Te Tari Ture o te Karauna
Crown Law

NEW ZEALAND
FOREIGN AFFAIRS & TRADE

17 December 2018

Minister of Foreign Affairs
Parliament Buildings
WELLINGTON 6011

Dear Minister

Global Compact for Safe, Orderly and Regular Migration

Instructions

1. On 10 December 2018, Cabinet invited you to seek advice from Crown Law on the implications of the Global Compact for Safe, Orderly and Regular Migration ("the Compact"). With your agreement, Crown Law and your Ministry have worked together to produce this advice.

Summary

2. The Compact is not legally binding at international law as there is not evidence of the intent to create legally binding obligations. The Compact is explicitly said to be a non-binding cooperative framework, and the form, language and surrounding context confirm this. The Compact contains political or moral commitments only. Accordingly, New Zealand's support for the Compact would not limit the actions of future governments to determine New Zealand's national immigration or migration policies. This is explicitly confirmed in the Compact too.

3. The Compact is not directly enforceable in domestic legal proceedings. Courts may be willing, however, to refer to the Compact and to take the Compact into account as an aid in interpreting immigration legislation or policy, especially if this is not clear. But we consider it is unlikely to have a determinative or substantial interpretive impact. In short, the Compact will not be legally irrelevant but, in the event that the Courts consider it, it will be taken into account in a limited way.

4. New Zealand should take the opportunity to confirm its position on certain core matters, including the status and impact of the Compact, in an Explanation of Vote made at the time of adoption of the UN General Assembly Resolution. In the event that the Compact ever arises in domestic litigation, New Zealand courts should take New Zealand's Explanation of Vote, along with those of other countries, into account.

Background

5. Under a Ministerial mandate, New Zealand participated in the negotiations which led to production of the text of the Compact. The Compact establishes 23 high-level objectives and commitments that States are encouraged to work towards to achieve safe, orderly and regular migration. Under each objective and commitment is a list of actions States can draw on to realise each objective.

6. The Compact was endorsed by many States in a high-level meeting in Marrakesh on 10-11 December 2018.[1] It is expected to be adopted by a UN General Assembly resolution in the week of 17 December 2018. This means that States will not "sign" the Compact; rather they will indicate their position on it by their vote on the resolution.[2]

Status of the Compact at International Law

Intention

7. In determining the status of an international document, what is decisive is whether or not the negotiating states intend the instrument to be binding.[3] The intention is to be gathered from the terms of the instrument itself as well as the circumstances of its conclusion.[4]

Express Statement

8. The Global Compact is explicitly said to be non-legally binding, i.e. not of treaty status:

> This Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law.[5]

9. This explicit statement is reiterated in paragraph 15,[6] which also expressly "reaffirms the sovereign right of states to determine their national migration policy and their prerogative to govern migration within the jurisdiction". The non-binding and flexible nature of the Compact is also supported by the paragraph on implementation.[7]

Form and Content

10. The form of the Compact and its content reinforce its non-legally binding nature. The Compact is to be adopted as a UN General Assembly resolution. Such resolutions are not in themselves considered legally binding by the international community, except in very rare cases.

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[1] Over 100 countries delivered statements welcoming the Compact on 10 and 11 December 2018. These included Germany, Spain, Belgium, Portugal, Canada, the UK, Ireland, Finland, Netherlands, Norway, Denmark, France, Norway, China, Singapore, and Republic of Korea.

[2] Many resolutions in the UNGA are adopted by consensus (i.e. without a vote) but this is considered unlikely in this circumstance, as some States which have not participated in the development of the Compact are likely to call a vote.

[3] See Aust (*Modern Treaty Law and Practice* (3ed, 2013) 20.

[4] Qatar v. Bahrain (Jurisdiction and Admissibility), ICJ Reports (1994), p. 112 paras, 26-7: ILM (1994) 1461; 102 ILR 1.

[5] Paragraph 7 of the Compact.

[6] "International Cooperation: The Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own due to the inherently transnational nature of the phenomenon"

[7] Paragraph 41 states "We will implement the Global Compact, with our own countries and at the regional and global levels, taking into account different national realities, capacities, and levels of development, and respecting national priorities."

