

STATES OF JERSEY



ASSEMBLY CONSIDERATION OF THE BILATERAL INVESTMENT TREATY WITH THE UNITED ARAB EMIRATES (P.6/2023): COMMENTS

Presented to the States on 24th February 2023
by the Privileges and Procedures Committee

STATES GREFFE

COMMENTS

Background

On 7th February 2023, Deputy S.Y. Mézec of St. Helier South lodged [P.6/2023](#) which asks the Assembly to agree that the Bilateral Investment Treaty (BIT) with the United Arab Emirates (UAE) does not come into force until the Treaty has been considered by the Assembly (Part (a)). It also requests the Council of Ministers, in consultation with the Privileges and Procedures Committee (PPC), to bring forward a process by which all BITs are subject to full consultation with, and approval by, the Assembly before they come into force (Part (b)).

Deputy Mézec's proposition is subject to two amendments. The first from Deputy P.M. Bailhache of Grouville and St. Martin which amends Part (b) and the second from the Minister for External Relations and Financial Services which amends Part (a). If Members vote in favour of the proposition, as amended, it will read as follows:

- (a) to request the Minister for External Relations and Financial Services to take the necessary final steps to bring the Bilateral Investment Treaty with the United Arab Emirates into force as soon as possible; and
- (b) to request the Legislation Advisory Panel, in consultation with the Privileges and Procedures Committee, to bring forward legislation by which all Treaties and International Agreements signed by a Minister under entrustment from the United Kingdom Government or to be extended to Jersey under the United Kingdom Government's ratification process, are subject to ratification by the States Assembly before they come into force.

The Committee received a briefing by External Relations on the procedure for entry into force of BITs on 13th January 2023.

Procedure for entry into force

During the briefing, officers from the External Relations Department explained that, following the signing of a BIT, the Council of Ministers is presented with the treaty and asked to agree that the 'empowered Minister' presents a Report to the States to enable the treaty to be entered into force.

There are two Ministerial Decisions in this respect. The first Decision presents to the Assembly the treaty as signed and as approved by the Council of Ministers. This notifies the Assembly of the conclusion of the treaty and initiates a 14-working day period during which Members can raise any views.

Provided that no issues have arisen after the 14-day period, the procedure enabling the entry into force of the treaty is completed (once both parties in the treaty have completed their domestic procedures). Once in force, a second Ministerial Decision is made confirming the date.

Matters raised by the Committee

The Committee notes that there are two main types of parliamentary procedure that prescribe the form of scrutiny that legislation or a decision will receive. Any

legislation/decision laid under an ‘affirmative consent’ procedure is actively approved by the Assembly, whereas legislation/decisions laid under a ‘negative consent’ procedure does not require States approval.

The BIT process for Jersey described above is a ‘negative consent’ procedure and there is no legal requirement for BITs to come to the Assembly for approval. There is only a 14-day window for Members to raise concerns on BITs which have already been subject to negotiation with jurisdictions. There is no scope for Members to raise questions about the benefits or risks associated with having an agreement with a jurisdiction during the negotiation stage.

Procedure in other jurisdictions

The Committee undertook some research on the approval process in other jurisdictions, primarily to see whether alternative practice elsewhere could be applied in Jersey to ensure more scrutiny of the process. The Committee provides a brief summary on each of the jurisdictions researched which include Australia, Canada, the United Kingdom, the United States and New Zealand as follows -

Australia

The power to ratify treaties in Australia belongs to the executive (Chapter II of the [Australian Constitution](#)). Therefore, the Government in Australia may enter into a binding treaty without parliamentary approval. However, most but not all treaties are tabled for a certain number of sitting days (between 15 and 20 days) for scrutiny by a Joint Standing Committee on Treaties. If legislation is required for the treaty to take effect, this legislation must be passed by the legislature before ratification.

In summary, [the steps to enter into treaties include](#):

- seeking a mandate to negotiate from the Minister for Foreign Affairs;
- negotiating and finalising the text of the treaty;
- seeking the approval of relevant Ministers and the Executive Council for Australia to enter into the treaty;
- arranging for signature of the treaty;
- tabling the treaty in Parliament for scrutiny by the Joint Standing Committee on Treaties; and
- any other steps, such as passage of any implementing legislation, required to enable entry into force of the treaty.

Canada

In Canada, treaty-making is also controlled by the executive branch of the federal government. Parliament in Canada passes legislation for treaty implementation as necessary. In summary, [the steps to enter into treaties include](#):

- Negotiation – the Department of Foreign Affairs, Trade and Development Act states that the Minister of Foreign Affairs is responsible for negotiating international treaties on Canada’s behalf.
- Signature - Once treaty negotiators have agreed on the terms or text of an agreement, the lead department, working with Global Affairs Canada, requests Cabinet’s approval, submitting an explanatory Memorandum to Cabinet setting out the details of the agreement. The treaty can be signed when approval is granted
- Ratification – Once Canada is ready to be bound by an international treaty it has signed, a document is prepared establishing that the formalities for the coming into force and implementation of the treaty have been completed and that Canada agrees to be bound by the treaty. More formally, Cabinet prepares an order in council authorising the Minister of Foreign Affairs to sign an Instrument of Ratification or Accession. Once this instrument is deposited with the appropriate authority, the treaty is officially ratified. At this point, Canada is bound by the treaty as soon as it comes into force (if it is not already in force).

