

OFFICIAL

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Manatū Aorere



18 November 2022

Minister of Foreign Affairs

For action by

25 November 2022

International Treaty Making – Improvements to Aotearoa New Zealand's Processes

BRIEFING Cabinet Paper Covering Submission

PURPOSE To seek your agreement to submit the attached Cabinet paper.

Tukunga tūtohua – Recommended referrals

Prime Minister	For information by	25 November 2022
Minister for Māori Crown Relations: Te Arawhiti	For consultation by	25 November 2022
Attorney-General	For consultation by	25 November 2022
Minister for Trade and Export Growth	For consultation by	25 November 2022
Minister for Māori Development.	For consultation by	25 November 2022
Minister of Justice	For consultation by	25 November 2022
Associate Minister of Foreign Affairs	For information by	25 November 2022
Minister of State for Trade and Export Growth	For information by	25 November 2022

Whakaritenga wātaka - Timing requirement

Complete consultation	By 10 am on 7 December 2022
In Cabinet Office	By 10 am on 8 December 2022
For Cabinet Economic Development Committee (DEV) meeting	on 14 December 2022
For Cabinet meeting	on 19 December 2022

Taipitopito whakapā – Contact details

NAME	ROLE	DIVISION	WORK PHONE
Shannon Tau	Unit Manager	Legal Division	s9(2)(a)
Andrew Williams	Chief International Legal Adviser (Acting)	Legal Division	

Mā te Tari Minita e whakakī - Minister's Office to complete

<input type="checkbox"/> Approved	<input type="checkbox"/> Noted	<input type="checkbox"/> Seen
<input type="checkbox"/> Needs amendment	<input type="checkbox"/> Declined	<input type="checkbox"/> Withdrawn
<input type="checkbox"/> Overtaken by events	<input type="checkbox"/> See Minister's notes	

Comments

IN CONFIDENCE

RECEIVED

Waitangi Tribunal

4 Dec 25
 Ministry of Justice
WELLINGTON

Pito mātua – Key points

- This submission seeks your approval to submit the attached *International Treaty Making – Improvements to Aotearoa New Zealand's Processes* Cabinet paper to Cabinet's DEV Committee on 14 December 2022.
- The paper proposes improvements to aspects of Aotearoa New Zealand's international treaty making process, and seeks to take advantage of the window for change provided by the triennial Review of Standing Orders.
- As part of implementing the Government response to the recommendations of the Trade-for-All Advisory Board (TFAAB), the Ministry of Foreign Affairs and Trade (MFAT) was directed by Cabinet in March 2021 [DEV-21-MIN-0047, CAB-21-MIN-0084] to "report back to the Minister of Foreign Affairs and other relevant ministers on the issues relating to New Zealand's treaty making process by the end of March 2022."
- Following this advice, on 13 July 2022 you directed officials to prepare a Cabinet paper that seeks a constructive and pragmatic package of changes that can be implemented via Executive action, Cabinet decision, through the Standing Orders Review and completed within the current parliamentary term.
- If Cabinet agrees, you would write to the Chair of the Standing Orders Committee this year setting out the Government's view on a suitable package of changes so that they might be considered as part of the ongoing Review of Standing Orders prior to the 2023 General Election and requesting a specific public consultation process. Then when the Standing Orders Committee reported back, corresponding changes would be made to the Cabinet Manual and other related documents.
- While neither the TFAAB, nor the Waitangi Tribunal, nor FADTC has suggested changes be made to New Zealand's constitutional responsibilities for treaty making, this process may elicit calls from civil society and others to go further and provide a greater role for Parliament (for example, a parliamentary right of veto). It is also likely that the changes proposed in this paper will not fully meet the expectations of some Tiriti partners who advocate for systemic constitutional change.
- However, officials consider that the paper proposes a credible package of improvements which advance relevant issues and recommendations, increase the role of Māori and the wider public in treaty making, and promote further transparency and scrutiny. The changes proposed do not seek to change the Executive's prerogative for treaty-making.
- The only substantive issue that has arisen during departmental consultation is that Te Puni Kōkiri is advocating for a review of the 2001 Strategy for Engagement with Māori on International Treaties to occur by April 2023. MFAT's view is that the timing of such a review is not tenable and would pre-empt the changes proposed in this paper. It would also considerably expand the scope of this paper and is likely to open up significant constitutional questions.
- MFAT's view is that it would be more appropriate to conduct any review of the 2001 Strategy once the changes in this paper have been implemented.