11. The Compact is a cooperation framework. It sets out a vision and guiding principles in terms that point against the creation of any new international obligations. The 23 high level objectives and commitments, and suggested ways these might be implemented, do not, unlike some international declarations, establish new substantive principles. Rather the "principles" set out in the Compact are, by their nature, more procedural and can be seen as approaches to tackling the issues or a lens through which to consider issues of migration. Overall there is an absence of mandatory language in the Compact, with the language used being consistent with non-legally binding declarations and similar documents,[8] and crucially there is an absence of clear and identifiable obligations.[9]

Negotiating History

12. The negotiating history also indicates the non-binding nature of the Compact, as do the statements made by many States at the Marrakesh meeting.[10]

13. The fact the Compact refers to various international treaties and bodies of law does not alter our analysis. New Zealand's existing obligations remain, and New Zealand is bound only by any referenced treaties to which it is a party (and customary international law).

Customary international law?

14. We do not consider the Compact is declaratory of, or establishes, customary international law relating to safe, orderly and regular migration[11]. There is insufficient evidence that the guiding principles and/or objectives and commitments constitute *general practice accepted as law* in this area. Even if States behave in a way that is consistent with the objectives and commitments, the strong statements from numerous States indicate no belief on their part that any such behaviour is obligatory.

The legal effect for New Zealand at international law and whether New Zealand's support for the Compact would constrain or limit the actions of future governments with respect to immigration policies

15. We do not consider the Compact is binding on New Zealand or any other State at international law. This is the clear view expressed by other States too. Not being binding, it cannot be enforced against New Zealand in an international court or tribunal.

16. New Zealand's support for the Compact does not constrain or limit the actions of future governments over immigration or national migration policies. This is explicitly confirmed in paragraph 15 of the Compact under the heading of National sovereignty:

> The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction…

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[8] Aust (*Modern Treaty Law and Practice* (3ed, 2013) 31 table 3.1 and 429. We acknowledge that certain phrases, such as "we shall" and "we agree", do appear in the Compact and they are ordinarily indications of an intention to create binding obligations. But there are limited references of this kind and we do not consider they alter the position

[9] The absence of a dispute-resolution clause also indicates its non-binding status.

[10] Statements were made that the Compact is non-legally binding, that migration is not a human right, that the Compact does not seek to establish any customary international law, that the Compact confirms the sovereign rights of States to control their borders and national migration law, and that the Compact reaffirms the inherent rights of States to determine their migration policies and laws.

[11] If the Compact did constitute customary international law, New Zealand would be bound to it(regardless of adoption) and it could be directly applied by New Zealand Courts without first being incorporated into domestic law (unless irreconcilable its domestic law) *Governor of Pitcairn & Associated Islands v Sutton*[1995] 1 NZLR 426

17. New Zealand's ability to set its own migration policies is not limited by the references to "human rights" in paragraph 15 of the Compact (and elsewhere), as the references are to a body of existing human rights law, which is already binding on States (depending on the particular obligation and State), with no attempt or intention to expand or develop that law beyond its current terms and application.

18. However, there is a moral expectation that the 23 high-level objectives of the Compact will be respected by the States, with the actions being a "toolbox" of options to draw on. We understand that New Zealand officials are generally content that the provisions are consistent with our policies and strategies, so that implementation can occur, but New Zealand will make it clear that it will not undertake any activity that might encroach on media freedom, has no plans to change New Zealand's policies in relation to mutual recognition of foreign qualifications and skills, to develop an identity card for migrants or to remove any existing barriers to access public services for unlawful migrants.

19. Future Governments are entitled to change New Zealand's policies and strategies in this area, which could result in a different approach to implementation of the Compact.

The legal effects for New Zealand in domestic law and how it might be interpreted by New Zealand Courts

20. It remains New Zealand law that an international instrument is not directly enforceable in domestic judicial review or other proceedings.[12] So, even if the Compact were legally-binding, there would be no scope for an individual to assert a breach of the Compact in New Zealand Courts. This is all the more true when the Compact contains, as in our view it does, moral or political commitments only.

