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Appendix E – Additional Papers

Ms Dianne Yates MP, Treaty Review in New Zealand

Paper to the Joint Standing Committee on Treaties Seminar, Canberra, 30-31 March 2006

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History of New Zealand's Treaty Process

New Zealand acquired the right to make treaties independently of Britain at the 1923 Imperial Conference, which followed on from the Treaty of Versailles in 1919. Before this New Zealand had simply acceded to treaties made by Britain. Since then the power to take binding treaty action has been the sole prerogative of the Executive.

Strictly speaking, the power of the Crown in New Zealand to make treaties does not derive from parliamentary enactment, as it does in some other political systems. Nor is a treaty entered into by the Crown required to be ratified or endorsed by the House of Representatives. The treaty-making process in New Zealand has been modified somewhat over the years. There have been reviews, the most significant one in 1999, and their recommendations have been largely accepted by the Government. There was also a report from the Foreign Affairs Defence & Trade Committee on an unsuccessful private member's bill, the International Treaties Bill, in 2001. The report considered whether a Treaties Committee should be established, but this has not happened; treaties are referred to the Foreign Affairs Defence

& Trade Committee in the first instance, and then referred to appropriate subject committees depending on their specific content. Recent evidence would suggest that subject committees are better able to examine the content of treaties in relation to New Zealand law. Modifications now take account of the wider diversity of views represented in Parliament since the adoption of proportional representation in the form of Mixed Member Proportional electoral system in 1993. This has meant that a wider range of opinion is represented in Parliament. There is also, , a higher degree of public interest and awareness of international events and international law- and treaty-making, largely as a result of faster, more pervasive communication.

New Zealand Law and Treaty Powers

Whilst treaties are binding at an international level, longstanding legal doctrine inherited by New Zealand has held that a treaty is not in itself a source of law that can confer legal powers or duties on persons within New Zealand. The Crown cannot change New Zealand law by the expedient of entering into a treaty; only the New Zealand Parliament can change New Zealand Law. If the implementation of a particular treaty has implications for New Zealand law, then it is necessary for the Government to ask Parliament to change the law to accommodate these implications. In fact, New Zealand's treaty-making practice is to ensure that domestic law is compatible with a treaty's obligations *before* New Zealand becomes bound by it. The legal division of the Ministry of Foreign Affairs and Trade oversees the process by which the New Zealand Government enters into, withdraws from, or denounces treaties.

Current Processes – Bilateral and Multilateral Treaties

Bilateral Treaties

To quote from the Clerk of the New Zealand House of Representatives:

"Most treaties that the Government enters into ... are agreements with one other state; that is, bilateral treaties".

If a bilateral treaty is significant, it is subject to a process of ratification or post-signature acceptance, and it will be presented to the House under the Standing Orders for examination.

The undertaking from the Government to the House is that any major bilateral treaty of particular significance (as determined by the Minister of Foreign Affairs and Trade) will be presented for examination. The Government thus retains a large measure of discretion as to whether bilateral

treaties are examined. In practice, most bilateral treaties entered into are not presented to the House for examination, though the proportion is increasing.

The Minister of Foreign Affairs and Trade has developed criteria for determining which bilateral treaties should be submitted to the parliamentary examination process. Treaties should be examined if they meet any of the following conditions:

- The subject matter of the treaty is likely to be of major public interest;
- The treaty deals with an important subject on which there is no ready precedent;
- The treaty deals with an important subject and departs substantively from previous models;
- 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 specific period;
- The treaty is to be implemented by way of overriding treaty regulations;
- The treaty is a major treaty that New Zealand seeks to terminate;
- The Foreign Affairs, Defence and Trade Select Committee indicates its interest.

Progress on bilateral treaty negotiations is included in the International Treaties List and in briefings given to the Foreign Affairs, Defence and Trade Committee. In the course of the forty-sixth Parliament (1999–2002), three major bilateral treaties were presented for examination. A select committee with appropriate terms of reference can initiate its own examination of a bilateral treaty under its general inquiry power.