Victoria Hallum
for Secretary of Foreign Affairs and Trade

Tūtohu – Recommendations

It is recommended that you:

1 **approve** the attached Cabinet Paper for lodging

Yes / No

Hon Nanaia Mahuta
Minister of Foreign Affairs / Minita Take Aorere

Released under the Official Information Act

In Confidence

Office of the Minister of Foreign Affairs

Cabinet Economic Development Committee

INTERNATIONAL TREATY MAKING – IMPROVEMENTS TO AOTEAROA NEW ZEALAND’S PROCESSES

Proposal

- 1 This paper proposes improvements to aspects of Aotearoa New Zealand’s international treaty making process through changes to the Parliamentary Standing Orders, the Cabinet Manual and the CabGuide.

Relation to Government Priorities

- 2 The proposals in this paper:
 - 2.1 fulfil commitments by the Government to respond to the report of the Trade-for-All Advisory Board (TFAAB);
 - 2.2 form part of the Government’s response to Wai 262;
 - 2.3 provide greater openness and transparency in how New Zealand concludes international treaties, including facilitating more effective engagement with Māori.

Executive Summary

- 3 International treaties are binding agreements between states. They create formal legal obligations between New Zealand and other countries on a range of important issues including trade, security, human rights, and the environment. The rules created by treaties create significant benefits for New Zealand and underpin an international order founded on international law. Treaty making is the prerogative of the Executive but given treaties can have significant implications, New Zealand has a well-established domestic process to provide for public and Parliamentary engagement to build and maintain public confidence and support for international treaties.
- 4 The current treaty process was established in 2000, and has come under some scrutiny in recent years, including in the report of the Trade-for-All Advisory Board, the Wai 262 and Wai 2522 reports of the Waitangi Tribunal, and in the 2020 Review of Standing Orders. This paper responds to some issues arising from the Trade-for-All process that relate to New Zealand’s international treaty making process. The paper also takes the opportunity to pro-actively address related recommendations and issues from the Waitangi Tribunal and from the Foreign Affairs, Defence and Trade Committee (FADTC) during the last review of the Standing Orders.

- 5 This paper's recommendations do not seek to fundamentally alter the Executive's prerogative for foreign affairs (which would require a first principles review of current constitutional settings) nor seek to address all recommendations from the processes described above. The recommendations do make important incremental improvements to the existing process and take advantage of the limited window for change provided by the triennial Standing Orders Review.
- 6 The improvements proposed in this paper seek to enhance the balance between the Government's important role in negotiating and concluding treaties, the role of Māori as Tiriti partner¹, and the wider public and Parliament in the treaty-making process. The changes aim to:
 - 6.1 improve the process and timing of international treaty making, including aspects of Parliamentary Treaty Examination (PTE) and the interaction with Select Committees;
 - 6.2 enhance the decision-making process and transparency regarding which treaties are subject to PTE;
 - 6.3 enhance the content of the National Interest Analysis that accompanies a proposed treaty action;
 - 6.4 allow for greater Māori and stakeholder participation in the international treaty making process, including participation in international delegations, where appropriate; and
 - 6.5 consider the ongoing role of the 2001 Cabinet Strategy for Engagement with Māori on International Treaties (*the 2001 Strategy*²).
- 7 If agreed, the changes would need to be implemented through changes to the Standing Orders, Cabinet Manual and CabGuide, and a range of departmental policies. I propose to write to the Chair of the Standing Orders Committee setting out the Government's view on a suitable package of changes so that they might be considered as part of the ongoing Review of Standing Orders prior to the 2023 General Election and requesting a specific public consultation process. When the Standing Orders Committee reports back, corresponding changes can be made to the Cabinet Manual and other related documents.