21. There is a presumption of statutory interpretation that so far as its wording allows, legislation should be read in a way which is consistent with New Zealand's international obligations.[13] This is on the basis a statute will be read in the international legal context in which it increasingly operates.[14] The application of the presumption depends on both the international text and the related national statute. Similarly, there is a presumption that the common law will be interpreted consistently with international law (where possible).[15]

22. There is also scope for an international obligation to be elevated to a mandatory relevant consideration, i.e. a consideration that must be taken into account in the exercise of broad decision-making powers, so that the Courts can intervene when the decision-maker has failed to do so.[16] As the law currently stands, we do not consider there is any scope for the Compact to constitute a mandatory relevant consideration. There is no statute or other instrument which expressly or impliedly identifies the Compact as a matter that *must* be taken into account by a decision-maker as a matter of legal obligation.[17]

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[12] *Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308 (PC)* and *Taunoa & Ors v Attorney-General & Anor* [2006] NZSC 30 (Leave).

[13] *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA). See also *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA), *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC) and *Ye v Minister of Immigration* [2010] 1 NZLR 104 (SC).

[14] Ibid at 289.

[15] *Hosking v Runting* [2005] 1 NZLR 1 at [6]. The Court said that to ignore international obligations would be to exclude a vital source of relevant guidance.

[16] *Tavita v Minister of Immigration* [1994] 2 NZLR 257

[17] See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

23. The Compact does not establish international obligations, but given the way the Courts can take account of international obligations, we consider that litigants may seek to use the Compact to advance arguments about the interpretation of immigration legislation or policy.

24. The Courts may be willing to refer to the Compact and take it into account as an interpretive aid despite its non-binding nature. For example, when the Courts assess the exercise of a decision-maker's powers, they could refer to the Compact as providing support for a particular interpretation of the power or support for a particular remedy. The UN Declaration on the Rights of Indigenous People has been noted and referred to in this way although the Declaration is of a different nature than the Compact.[18] Similarly, the Detention Guidelines of the United Nations High Commissioner for Refugees may be referred to when determining whether detention of a refugee-claimant should be continued in a particular case.[19] But the matter is put no higher than that.

25. Having regard to the non-binding form of the Compact and the aspirational nature of the principles, objectives and commitments, while the Compact may well be referred to by the Courts, it is very unlikely to have a determinative or substantial interpretive impact. In short, the Compact will not be legally irrelevant but, in the event that the Court gives it consideration, it will be taken into account in a limited way.

26. The Compact could only realistically be used as an interpretive aid to the extent domestic legislation is unclear or open to interpretation. If domestic legislation clearly conflicts with particular provisions of the Compact, the Courts apply the domestic legislation.

27. If Parliament wished to do so, it could give force to the Compact by referring to it in legislation, as has occurred, for example, with the United Nations Standard Minimum Rules for the Treatment of Prisoners.[20] But this would be a policy choice and there would be no obligation to take such a step.

Advice on how New Zealand could indicate its position on the Compact

28. New Zealand will have an opportunity to elaborate on its position on the UN vote through a statement made at the time of adoption of the resolution known as an explanation of vote (EOV). This can clarify and be evidence of New Zealand's intentions. It is likely that a significant number of States will make EOVs, building on the statements made at the high level meeting in Marrakech.

29. We recommend that New Zealand should set out its position including the following core matters in an EOV. This could be done on an individual basis or as part of a group of States.

    a. That the Compact is non-legally binding and does not create legal obligations for States;
    b. That the Compact does not establish customary international law;
    c. That paragraph 2 of the Compact should not be taken to give the instruments listed in that paragraph any binding effect on States that those instruments do not already have at international law;

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[18] See *The New Zealand Maori Council and Others v The Attorney-General and Others* [2013] NZSC 6, *Takamore v Clarke* [2011] NZCA 587 and *Paki v Attorney-General (No 2)* [2014] NZSC 118.

[19] *Attorney-General v E* [2000] 3 NZLR 257 (CA).

[20] Section 5 of the Corrections Act provides that the rules set out in the Act and regulations made under the Act are based, amongst other things, on the UN Minimum Rules.

d. That the Compact reaffirms the sovereign right of States to determine national immigration policy and laws and that States have the sole authority to distinguish between regular and irregular migratory status;
e. That the Compact does not establish any new human rights law, nor create any new categories of migrants, nor establish a right to migrate.
f. That the Compact in no way restricts or curtails established human rights, including the right to freedom of expression.

Yours sincerely
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