In January 2008, the federal government announced a new policy, later updated in November 2020, to enhance parliamentary involvement in the process by tabling all treaties between Canada and other states or entities in the House of Commons before ratification. The full text of the agreement is distributed, accompanied by a memorandum, which enables the House of Commons 21 sitting days to consider the treaty before the executive branch may take action to bring the treaty into effect through ratification.

- Coming into force – Although Canada may have signed and ratified a treaty, this does not necessarily mean that the treaty is in force. The date that a treaty comes into force, or the terms and conditions necessary for the treaty to come into force, are established in the treaty itself or in an agreement between the parties, and is usually the date on which the ratification instruments are exchanged or tabled.

United Kingdom

The position in the UK is very similar to Australia and Canada in that the UK Parliament has no power to ratify a treaty text. Therefore, it is under the Minister’s power to enter into treaties, but the successful conclusion of a treaty is subject, in effect, to a power of veto by the House of Commons.

This procedure is now a creature of statute ([Constitutional reform and Governance Act 2010](#)) – and codified a pre-existing convention (the [Ponsonby Convention](#)) which was to like effect.

In summary, [the steps to enter into treaties include](#):

- The Government negotiates a treaty, which for multilateral treaties is often a lengthy process involving a series of inter-governmental meetings.
- The Government signs the finalised treaty. Signing usually shows only that the State agrees with the text and puts it under an obligation to refrain from acts

that would defeat the object and purpose of the treaty. The UK does not usually sign a treaty unless it has a reasonably firm intention of ratifying it. Sometimes, however, a treaty itself provides that it enters into force on signature alone.

- Parliament makes any necessary domestic legislative changes.
- The Government lays the signed treaty before Parliament, along with an Explanatory Memorandum. The Government may not ratify the treaty during the following 21 sitting days.
- Parliament does not have to do anything, but if either House resolves against ratification during that period, the Government must explain why it wants to ratify anyway. The House of Commons can effectively block ratification by passing repeated resolutions.
- If there are no outstanding resolutions, the Government can ratify the treaty. Ratifying is when a State confirms that it is bound by a treaty that it had already signed.
- The treaty enters into force for the UK according to the provisions in the treaty – for example six months after ratification, or once the treaty has been ratified by 20 States.

United States

In the United States, negotiation of treaties and international agreements is the responsibility of the Executive Branch. The [general procedures for negotiation, signature, publication, and registration of treaties](#) and international agreements is as follows:

- the Secretary of State authorises negotiation;
- a United States representative negotiates;
- agreement on terms, and upon authorisation of the Secretary of State, signature of the treaty;
- the President submits the treaty to the Senate;
- the Senate Foreign Relations Committee considers the treaty and reports to the Senate;
- the Senate considers and approves the treaty with a two-thirds majority; and
- the President proclaims entry into force.

New Zealand

In New Zealand, the general procedure in relation to BITs [has seven main steps](#):

- Negotiation: the Ministry of Foreign Affairs and Trade (MFAT) oversees the government's entry into, or withdrawal from, treaties. It advises the government and works with other government agencies on the negotiations that lead to treaties being established or changed. Officials negotiate the text of an

agreement with the treaty partner(s). They may consult interested parties and the public.

- National interest analysis (NIA): the lead government agency on a treaty prepares a Cabinet paper and a NIA. This sets out the advantages and disadvantages for New Zealand of becoming a party to an agreement or deciding to withdraw from one.
- Signing: Cabinet approves the final text of the agreement, and authorises its signing. It also approves the NIA.
- Presentation: MFAT presents the treaty and its corresponding NIA to the House.
- Referral (where applicable): the treaty is retained by the Foreign Affairs, Defence and Trade Committee or referred to the most appropriate subject 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.

Legislation may be needed to implement a treaty. The practice is for Parliament to pass this before the government ratifies the treaty.

- Ratification: formal documents are exchanged with the other countries or organisations involved to bring the treaty into force for New Zealand. These documents confirm that domestic procedures have been completed and the treaty is in force.

Conclusion

In all but one of the jurisdictions researched, there appeared to be no mechanisms for parliamentary scrutiny of treaties during the negotiation stage. Therefore, parliaments in these jurisdictions are not normally involved when changes could be made to the text of a treaty; as, like in Jersey at present, the power to enter and ratify treaties is a government / executive function. The US, however, allows the Senate Committee on Foreign Relations to propose amendments to treaties.

In considering its research, the Committee also notes that, where the ‘negative consent’ procedure is used for the approval of BITs, these jurisdictions also operate under party political systems which enables a process whereby some form of scrutiny is undertaken. For example, in Australia most, but not all, treaties are tabled for a certain number of sitting days (between 15 and 20 days) for scrutiny by a Joint Standing Committee on Treaties.

The Committee believes that the matter could be considered further in order to address the concerns raised by some Members on the level of involvement the Assembly has in the ratification of BITs.