Background

- 8 As part of implementing the Government response to the recommendations of the Trade-For-All Advisory Board (TFAAB), officials were directed by Cabinet in March 2021 to "report back to the Minister of Foreign Affairs and other

¹ References to Tiriti or Te Tiriti refer to Te Tiriti o Waitangi / the Treaty of Waitangi and its principles.

² The 2001 Strategy is a Cabinet approved document [CAB Min (01) 10/40]. It sets out a process for determining Māori interests in relation to international treaties and the associated engagement.

relevant ministers on the issues relating to New Zealand's treaty making process" [DEV-21-MIN-0047, CAB-21-MIN-0084]³.

- 9 The initial Cabinet direction acknowledged that the TFAAB recommendations raised issues connected to New Zealand's treaty making process that applied to policy areas beyond trade and to Standing Orders. Also, that the treaty making process was a potential component of the Government's response to Waitangi Tribunal claim, Wai 262⁴.

Aotearoa New Zealand's international treaty making process

- 10 Treaties are the foundation of the international rules-based system, and continue to be an important foreign and trade policy tool for New Zealand. In New Zealand, as in most countries, the power to negotiate and enter into treaties rests with the Executive branch of Government. This is because, historically, treaty making is part of the Executive's foreign affairs prerogative. The foreign affairs prerogative is a core part of the Crown's kawanatanga under Te Tiriti o Waitangi as acknowledged in the Wai 262 and Wai 1040 reports. To substantively change this prerogative would be a significant constitutional step. Neither of the two private members bills⁵ in the last 20 years seeking a significantly increased role for Parliament in the treaty making process proceeded past second reading.
- 11 New Zealand's existing international treaty making process has been in place since 2000 when Parliamentary Treaty Examination (PTE) was introduced to address concerns about the lack of Parliamentary involvement with respect to treaties. It enables Parliament (through a Select Committee process) to consider a treaty and make recommendations to the government before New Zealand becomes bound by the treaty. Annex One further outlines New Zealand's treaty making process.
- 12 Over the years, the number of international treaties has grown and these treaties have become increasingly linked to areas of domestic policy. With this has come an increased level of public interest, and at times concern, particularly where the obligations contained in treaties were perceived to constrain the Government's future policy freedom. Expectations for the Government's engagement with Māori as Tiriti partner, and the wider public on these matters, including with respect to treaties, have increased and this is also reflected in the TFAAB report.

³ The Trade for All Advisory Board was appointed to provide the Government with an independent report with recommendations on our trade policies and negotiations.

⁴ The Waitangi Tribunal's report responding to the Wai 262 claim, Ko Aotearoa Tēnei was issued in 2011. The consolidated Government response to the claim and report is through Te Pae Tawhiti, a process led by Te Puni Kōkiri with contributing agencies across Government. The updated work programme for Te Pae Tawhiti was approved by Cabinet on 1 February 2022 [CAB-22-MIN-0003].

⁵ International Treaties Bill 2000 (Keith Locke MP), International Transparent Treaties Bill 2017 (Fletcher Tabuteau MP). Both bills would have required Parliamentary approval of treaties before they become binding.

What are the Government's interests in the treaty making process and what are the risks in taking action?

