

Aotearoa New Zealand Defence of an Investor-State Dispute Settlement (ISDS) case:

A PROTOCOL

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, Manatū Aorere:

Recalling the importance of the Treaty of Waitangi/Te Tiriti o Waitangi to Aotearoa 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 [Party/Parties] or as a disguised restriction on trade in goods, trade in services and investment, nothing in this 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 this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

The Parties 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 this Agreement. The Dispute Settlement chapter shall otherwise apply to this Article. A panel established under the Article entitled 'Establishment of a Panel' in the Dispute Settlement chapter 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 this 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 Pūkenga/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 Pūkenga/expert with expertise on the Treaty/Te Tiriti and tikanga Māori. The role of the Pūkenga/expert will be to bring an expert and independent te ao Māori perspective to the Government's legal team in its defence of the case. In complex cases, consideration will be given to providing support to the Pūkenga/expert where required (such as by the appointment of a second Pūkenga/expert or junior).

Selection of the Pūkenga/expert

2. The Pūkenga/expert will be selected as early as possible in the ISDS proceedings, to ensure that the Pūkenga/expert could participate in the consultations (with investor) phase of proceedings, and in discussions within the Government legal team as to whether it was appropriate to invoke the Treaty of Waitangi exception, based on the facts of the case and other relevant considerations.
3. The New Zealand Government will make the appointment guided by timely recommendations from Māori entities that MFAT regularly engages with on trade issues, which at the time of publishing this Protocol include Te Taumata,¹ Ngā Toki Whakarururanga,² the National Iwi Chairs Forum, and the Federation of Māori Authorities.
4. The New Zealand Government would be ultimately responsible for the appointment of the Pūkenga/expert to the Government legal team and would pay the fees of the Pūkenga/expert.

Qualifications of the Pūkenga/expert

5. The Pūkenga/expert appointed will have Treaty/Te Tiriti expertise and knowledge of tikanga and te ao Māori.
6. In seeking the Pūkenga/expert, efforts will be made to appoint a person with knowledge of public law, international law, or trade and investment law.
7. Ideally, the Pūkenga/expert appointed will be a qualified lawyer who is eligible to hold a practising certificate. As the Pūkenga/expert would be appointed to, and be a member of, the Government's legal team professional obligations (including confidentiality and privilege) would be owed to the Government.
8. Where circumstances dictate, the Pūkenga/expert appointed may be required to seek a New Zealand Government Security Clearance.

Role of the Pūkenga/expert

9. If appointed in time, the Pūkenga/expert appointed will be asked to participate in the consultation phase of the ISDS proceedings.
10. The Pūkenga/expert appointed will be asked to contribute to consideration within the Government legal team as to whether the dispute in question was an appropriate case in which to invoke the Treaty of Waitangi exception.
11. The Pūkenga/expert appointed will be asked to contribute to the Government 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.
12. If it is decided by the Government legal team that the Treaty of Waitangi exception will be invoked, the Pūkenga/expert appointed will be asked to focus on 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.
13. The Pūkenga's/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.

¹ Te Taumata is an independent Māori engagement group focused on ensuring Māori interests are reflected in trade policy.

² Ngā Toki Whakarururanga is a Māori entity to be established pursuant to a Mediation Agreement between the Trade and Economic Group of the Ministry of Foreign Affairs and Trade in October 2020. At the time of adopting this Protocol, an Interim Working Party was in the process of establishing Ngā Toki Whakarururanga.

Transparency

14. The New Zealand Government will be as transparent as possible with Aotearoa whānui (all New Zealanders) over the course of a case, unless the rules and circumstances governing the relevant dispute prevent this. New Zealand will make the following information publicly available unless there is a reason preventing it:
 - a) the fact that ISDS proceedings have been initiated;
 - b) the name of the investor;
 - c) the economic sector and measure involved in the dispute;
 - d) documents related to the proceedings including the statements of claim and defence, written submissions, transcripts of hearing, and orders, decisions and award of the arbitral tribunal;
 - e) the sum being sought by the investor; and
 - f) the process for submission of amicus curiae briefs, where the dispute mechanism provides for these.
15. In some circumstances New Zealand may have reason not to release some information. 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, to the extent possible.
16. Should the Government legal team decide not to invoke the Treaty of Waitangi exception, that decision should be communicated.
17. Where the rules governing the relevant 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 paragraph 14.
18. Where the rules and circumstances governing the dispute allow, the New Zealand Government will provide relevant updates of progress and information on matters relating to Māori interests to the entities referred to in paragraph 3.
19. Where possible, the New Zealand Government will make publicly available information concerning the outcome of the dispute.

