discussed above, the approach is for treaties to be examined by the House after the text is finalised, but before binding action is taken.
14. When an international treaty is subsequently presented to the House for examination, the accompanying national interest analysis (see below) must include information about the Government’s consultation with stakeholders and interested parties.
15. The Standing Orders Committee in 2003 discussed the idea of treaties being examined at an early stage, for example during the negotiation phase. The committee acceded to the view of the then Minister of Foreign Affairs and Trade that examination of proposed international agreements during negotiations “would undermine the Government’s position”. However, it noted that committees could initiate briefings or inquiries at any time, including to receive information about draft or proposed treaties.<sup>13</sup>
16. The Standing Orders Committee recommended in 2003 that the Government circulate an International Treaties List to all subject select committees on a 6-monthly basis, with an invitation to committees to receive briefings on treaties of interest.<sup>14</sup> The Government agreed to this recommendation, except that it asked that any requests for briefings should be channelled through the Foreign Affairs, Defence and Trade Committee, and that the provision of information would be “subject to existing caveats where

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<sup>11</sup> Dr Kennedy Graham, “Guiding Principles for Modernising Parliament”, *Australasian Parliamentary Review*, 31(1), Autumn/Winter 2016, at pp 32–34.

<sup>12</sup> Ministry of Foreign Affairs and Trade, *International Treaty-making Guide*, August 2019, p.6.

<sup>13</sup> Standing Orders Committee, *Review of Standing Orders* (I.18B), December 2003, p 77.

<sup>14</sup> *Ibid*, Recommendation to the Government No 4.

confidentiality needs to be preserved”.

17. While the circulation of the International Treaties List did ensue, the practice appears to have been discontinued. But the Foreign Affairs, Defence and Trade Committee retains the right to request a briefing about treaties under negotiation. If necessary, select committees can choose to receive evidence in private or in secret in order to facilitate the provision of information.
18. It is not unusual for the Foreign Affairs, Defence and Trade Committee to receive general updates and discuss the progress of trade negotiations during its annual examinations of the Estimates and annual reviews of the Ministry.

### **Presentation to House of treaties and national interest analyses**

19. The House adopted a procedure for the presentation and examination of international treaties on a trial basis in 1998, and then as a permanent feature of the Standing Orders in 1999. This followed recommendations made in the report on an inquiry by the Foreign Affairs, Defence and Trade Committee in 1997.
20. International treaties are presented to the House of Representatives when they are subject to ratification, accession, acceptance, or approval. There are exceptions to this general rule: not all bilateral treaties are presented (with criteria applied by the Minister of Foreign Affairs); and treaties can be presented that have already been subject to ratification, accession, acceptance, or approval on an urgent basis in the national interest.
21. International treaties must each be accompanied by a national interest analysis when presented to the House. The Standing Orders set out the matters that must be addressed in a national interest analysis,<sup>15</sup> including:
  - reasons for New Zealand becoming party to the treaty
  - advantages and disadvantages for New Zealand
  - obligations imposed on New Zealand, and reservations to the treaty
  - economic, social, cultural and environmental effects
  - New Zealand’s costs of compliance
  - measures needed or intended to implement the treaty, including legislation
  - consultation undertaken with the community and interested parties.
22. In particular, the Government must indicate whether or not it intends

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<sup>15</sup> [Standing Order 398](#).

for the treaty to be implemented through a bill.

### **Examination by select committee**

23. The Foreign Affairs Defence and Trade Committee then either examines the treaty itself, or, if the subject area of the treaty is primarily within the terms of reference of another select committee, refers the treaty to that committee.<sup>16</sup> This approach is consistent with New Zealand's system of multifunctional subject select committees that consider policy matters within their own subject areas.
24. The Government undertakes not to proceed with further binding action in respect of the treaty until after the select committee reports on it, or 15 sitting days have elapsed following the treaty's presentation, whichever is sooner.<sup>17</sup> (Normally 15 sitting days would amount to about 7 calendar weeks.) This means there is some pressure on the select committee to meet this deadline. A committee can indicate that it needs more time, in which case the Government can consider a deferral of further action.<sup>18</sup>
25. The examination of the treaty, and the accompanying national interest analysis, is similar to the process for an inquiry, although the reporting deadline can constrain evidence-gathering. A select committee might refrain from a full public submissions process, and focus on identifying experts and affected parties to invite to make submissions. However, an open call for submissions might be made on a treaty of high public interest.
26. In its report, the select committee must—
  - consider whether the treaty ought to be drawn to the House's attention
  - append the national interest analysis, and
  - highlight if the Government intends to implement the treaty through a bill.
27. Roughly 10 percent of select committee reports on international treaty examinations relate to trade agreements.<sup>19</sup>
28. Occasionally, select committees reporting on trade agreements have commented substantively on the negotiating process.<sup>20</sup> These comments have usually been minority views expressing dissatisfaction with the confidentiality of negotiations or the lack of community

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<sup>16</sup> [Standing Order 399](#).