- 13 There are good practical and conceptual reasons for the Executive's foreign affairs prerogative, including the power to effectively negotiate and enter into treaties.
- This ensures New Zealand speaks with one voice on the international stage and maintains the flexibility to respond to urgent issues that arise unexpectedly. In the context of treaty making, it is important for maintaining the confidence of other States that the Executive is able to deliver on the commitments that it has negotiated.
 - Requiring greater transparency in international treaty making involves risks that do not arise with national legislation. For example, there is the risk that revealing negotiating positions can decrease the chances of achieving the best outcomes for New Zealand – including for concurrent and future negotiations.
 - In many cases, New Zealand's ability to influence the obligations contained in a treaty (and sometimes negotiation time-frames) will be low or will need to be highly targeted – for example, in multilateral treaty negotiations involving many States. This supports the idea that the treaty making process may be justifiably different from the legislative process.
- 14 On the other hand, transparency and public understanding of, and involvement in decision-making is essential to democracy and good public policy development, including in relation to international treaties. The Government's obligations to Māori, as Tiriti partner, are also an essential component of international treaty making where Māori interests are engaged. For example, as part of the Crown's exercise of kawanatanga, appropriately identifying, reflecting, and, where necessary, actively protecting Māori interests, is essential.
- 15 While not all treaties require changes to New Zealand legislation to implement, international obligations are binding and can require a range of policy and administrative measures to implement. Treaties may also inform the content of future policy development and legislation and influence judicial decisions.
- 16 While neither the TFAAB, the Waitangi Tribunal, nor FADTC has suggested changes be made to New Zealand's constitutional responsibilities for treaty making, I expect some calls from civil society and others to go further and seek a greater role for Parliament (for example, a parliamentary right of veto). It is also likely that the changes proposed in this paper will not fully meet the expectations of some Tiriti partners who advocate for systemic constitutional change.
- 17 In my view however, the changes proposed address relevant issues and recommendations, including by increasing the role of Māori and the wider public in treaty making, and by promoting further transparency and scrutiny of the Executive's foreign affairs prerogative. The changes proposed do not seek to

displace, or substantially change, the scope of that prerogative. In particular, the paper does not seek to address fundamental issues of the constitutional balance of the Executive's role in negotiating and concluding treaties with Māori interests as Tiriti partner. This would require a first principles review which I am not proposing at this time.

What recommendations has the government received on possible changes to the treaty making process?

- 18 The TFAAB, Waitangi Tribunal, and the FADTC have identified a number of issues and made several recommendations to improve New Zealand's international treaty making process. As part of MFAT's stewardship obligations, officials have also identified several other areas where the treaty making process could be improved. The key areas to consider are:
- 18.1 improving engagement and participation of Māori and the general public in the negotiation of treaties;
 - 18.2 improving the robustness and effectiveness of the PTE process; and
 - 18.3 the role of the Cabinet approved 2001 Strategy for Engagement with Māori on International Treaties (the 2001 Strategy).

Improving engagement and participation of Māori and the general public in the negotiation of treaties

- 19 The TFAAB and Waitangi Tribunal have recommended the Government do more to keep the public (including Māori as Tiriti partner) engaged with the treaty making process, including during the negotiation of international treaties, including that:
- The Government should seek agreement from negotiating partners to release draft treaty texts to the public or select groups (TFAAB);
 - The composition of negotiating delegations should be carefully considered to ensure appropriate representation from outside Government, including Māori. This would also increase Māori participation in international fora (TFAAB, Waitangi Tribunal);
 - Departmental partnership bodies should be created or continued to engage with Māori on treaty negotiations (Waitangi Tribunal); and
 - The Government should be required to report to the Māori Affairs Select Committee on the progress of treaty negotiations (Waitangi Tribunal).

