

Possible elements of an ISDS protocol

FOR CONSULTATION

Objective

The key objective of an investor-state dispute settlement (ISDS) protocol could be:

In the event of an ISDS case in which the Treaty of Waitangi exception is likely to be relied upon, the Crown and Māori should work together to ensure that the Treaty of Waitangi exception in our free trade agreements (FTAs) functions as it is designed to, to protect the ability of New Zealand to adopt policies it deems necessary to accord more favourable treatment to Māori, including in fulfilment of the Crown's obligations under the Treaty of Waitangi.

Preamble

The following principles and context could be set out in a preamble to a protocol:

- The importance of Te Tiriti o Waitangi/the Treaty of Waitangi to New Zealand as a founding document of constitutional significance;
- A noting reference that New Zealand's free trade agreements include the Treaty of Waitangi exception clause;
- The importance of ensuring that Māori perspectives and expert knowledge on the Treaty of Waitangi and relevant government policies are taken into account when defending an ISDS case in relation to the application of the Treaty of Waitangi exception;
- The opportunity for input of Māori perspectives and expert knowledge on the Treaty of Waitangi, tikanga Māori and related issues provided by the protocol should be meaningful and authentic, rather than token or formalistic.

Commitment to appoint a legal expert on the Treaty of Waitangi issues and tikanga Māori

In order to ensure the above objectives and principles are met, the protocol could set out a commitment by the New Zealand government to appoint an expert lawyer on Treaty of Waitangi issues, te ao Māori, and tikanga Māori. The lawyer could be appointed if an ISDS case were brought against New Zealand in which the Treaty of Waitangi exception is likely to be relied upon, and could work as an integral part of the New Zealand government legal team defending the ISDS case. The role of the lawyer would be to bring an expert and independent perspective to the Crown team.

Selection of legal expert

An ISDS protocol could include a process for selecting the legal expert. Elements of the selection process could potentially include:

- The New Zealand government would be ultimately responsible for the appointment of the expert lawyer to the Crown legal team, and would pay the fees of the legal expert;
- A representative Māori group, if such a group were established, could be consulted by the Crown on the selection of an appropriate legal expert [Note: under a parallel process being undertaken by the Ministry of Foreign Affairs (MFAT), a proposal to establish a Māori advisory group on trade is currently being discussed. If such a group had been established at the time that an ISDS case arose, it could be named in the protocol as the group responsible for selecting the legal expert, and proposing to the government their inclusion in the New Zealand legal team.]
- Feedback has suggested that the advisory or representative group consulted by the Crown with regard to the selection of legal expert would ideally contain members with wide-ranging knowledge of the different issues that may be presented in a trade context, in addition to knowledge of te ao Māori. Additionally, feedback has suggested that it would be important for the process of selecting the legal expert to be fair and reasonable.

- In order to ensure an effective contribution, the process for selecting the legal expert should start as early as possible after any ISDS dispute proceedings against New Zealand commence. This would ensure that the legal expert could participate in discussions within the New Zealand legal team defending the case as to whether it was appropriate to invoke the Treaty of Waitangi exception, based on the facts of the case and other relevant considerations.

Qualifications of the legal expert on Treaty of Waitangi and tikanga Maori

An ISDS protocol might also include a list of qualifications that appropriate candidates would need to have. The successful candidate would be a person of appropriate standing in the community, and:

- Have Treaty of Waitangi (public law) expertise and knowledge of tikanga and te ao Māori;
- Have knowledge of international dispute settlement;
- Have knowledge of international investment law.

The person would also be a qualified lawyer.

Role of the legal expert

An ISDS protocol could set out the role that the legal expert on Treaty of Waitangi issues, te ao Māori, and tikanga Māori could play in the New Zealand legal team.

This could focus on:

- Contributing to consideration within the New Zealand legal team as to whether the dispute at hand was an appropriate case in which to invoke the Treaty of Waitangi exception;
- Contributing to the New Zealand legal team's consideration of other aspects of defending the case and its procedure including:
 - Selection of arbitrators and what expertise the New Zealand appointed arbitrator should have;
 - Whether expert evidence including on Treaty of Waitangi matters should be provided in the case;
 - How best to provide information over the course of the case on issues of interest and concern to Māori.
- If it were decided by the New Zealand legal team that the Treaty of Waitangi exception was to be invoked, contribute to the development of legal submissions on the Treaty of Waitangi exception at the jurisdictional and admissibility phases, and (if required) merits phase of the dispute.
- Providing relevant updates of progress in the dispute to the representative Māori body involved in the appointment of the legal expert (subject to any requirements not to disclose confidential information).

Transparency

Finally, an ISDS protocol might include several commitments relating to transparency of the proceedings to the dispute. This might include:

- A commitment to be as transparent as possible in a case, where the rules governing the dispute allowed for it;
- And, where rules do not expressly allow for transparency, a commitment to requesting that the investor agree to transparency in proceedings.

Specific transparency-related steps relating to these commitments could include seeking to make publicly available key information (such as the name of the investor, and the economic sector involved) and documents (such as statements of claim and defence, written submissions, transcripts of hearings, and orders, decisions and awards of the arbitral tribunal). It could also include seeking to make hearings open to the public.

Additionally, an ISDS protocol might include a commitment to provide regular updates on the proceedings to the public, as the case progresses.