For example:

In June 2002 a public discussion document was issued by Government on a proposed treaty to establish a trans-Tasman joint agency to regulate therapeutic products.

In September 2002 the New Zealand Health Select Committee initiated an inquiry into this therapeutic products agreement.

In December 2003 a treaty was signed by the Government, and in the same month the select committee report on its Inquiry was reported to Parliament. This report made a large number of recommendations, the most significant of

which was that the Government pursue an alternative, mutual-recognition regulatory option rather than a joint agency with Australia. In a response to this report, the Government accepted many of the 34 recommendations.

In March 2004 the treaty itself was presented to Parliament, along with a National Interest Analysis.

In June 2004 the Health Select Committee reported back on its consideration of the National Interest Analysis. This second report suggested that the Treaty should not be ratified by legislation until specific recommendations, especially those regarding New Zealand's powers to make regulations, had been adopted. The concern in this case is that rules should not be made by treaty unless authority is conferred by New Zealand legislation.

The matters are still being considered in on-going negotiations as the Government develops legislation and bilateral instruments with Australia to complete the treaty process.

Multilateral Treaties

Multilateral treaties are presented to the House after they have been signed by the Government (but before they become fully binding) though there is nothing to prevent a treaty being presented before the Government has signed it.

While, in principle, multilateral treaties are to be presented for parliamentary examination before they become binding, it is recognised that there may be circumstances in which a treaty must be entered into immediately in the national interest, without the opportunity for prior parliamentary examination. Where this happens, and an urgent multilateral treaty has become binding, the treaty still has to be presented to the House, in this case as soon as possible after the binding treaty action has been taken".

In the case of the "P4" treaty – the Trans-Pacific Strategic Economic Partnership, between New Zealand, Chile, Brunei-Darussalam, and Singapore– consultations with the signatories began in 2003

New Zealand's internal consultations also began in 2003, with the Ministry of Foreign Affairs and Trade circulating a paper outlining the main objectives of the treaty.

In the process of compiling the National Interest Analysis, consultation extensive, involving stakeholders groups ranging from Chambers of Commerce to Maori organisations interested in intellectual and cultural property.

The National Interest Analysis statement was considered by the Foreign Affairs, Defence and Trade Select Committee, which also called for and heard submissions on the National Interest Analysis and reported back to Parliament. This report was debated.

Last week the House passed legislation to amend the 1988 Tariff Act to align domestic law with the Treaty, allowing the P4 agreement to be signed and come into effect on 1 May 2006.

Public Input

Major treaties are agreed in principle by Government, then public consultation is undertaken, sometimes over a period of years, before a treaty is presented to Parliament.

Officials endeavour to consult interested parties and stakeholders in the course of treaty negotiations, ensuring that New Zealand's wider interests are taken into account. For example, in November 2002 the Ministry of Foreign Affairs and Trade organised and conducted a wide-ranging communication and consultation programme regarding the Trans-Pacific Strategic Economic Partnership agreement (or 'P4'). The programme included a number of studies and papers, which were distributed to interested parties and were made readily available to the wider public. The consultation programme included meetings and correspondence with various companies, organisations, and Maori. This consultation process elicited over 130 submissions and responses from a wide range of individuals and organisations, including over 50 submissions from companies and over 20 submissions from business or sector organisations.

The department with the main policy interest in a treaty is general responsible for developing the National Interest Analysis, a report which must be approved by Cabinet and which must address (according to Standing Orders) the following matters:

- The reasons for New Zealand becoming a party to the treaty;
- The advantages and disadvantages;
- The economic, social, cultural, and environmental effects of the treaty entering into force;
- The costs of compliance;
- The possibility of any subsequent protocols and their likely effects;
- The measures to be adopted in implementing the treaty;

- A statement setting out the consultation process;
- Whether the treaty provides for withdrawal or denunciation.