Improving the robustness and effectiveness of the Parliamentary Treaty Examination process

- 20 The TFAAB, Waitangi Tribunal, and FADTC have recommended changes to the National Interest Analysis (NIA) and PTE processes to increase engagement and transparency. The recommendations included:

- The establishment of a Parliamentary Select Committee for international treaties (TFAAB);
- Having an independent body prepare NIAs (TFAAB);
- Tailoring NIAs to the significance of the treaty action and formalising some current practices, e.g. the inclusion of a Tiriti assessment, and the identification of any tacit acceptance procedures⁶ (Waitangi Tribunal);
- Increasing the time allocated for PTE (FADTC);
- Setting the time-limit for report back to the House in Standing Orders which currently only set out in the Cabinet Manual (FADTC);
- Removing the requirement for Cabinet to approve NIAs so that it is more clearly a departmental document. This would ensure better alignment with the process for providing a Regulatory Impact Statement for regulatory proposals (Officials); and
- Allowing waivers from PTE for minor and technical multilateral treaties (Officials).

The role of the Cabinet approved 2001 Strategy for Engagement with Māori on International Treaties

- 21 In its Wai 262 report, the Waitangi Tribunal had a range of recommendations in relation to the 2001 Strategy and engagement practice with Māori. These included that:
- The 2001 Strategy should be amended to require engagement over both binding and non-binding instruments;
 - The 2001 Strategy should provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest; and
 - The Crown's implementation of the 2001 Strategy should be improved.⁷

Proposal – Improvements to the international treaty making process

- 22 Given the interconnected nature of the recommendations and issues, I propose a package of important incremental changes that responds in a pragmatic and constructive way. To address key issues above, the changes aim to:
- Improve engagement and participation of Māori and the general public in the negotiation of treaties and provide for greater openness and transparency in how New Zealand concludes international treaties;

⁶ Tacit acceptance procedures are an element in some treaties that enable binding amendments to take place unless a positive objection is lodged, with the result that treaty amendments can bind future Governments without any positive action being required.

⁷ These views around approach to engagement were broadly reiterated in the Wai 2522 report also.

- Improve the robustness and effectiveness of the PTE process; and
- Reassess our existing engagement practice for international treaties, including application of the 2001 Strategy, and promote active consideration of the 2001 Strategy's ongoing role in the current context of Māori as Tiriti partner and developing public sector practice.

23 The proposed package would be transacted in the following ways.

Improvements to the Cabinet Manual and Cabinet Guidelines

- 24 I propose to direct officials to update the CabGuide and **develop a new Cabinet paper template for use when seeking a negotiation mandate for a new treaty**. The template will ensure that departments and Ministers address a number of recommendations referred to in the previous section. The updated guidance would require Ministers to:
- 24.1 advise Cabinet on delegation composition for negotiations, including on Māori participation as Tiriti partner; and
- 24.2 consider whether they will seek consent from negotiating partners to release draft texts of the treaty during negotiations.
- 25 Where a Cabinet Paper is not required to commence treaty negotiations (i.e. where the proposed treaty is consistent with existing policy), the updated CabGuide material will instruct agencies to provide this same advice to their responsible Minister when seeking a Ministerial mandate.
- 26 I also propose that Cabinet consider **adding language to Cabinet Office Circular CO 00(14)⁸ that recognises Māori as Tiriti partner for the purposes of consideration as part of international delegations**. In addition, I propose providing clarifying criteria for when approval for non-official participation is (and is not) required. This would clarify for example, when ongoing Ministerial approval is no longer needed for recurring international meetings.⁹ Given the change in nature of international meetings (with more virtual attendance) and increased interest from non-officials, such criteria may facilitate greater participation.
- 27 I propose to **remove the requirement in the Cabinet Manual for Cabinet to approve the National Interest Analysis (NIA)**. For treaties with regulatory implications, the NIA serves as the Impact Analysis. This will align the NIA approach with the regulatory impact assessment approach, and ensure officials are accountable for providing robust and independent assessments of the national interest.

⁸CO (00) 14 is "Procedures for Including Non-Official Representatives On Official Delegations to International Meetings".

⁹ Paragraph 13 of the guidelines provides that in cases of well established and agreed practice of including non-official representatives, it is not necessary to seek approval on every occasion.

