

New Zealand defence of an Investor State Dispute Settlement (ISDS) case



DRAFT PROTOCOL FOR CONSULTATION

Protocol to apply in the event of an ISDS case where the Treaty of Waitangi exception is likely to be relied on

The New Zealand Ministry of Foreign Affairs and Trade:

Recalling the importance of the Treaty of Waitangi/Te Tiriti o Waitangi to New Zealand as a founding document of constitutional significance

Recognising that the Treaty/Te Tiriti provides a framework for the Crown's obligations towards Māori as its Treaty partner, including the duty of active protection

Also recalling that New Zealand's free trade agreements contain a 'Treaty of Waitangi exception' clause, which states that:

provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in the relevant Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by the relevant Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

The Parties to the relevant Agreement agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of the relevant Agreement. The Dispute Settlement chapter of the relevant Agreement shall otherwise apply to this Article. A panel established under the Article entitled 'Establishment of a Panel' in the relevant Agreement may be requested by the complaining Party to determine only whether any measure (referred to in the above paragraph) is inconsistent with its rights under the relevant Agreement.

Noting the importance of ensuring that expert legal advice on the Treaty/Te Tiriti is considered when defending an ISDS case in relation to the application of the Treaty of Waitangi exception

Commits to the following actions that would be taken in the event of an Investor State Dispute Settlement (ISDS) case in which the Treaty of Waitangi exception is likely to be relied upon:

Appointment of a legal expert

- 1 In the event of an ISDS case in which the Treaty of Waitangi exception is likely to be relied on, the Government will take all reasonable steps to appoint a legal expert with expertise on the Treaty/Te Tiriti and tikanga Māori. The role of the legal expert will be to bring an expert and independent perspective to the Government's legal team in its defence of the case.

Selection of the legal expert

- 2 The legal expert will be selected as early as possible in the ISDS proceedings. This will enable the legal expert to provide advice to the government legal team on whether to invoke the Treaty of Waitangi exception. It will also ensure the legal expert can participate in the consultation phase (with the investor) of the proceedings.
- 3 *Te Taumata* – an independent and unique Māori engagement group focused on ensuring Māori interests are reflected in trade policy – will be consulted by the Government on the selection of an appropriate legal expert.
- 4 The New Zealand Government will be ultimately responsible for the appointment of the expert lawyer to the government legal team and will pay the fees of the legal expert.

Qualifications of the legal expert

- 5 The legal expert appointed will have Treaty/Te Tiriti expertise and knowledge of tikanga and te ao Māori.
- 6 Ideally, the legal expert appointed will have knowledge of international dispute settlement, but a lack of expertise in this area will not preclude selection.
- 7 Ideally, the legal expert appointed will have knowledge of international investment law, but a lack of expertise in this area will not preclude selection.
- 8 The legal expert appointed will be a qualified lawyer who holds a practising certificate and is subject to the professional standards and obligations of the New Zealand legal profession. As the legal expert will be appointed to, and be a member of, the Government's legal team these obligations (including confidentiality and privilege) will be owed to the Government.
- 9 The legal expert appointed may be required to seek a New Zealand Government Security Clearance.

Role of the legal expert

- 10 If appointed in time, the appointed legal expert will be asked to participate in the consultation phase of the ISDS proceedings.
- 11 The appointed legal expert will be asked to contribute to consideration within the New Zealand legal team as to whether the dispute in question was an appropriate case in which to invoke the Treaty of Waitangi exception.
- 12 The appointed legal expert will be asked to contribute to the New Zealand legal team's consideration of other aspects of defending the case and its procedure, including:
 - a) selection of arbitrators and what expertise the New Zealand-appointed arbitrator should have; and
 - b) whether expert evidence including on Treaty/Te Tiriti matters should be provided in the case.
- 13 If the New Zealand legal team decides that the Treaty of Waitangi exception will be invoked, the appointed legal expert will be asked to contribute to the development of legal submissions on the Treaty of Waitangi exception at the jurisdictional and admissibility phases and, if required, the merits phase of the dispute.
- 14 The legal expert's role is distinct from, and in addition to, the general consultation and decision-making mechanisms New Zealand would use in the running of any ISDS case – including to understand and gauge Māori interests.

Transparency

- 15 The New Zealand Government will be as transparent as possible with the public where the rules and circumstances governing the relevant dispute allow for this. Where possible, New Zealand will make publicly available:
 - a) the fact that ISDS proceedings have been initiated;

- b) the name of the investor;
- c) the economic sector involved in the dispute;
- d) documents related to the proceedings including the statements of claim and defence, written submissions, hearing transcripts, and orders, decisions and award of the arbitral tribunal.

In some circumstances New Zealand may have reason not to release some information. For example, this may apply where a tribunal decision has been made preventing release, or there is a risk of multiple claims being brought against New Zealand related to the same matter and the release of information may prejudice New Zealand's defence. Where this is the case, reasoning will be provided, and the New Zealand Government will continue to be as transparent as possible with unaffected information.

- 16** Where the rules governing a dispute do not expressly allow for transparency, the New Zealand Government will request that the investor bringing the dispute agree to transparency by New Zealand on the points raised in paragraphs 15.
- 17** Where the rules and circumstances governing the dispute allow, the New Zealand Government will provide relevant updates of progress to Te Taumata (noted in paragraph 3), or a similar group, if such a group is operating.
- 18** Where possible, the New Zealand Government will make information publicly available concerning the outcome of the dispute.

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