



TIRITI O WAITANGI PROTECTION – INFORMAL PROCESS PAPER (January 2025)

The Mediation Agreement between Wai 2522 claimants and the Crown provides for the development of options for a different Treaty of Waitangi exception clause. The first step has been to propose wording for a new gold standard Tiriti protection that can protect Māori responsibilities, duties, rights and obligations effectively in trade and investment agreements.

Appropriate strategies and processes then need to be established to ensure that this protection is given effect to domestically and internationally in situations where there are or might be concerns, or threats, that Tiriti-compliant policies or actions breach Aotearoa New Zealand's trade or investment agreements.

The goal is to ensure that domestic decision-making is free of any chilling effect arising from ignorance or uncertainty about te Tiriti and the protection, and where necessary to respond to concerns or disputes raised by parties to those agreements.

To achieve this, Māori need to be involved at the initiation of discussions on policies that affect them and at all subsequent stages so as to protect their interests, to ensure there is proper knowledge of the Treaty and tikanga implications of the policy or regulation, and to ensure the process, substance, understanding of the issues and decisions are Tiriti-compliant.

The following process elements need to accompany a more effective Tiriti o Waitangi/ Treaty of Waitangi protection:

- 1) Agreement on the revised wording and scope of a protection
- 2) Understanding and explaining the rationale for the provision
- 3) Developing negotiation strategies
- 4) Interpretation of and advocacy for the provision during negotiations
- 5) Explanation and application of the provision following negotiations
- 6) Understanding and advocacy during reviews
- 7) Awareness and accurate application of the provision in policy advice and domestic policy decisions
- 8) Application of the provision in the international trade and investment context
- 9) Understanding and application during a consultation phase of a dispute
- 10) Handling a dispute

After reflecting on these various elements, it is apparent that some kind of joint standing mechanism is needed with the appropriate mana, knowledge base, and accountability to act as a joint decision-maker on matters relating to the protection. It would not need to be large

or complicated, but could help formalise the Tiriti relationship in the trade space. This rests squarely within the Tiriti-based mandate of Ngā Toki Whakarururanga, but would not replace the various Māori entities as they serve different functions in the broader trade policy and negotiating arena.

This approach would also supersede the process in the Crown's ISDS protocol that was developed in response to the report of the Waitangi Tribunal on the urgency hearing in the Wai 2522 inquiry. That related narrowly to investor-state disputes where the 2001 Treaty Exception might be invoked, and where the arbitrators might examine the nature of the Crown's Te Tiriti obligations. Ngā Toki Whakarururanga made it clear that the Crown's final version of that protocol was not Tiriti compliant, so this review also provides an opportunity to redress that.

1) Agreement on the revised wording and scope.

The earlier memorandum identified and explained the rationale for the gold standard wording. Alongside the actual wording, it is critical to determine:

- the form, as a carveout or an exception;
- the scope of its coverage;
- application to most-favoured-nation obligations in other agreements.

2) Understanding and explanation of the rationale for the provision.

Explaining to other parties to the negotiation, to the Cabinet, and to the public, the intent, meaning and rationale for the wording and its scope, requires careful preparation. That explanation needs to be developed with clarity and integrity to avoid downstream disagreements or misinterpretations by those who clearly understand the nature and function of the protection. It will also require the Crown to accept and explain that the 2001 Treaty Exception does not provide the full protection that it continues wrongly to claim.

3) Development of negotiating strategies.

Once that background work is done, the strategy for negotiations, including the process for its conduct and by whom, needs to be developed and agreed, along with complementary strategies that maximise the prospects for success. That strategy needs to include:

- understanding, explaining and educating the relevant constituencies about the rationale for and meaning of the new provision;
- ensuring informed, committed and accountable advocacy at the table;
- supportive external advocacy;
- alliances in other negotiating countries.

4) Interpretation and advocacy of the provision during negotiations.