Issues to be considered by the Standing Orders Review

- 28 Many elements of New Zealand's treaty making process are set out in Standing Orders. The triennial Review of Standing Orders by the Standing Orders Select Committee is underway and this provides an opportunity for Parliament to make changes to Standing Orders.
- 29 I propose to write to the Chair of the Standing Orders Committee setting out the issues canvassed in this paper and the Government's preferred approach. I would then invite the Standing Orders Committee to consider these issues as part of that review, invite public submissions, and make any changes it deemed necessary to Standing Orders. Corresponding changes would then be made to the Cabinet Manual and related material if the proposed changes were reflected in any new Standing Orders approved by Parliament.
- 30 I request **Cabinet's approval to submit the following issues to the Standing Orders Committee for consideration:**
- 30.1 Amending the NIA requirements set out in Standing Orders to include an assessment of Te Tiriti o Waitangi interests and issues and summary of engagement with Māori;
 - 30.2 Amending the NIA requirements set out in Standing Orders to highlight any tacit acceptance procedures for a proposed binding treaty action (which have the potential to bind future Governments without any positive action being required);
 - 30.3 Making explicit FADTC's ability (or any other relevant Select Committee) to request independent advice on an international treaty including to review an NIA;
 - 30.4 Require regular reports to FADTC identifying treaties under negotiation;
 - 30.5 Increasing the timeframe from 15 to 21 sitting days for Select Committees to report to the House of Representatives. The current timeframe is established in the Cabinet Manual¹⁰ so if this recommendation is accepted officials will seek to amend the Cabinet Manual;
 - 30.6 Making explicit that the relevant Select Committee can request further time for consideration if required;
 - 30.7 Permitting waivers for minor and technical multilateral treaties to avoid unnecessarily using up valuable parliamentary time on issues that do not warrant it (currently all multilateral treaties go through PTE and minor and technical amendments to multilateral treaties themselves constitute new treaties regardless of the materiality of the amendment); and

¹⁰ Cabinet Manual 7.129.

- 30.8 Considering increasing transparency of waiver decisions including requiring the Minister of Foreign Affairs to inform FADTC of her waiver decision.
- 31 If the Standing Orders Review Committee agrees, and following consideration of any dedicated public consultation process, officials would implement the required changes, liaising with Parliamentary officials as required.

Consideration of the 2001 Strategy for Engagement with Māori on International Treaties (2001 Strategy)

- 32 I propose officials conduct a stocktake of Government policy practice in the area of international engagement, including with regard to how the 2001 Strategy is used. In conducting this stocktake, officials will consider subsequent Cabinet guidance on related matters¹¹, and the current context of Māori as Tiriti partner as well as developing public sector practice on engagement.
- 33 Any work in this area should take into account and complement Cabinet's decisions on work related to Te Pae Tawhiti and also consider engagement practice for major non-binding instruments that relate to issues of significance for Māori.
- 34 In addition, when the wider proposals in the paper are implemented, and a renewed picture of the broader international treaty-making process is clear, I consider that the ongoing role of the 2001 Strategy and its fitness for purpose should be considered. Any comprehensive review of the 2001 Strategy will necessarily involve engagement with Māori as Tiriti partner, consideration of the outcomes of the Standing Order Review, and a recognition of changes and improvements in Government practice since 2001. This will require careful consideration to ensure an appropriate engagement process is followed and relevant interests appropriately considered.

Financial Implications

- 35 There are no significant or immediate costs associated with this proposal.

Legislative Implications

- 36 There are no legislative implications of this proposal. All of the changes can be completed through Cabinet decision, changes to the Cabinet Manual, Cabinet Guidelines and Standing Orders.

Impact Analysis

- 37 Not required.

¹¹ For example, Cabinet Office Circular CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance.

Population Implications

- 38 Not required.