The National Interest Analysis is provided to the select committee to assist the committee in its examination of the treaty. The select committee reporting on a private member's bill in the name of Green MP Keith Locke (he was defeated in February 2003) suggested that the National Interest Analysis was deficient in not demanding quantitative cost-benefit analysis. Interestingly the subsequent Health Select Committee Inquiry into the trans -Tasman therapeutic goods joint agency also solicited such an analysis.

Select Committee consideration

Once a treaty has been presented to Parliament, it is referred to the Foreign Affairs, Defence, and Trade Select Committee. This committee may inquire into the treaty itself, or if the subject matter of the treaty falls within the terms of reference of another subject select committee, then the treaty must be referred to that committee. In the case of the trans-Tasman treaty on therapeutic goods, it was referred to the Health Select Committee.

As part of the process of inquiry, the select committee may advertise in the major newspapers for public submissions, and it may hold public hearings.

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, on any of the grounds covered by the national interest analysis, or for any other reason. Except in very rare or urgent circumstances, the Government refrains from taking any binding action in relation to a treaty until either the relevant committee has reported, or 15 sitting days have elapsed from the date of presentation. 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 any binding treaty action. As we have seen with the Health Committee, it held an inquiry into the therapeutic goods treaty.

The House itself may sometimes wish to have a further opportunity for discussion of the proposed treaty action, for example, by way of a debate in the House. This happened in relation to the New Zealand/Singapore Closer Economic Partnership agreement, which was presented to the House by the Foreign Affairs, Defence and Trade Select Committee in October 2000, and again this year on the "P4" agreement.

It is important to note that although a vote is taken by Parliament on the report presented to the House by the select committee, this doesn't mean that

any formal powers of treaty approval have been ceded to Parliament – authority concerning treaty action remains with the Executive.

Recommendations, negotiation and amendments

If the select committee report contains recommendations to the Government, a Government response to those recommendations must be tabled within 90 days of the report. In my example of the Health Select Committee in 2004, the committee recommended to the Government that it not become a party to a treaty to establish a joint agency for the regulation of therapeutic products, unless a number of recommendations were followed in the implementing legislation regarding therapeutic products. The Government addressed the select committee's recommendations in its response, and implementing legislation taking account of the recommendations is in the process of being formalised with the Australian Government.

The Minister of Foreign Affairs and Trade may wish to discuss the content of a select committee report on an international treaty with Cabinet colleagues before the Executive takes binding treaty action. Any legislation necessary to implement a treaty should not be introduced into the House until the treaty has been presented to the House and the time for reporting back on the National Interest Analysis has expired. The Government will not take binding treaty action until the treaty is implemented in New Zealand's domestic law. Once formal treaty action (such as ratification or accession) has been completed, New Zealand is bound to the obligations in a multilateral treaty. For bilateral treaties, on the other hand, signature is usually the binding step in the process.

Conclusion

New Zealand has entered the new domain of providing for Parliament and the public to be consulted in advance, as part of the process by which the Executive undertakes New Zealand treaty actions. The Government's decision to forbear to take multilateral treaty actions until the House has been consulted is a significant step.

Parliament's desire for a role in the international treaty process has been debated in many quarters; and in the MMP political environment, where the actions of the Executive may not always represent the majority of parliamentarians, how the House might express its view on a proposed treaty action assumes even greater importance. The exercise of parliamentary scrutiny does not, of itself, prevent the Executive from undertaking international treaty actions. However, it is possible that a future Parliament may object outright to a particular treaty. The relevant select committee has

the opportunity to express its view by making a report to the House. Debates between members in the House on these reports also provide an opportunity for opinions to be aired. Both avenues arguably allow more productive contributions than the blunt threat of preventing the passage of proposed legislation, where legislation is required before New Zealand can become party to treaty. This was the only option available to Parliament before the implementation of the new procedures.

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