

Response to feedback on the development of an ‘Investor State Dispute (ISDS) Protocol’



EXPLANATORY NOTE:

This document outlines changes in the draft ISDS protocol which is out for final consultation. It sets out the general themes of feedback we received to the initial consultation, and MFAT’s response.

Context

The Waitangi Tribunal, in its report on the Trans-Pacific Partnership Agreement (WAI 2522), considered the issue of the Treaty of Waitangi exception clause in New Zealand’s free trade agreements. While the Tribunal accepted that the clause offered a reasonable degree of protection to Māori interests under the Treaty of Waitangi, the Tribunal made a suggestion that the Crown develop a protocol on Investor State Dispute Settlement (ISDS).

The Tribunal suggested that the protocol on ISDS should:

- be developed in dialogue with Māori
- be adopted by the Crown
- set out the procedures New Zealand would follow in the future if:
 - an investor took an ISDS case against New Zealand; and
 - the case was one which is likely to involve the Treaty of Waitangi exception.

While there has never been an ISDS case taken against New Zealand under a free trade agreement or bilateral investment treaty, the Government has been considering the Tribunal’s suggestion.

1 In October 2018, a draft ISDS protocol ‘elements’ paper was published for public consultation, following initial discussions with a wide range of interested people. In response to this consultation, we received nine written submissions as well as oral feedback at meetings. The following sections outline the feedback the Ministry received, with our response in the bulleted points.

Preamble and objective

- 2 Several of those providing feedback suggested that the Treaty of Waitangi exception be replicated in its entirety in an introductory section to the protocol.
- The text of the exception has been placed in the preamble.

The sufficiency of one expert lawyer, and the timing of their appointment

- 3 Several submitters suggested it would be inadequate to commit to appointing just one expert lawyer on Treaty of Waitangi issues in an ISDS case where the Treaty of Waitangi exception was likely to be relied upon. Some suggested that the burden of the role could be shared either by a larger team of counsel acting independently of the Crown, or by allowing Te Taumata (an independent and unique Māori engagement group focused on ensuring Māori interests are reflected in trade policy) to take a more active role in the response to an ISDS case.
- This feedback was carefully considered. MFAT considers the proposal to use a larger group of counsel acting independently of the Crown defence risks slowing down of the preparation of the ISDS defence. This could weaken New Zealand’s ability to effectively defend the case. It could also create both uncertainty and legal risk for New Zealand in a process in which the New Zealand Government was the official respondent in the case. MFAT does acknowledge, however, that this could be a big role for one lawyer. We have determined that one expert lawyer is appropriate as a baseline commitment, but we do not rule out the possibility of

retaining more than one expert on Treaty of Waitangi issues, depending on the circumstances of a case. We have also clarified in the protocol that the legal expert's role is distinct from, and in addition to, the general consultation and decision-making mechanisms that New Zealand would use in the running of any ISDS case – including in order to understand and gauge Māori interests.

- 4 Several submitters suggested the expert lawyer should be appointed to the Crown team established to defend the ISDS case as soon as possible, including for the consultation stages of a dispute.
 - This proposal has been explicitly included in the protocol.

The qualifications of the lawyer

- 5 Doubt was expressed that it would be possible to find any candidates who met all of the listed criteria for the role of expert lawyer.
 - MFAT agrees that the criteria for selection were likely to be difficult to achieve. On this basis, the criteria have been changed so that the only 'required' qualifications are that the legal expert has Treaty of Waitangi expertise and knowledge of te ao Māori; and that the expert be a qualified lawyer. The other criteria, which focused on experience in international law, are not listed as 'required', but something a candidate would ideally hold. Lack of expertise in this area would not preclude selection.

Transparency

- 6 Feedback stressed the high importance of public transparency on all aspects of an ISDS dispute, and sought firmer commitments on the Crown's transparency commitments.
 - MFAT acknowledges the importance of transparency in ISDS proceedings, and will ensure that ISDS processes are as transparent as possible. However, because of the rules of procedure that apply to some ISDS proceedings, and the circumstances that may surround them (for example where there is a risk of multiple claims), it is not possible to make more explicit commitments on these points in the ISDS protocol without risking misrepresenting the ability of the Crown to make decisions about transparency in a dispute. That said, this will not stop the Crown from publicly putting pressure on the investor to agree to greater transparency.
- 7 Some submitters suggested that it was inappropriate to task the expert lawyer with communicating updates on the case to the public and Te Taumata group.
 - It has been clarified that this task will be undertaken by the Government in the 'transparency' section of the protocol.

Terminology

- 8 Several submitters did not agree that the Protocol should refer to Māori perspectives being "taken into account", or should refer to an "opportunity" for input of Māori perspectives.
 - This terminology has been removed with a view to better conveying the importance of the role that expertise on the Treaty of Waitangi and tikanga Māori would play.

General issues

- 9 One submission suggested that a protocol of this nature was inadequate to address wider concerns held about investment and free trade agreements.
 - While MFAT accepts the concerns inherent in this feedback are sincerely held, they are outside the scope of this work. As such, this is not able to be addressed in the ISDS protocol.
- 10 Feedback also suggested that the protocol should be published in both Te Reo Māori and English.
 - MFAT intends to publish the ISDS protocol in its final form in both Te Reo Māori and English.

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