Human Rights

- 39 This proposal is not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

- 40 The following agencies were consulted in the preparation of this paper: Crown Law, Customs, Department of Conservation, Department of Prime Minister and Cabinet, Inland Revenue Department, Ministry of Business, Innovation and Employment, Ministry for the Environment, Ministry of Justice, Ministry for Primary Industries, Ministry of Transport, Te Arawhiti, Te Puni Kōkiri, and Treasury.
- 41 Subject to agreement from the Standing Orders Committee, consultation will be carried out as part of the Review of Standing Orders 2023. Importantly, the processes which this package of changes seeks to respond to were themselves subject to extensive public engagement.
- 42 Te Puni Kōkiri officials consider that a revision of the 2001 Strategy should be prioritised and take place now with a report-back in April 2023 and implementation by mid-2023. Te Puni Kōkiri considers that while the TFAAB findings have merit, Māori have continued to raise the lack of a comprehensive and enabling approach for Māori to effectively engage on international matters and notes the importance of a systemic approach to these issues.
- 43 MFAT officials consider that there is a window of opportunity to make some meaningful improvements to the existing process and that it would be better to consider any revision to the 2001 Strategy after the implementation of the changes in this paper. Any revision of the 2001 Strategy will necessarily involve engagement with Māori as Tiriti partner and is likely (and reasonably so) to engage with constitutional issues about the Government's role in negotiating, concluding and implementing international treaties.
- 44 This type of discussion is beyond the scope of what this paper seeks to achieve at this time. As above, allowing the Standing Orders Review consultation process to conclude, and allowing the proposed changes in the paper to be implemented will also present a renewed picture of the international treaty-making process – and an opportunity then to consider the ongoing role of the 2001 Strategy.

Communications

- 45 This paper should be published at the same time as the Standing Orders Committee asks for public submissions. Some material may be withheld in accordance with the provisions of the Official Information Act 1982.

Proactive Release

- 46 I propose that this paper be released at the same time as the Standing Orders Committee asks for public submissions. This will provide the public with supporting information to actively engage with the consultation process.

Recommendations

The Minister of Foreign Affairs recommends that the Committee:

- 1 **note** that in March 2021 officials were directed to report back to the Minister of Foreign Affairs and other relevant ministers on issues relating to New Zealand's treaty making process [CAB-21-MIN-0084];
- 2 **note** that this advice identified, consolidated, and proposed responses to, select issues arising from TFAAB, the Waitangi Tribunal (in its Wai 262 and Wai 2522 reports) and FADTC in the previous Standing Order Review process;
- 3 **note** that the proposed response promotes:
 - enhanced engagement and participation of Māori and the general public in the negotiation of treaties;
 - greater openness and transparency in how New Zealand concludes international treaties;
 - a more robust and effective Parliamentary Treaty Examination process; and
 - policy work that considers Government practice in the area of international engagement and the role of the 2001 Cabinet Strategy for Engagement with Māori on International Treaties (the 2001 Strategy).
- 4 **note** the proposed changes need to be implemented through changes to the Cabinet Manual, CabGuide and the Standing Orders, and some departmental policies, and that the below recommendations give effect to these changes;

Proposal – Improvements to the international treaty making process

- 5 **approve** adding language to Cabinet Office Circular CO 00(14) that recognises Māori as Tiriti partner for the purposes of consideration as part of international delegations;
- 6 **approve** a direction to officials to develop further criteria for Cabinet Office Circular CO 00(14) clarifying when ongoing Ministerial approval is needed (or not) for non-official attendance on international delegations;
- 7 **approve** the creation of a template for negotiation mandate Cabinet papers to be included in the CabGuide;