<sup>17</sup> Cabinet Manual, 2017, at [7.129].

<sup>18</sup> Ibid.

<sup>19</sup> Of the approximately 180 reports published online since 2002, 17 related to trade agreements. Note that a few reports relate to two or more international treaty examinations.

<sup>20</sup> Such comments appeared in 4 of the 17 reports on trade agreements.

engagement.

### **Parliamentary scrutiny and debate**

29. Until recently, the House normally did not debate select committee reports on international treaty examinations. Instead, it was expected that the House would express its view on any legislation that was introduced to implement the treaties concerned.
30. In 2017, the Standing Orders Committee was concerned that the House was expected to pass legislation without first considering the treaty that prompted it:<sup>21</sup>

Select committee consideration of treaties is intended to scrutinise the case for entering into a treaty as a matter of principle, whereas implementing bills are considered within the framework of the regular legislative process—debate on the bills should focus primarily on the proposed law changes themselves. In light of this distinction, we believe that in cases where primary legislation is required to implement a treaty, the House’s involvement in the process would be improved by debating the select committee report on the treaty, before debating the implementing bill.

31. The committee therefore recommended a new procedure where the House debates the report on each treaty that the Government intends to implement through bill. In return, the bill that implements the treaty can receive its first reading without the debate that normally would occur at that stage.
32. This procedure has now operated several times during the current term of Parliament, and generally is regarded as a successful change that recognises the House’s legislative authority without diminishing the external relations prerogative.

### **Amendments and disputes**

33. Amendments to treaties are subject to the same international treaty examination procedure as treaties themselves. It is for the select committee concerned to judge the scale of each examination, depending on the nature of the agreement and the political context.
34. There is no formal mechanism for informing the House of disputes that have arisen under international agreements. The Trade Law Unit of the Ministry of Foreign Affairs and Trade assesses whether trading partners are adhering to WTO and other trade agreements, and reports on the Ministry’s website when New Zealand is party to a WTO dispute.<sup>22</sup>

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<sup>21</sup> Standing Orders Committee, [Review of Standing Orders](#), I.18A, 2017, pp 39–40.

<sup>22</sup> Ministry of Foreign Affairs and Trade, “Trade law and dispute settlement”,

35. Issues relating to dispute settlement were of high public interest recently, in relation to the investor state dispute settlement (ISDS) mechanism proposed for the Trans-Pacific Partnership Agreement (TPP). The TPP was revised, with a number of its provisions suspended, and subsequently adopted as the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP). The Government argued that the ISDS mechanism proposed in the CPTPP was narrower in scope, with additional safeguards, when compared with the ISDS provisions in the TPP.<sup>23</sup> This was an important question for the House to consider when dealing with the legislation to implement the CPTPP.

## Conclusion

36. New Zealand's procedures for examining international treaties provide an effective mechanism for holding the Government to account for entering into agreements on the country's behalf. The House and its committees generally have no involvement in the negotiations phase, but the Government does not take binding action without first subjecting each treaty to scrutiny. Any treaty that requires implementation through primary legislation is debated before the relevant bill is introduced, and the legislation must be passed before the treaty is finally ratified.
37. These arrangements seek to balance the Crown's external relations prerogative with the House's own pre-eminent authority to legislate and scrutinise.

More detail about the international treaty examination procedure can be found in *Parliamentary Practice in New Zealand*.<sup>24</sup> Please feel free to contact me if you would like further information, or if an appearance by videoconference would be useful.

I am grateful to the Parliamentary Library for assisting with research for this submission.

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<https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/>, accessed 5 June 2020. At that date, the website indicated that "New Zealand is currently involved in six [WTO] disputes, one as a principal complainant and a further five as a third party to other members' disputes".

<sup>23</sup> Ministry of Foreign Affairs and Trade, "CPTPP vs TPP", <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/tpp-and-cptpp-the-differences-explained>, accessed 5 June 2020.

<sup>24</sup> Mary Harris and David Wilson (eds), *Parliamentary Practice in New Zealand*, 4th ed, Oratia Books, 2017, [Chapter 42](#).

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