- 8 **approve** the removal of 7.127 of the Cabinet Manual requiring Cabinet to approve National Interest Analyses (NIAs);
- 9 **invite** the Minister of Foreign Affairs to write to the Standing Orders Committee requesting that the following issues be considered as part of the Review of Standing Orders 2023:
- 9.1 Amending the NIA requirements set out in Standing Orders to include an assessment of Te Tiriti o Waitangi interests and issues, and a summary of engagement with Māori.
 - 9.2 Amending the NIA requirements set out in Standing Orders to highlight any tacit acceptance procedures for a proposed binding treaty action (which have the potential to bind future Governments without any positive action being required).
 - 9.3 Making explicit FADTC's ability (or any other relevant Select Committee) to request independent advice on an international treaty, including to review an NIA.
 - 9.4 Requiring regular reports to FADTC identifying treaties under negotiation.
 - 9.5 Increasing the timeframe from 15 to 21 sitting days for Select Committees to report to the House of Representatives. The current timeframe is established in the Cabinet Manual¹² so if this recommendation is accepted officials will seek to amend the Cabinet Manual.
 - 9.6 Making explicit that the relevant Select Committee can request further time for consideration if required.
 - 9.7 Permitting waivers for minor and technical multilateral treaties (currently all multilateral treaties go through PTE).
 - 9.8 Considering increasing transparency of waiver decisions including requiring the Minister of Foreign Affairs to inform FADTC of any waiver decisions.
- 10 **authorise** the Cabinet Office to make any necessary changes to the Cabinet Manual and CabGuide consistent with the decisions in this paper and the outcome of the Review of Standings Orders 2023;
- 11 **note** the Waitangi Tribunal's view (in its Wai 262 report and broadly endorsed in Wai 2522) that the 2001 Cabinet Strategy for Engagement with Māori on International Treaties be amended to require engagement over both binding treaties and non-binding instruments, and that it provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest.

¹² Cabinet Manual 7.129

- 12 **note** officials are considering the ongoing role of the 2001 Cabinet Strategy for Engagement with Māori on International Treaties (including the scope of its application) taking into account best practice across the public sector, and subsequent Cabinet guidance, and will conduct a stocktake of Government policy practice in the area of international engagement; and
- 13 **note** that after implementation of agreed changes in this paper and considering the outcomes of the Review of Standing Orders 2023, officials will further assess the content of 2001 Strategy including whether it remains fit for purpose, and report back to Ministers by the end of April 2024.

Authorised for lodgement

Hon Nanaia Mahuta

Minister of Foreign Affairs

Released under the Official Information Act

Annex One: What is New Zealand's current international treaty making process?

- There are three phases in New Zealand's international treaty making process: negotiation (including preparation), acceptance and implementation. Government agencies negotiate treaties within mandates approved by Cabinet. Lead agencies are responsible for determining the nature of engagement with interested parties and the public during this part of the process. Under the Cabinet-approved 2001 Strategy for Engagement with Māori on International Treaties, the lead agency is also responsible for consultation with Māori, including determining the nature and degree of that engagement.
- As part of the "acceptance" phase, Cabinet approves the final text of the treaty and gives authority for New Zealand to become bound by it. The Government is required to table all multilateral treaties and "bilateral treaties of particular significance"¹³ in the House of Representatives 15 days before taking any action that would bind New Zealand to the obligations under the treaty, together with a National Interest Analysis. This PTE process is set out in Standing Orders of the House of Representatives and the Cabinet Manual. During PTE the treaty is considered by Select Committee and may be debated in the House, but the process does not provide for the House of Representatives to prevent the Executive from entering into the treaty. Parliament of course retains overall sovereign law-making powers.
- If primary legislation is required to implement the treaty in domestic law then this must be passed by Parliament. By invariable practice, New Zealand will not take binding treaty action until any required implementing legislation is passed, in order to ensure that New Zealand is in a position to comply with its obligations under the treaty.

¹³ The decision as to whether a bilateral treaty is of "particular significance" and therefore should be presented to Parliament sits with the Minister of Foreign Affairs, and is taken in accordance with standard criteria developed by officials and on the basis of officials' advice.