The ability to advocate successfully for and justify the new provision during negotiations depends on how it is interpreted and conveyed, by whom. Problems have arisen when those conducting negotiations do not understand or lack a commitment to Te Tiriti and the related issues. Effective advocacy at the negotiating table requires:

- a clear understanding of both te Tiriti and its relationship to the matters under negotiation;
- preparation and delivery that is accountable to, and hence by, Māori outside the Crown;
- accurate, informed and consistent responses to written and verbal questions from the other negotiating parties;
- consistency over a different parts of a negotiation;
- consistency across other negotiations.

5) Explanation and application of the provision following negotiations

It is inevitable that officials and others from Aotearoa New Zealand and the other party/ies who were not at the negotiating table will bring their own interpretation to the final text. In addition to preparatory work, the interpretation and explanation post-negotiation, including in the National Interest Analysis, need to be authentic and accurate, and cannot be defined solely by the Crown. A careful, authentic explanation will provide important guidance for domestic policy makers and Māori, as well as overseas parties.

6) Understanding and advocacy during reviews

Existing agreements have the 2001 Treaty Exception or something weaker. When they come up for review there needs to be a commitment to advancing and securing a revised protection. To do that effectively requires a compelling rationale and strategy, prioritisation where Māori consider that is appropriate, and a determination by negotiators to achieve change. The issues raised earlier regarding understanding, knowledge, commitment, advocacy, priority over other trade-offs all apply.

7) Awareness and accurate application of the provision in policy advice and domestic policy decisions.

Experience shows that officials in MFAT and other agencies often do not realise there is a Tiriti dimension to a policy or issue they are examining (eg digital trade, critical minerals), and may then lack the necessary knowledge and prioritisation to apply protections if trade issues arise. That includes policy development and regulatory impact assessments. Pre-requisites for a Tiriti protection to have the expected effect domestically include:

- awareness of the relevance of Te Tiriti to domestic policies under consideration where they may involve issues under international trade and investment policies and agreements, in MFAT and other agencies, to enable interaction at the earliest stages of decisions;
- understanding what the Tiriti protection means for that area of domestic policy, which requires a process for proactive input through the policy process;
- the need to enable and resource independent and accountable Māori expertise in those areas.

8) Application of the provision in the international trade and investment context

Other parties to a trade and investment agreement, and investors who have access to ISDS, can raise issues of compliance of domestic actions with obligations under the agreement through various informal and formal channels. These include:

- questions raised at a committee established under an agreement;
- approaches to Ministers or MFAT indicating concerns;
- investors in public statements, lobbying, applications for consents and investment approvals, submissions to regulatory impact and select committees, participation in resource or court hearings;
- requests for consultations under an agreement.

The responses to these interventions are important not just to influence what happens next, but also because responses may form part of the evidence and argument in subsequent litigation.

9) Understanding and application during a consultation phase of a dispute

A request for consultations is the first step in a formal dispute. This becomes more legalistic, with risks that decisions could marginalise or override te Tiriti obligations.

To avoid that occurring requires a clear process and commitment, and reinforces the value of establishing some kind of joint standing mechanism that ensures consistency and oversight.

How that might work in practice would depend on the nature of the dispute and Māori concerns (thinking, for example, of an equivalent to the USCMA dispute by the US against Mexico over GM corn, in which the Indigenous Exception is one of the defences being argued).

10) Handling a dispute

The formal stages of a dispute are preceded by a series of preliminary and preparatory steps that would be the responsibility of the standing body. As with consultations, how this operates

would depend on the nature of the dispute and the Māori/Tiriti issues that arise. The following would be pre-requisites (drawn from the Wai 2522's Tribunal's urgency report):

- a commitment to invoke the Tiriti protection if there is a dispute that impacts on Māori and the advice is that it would be relevant;
- a policy to lead Māori expert evidence where the protection may be invoked;
- amicus curiae briefs for Māori to be encouraged and resourced;
- regular dialogue over the course of a dispute through the joint standing mechanisms;
- information flows to Māori on what is happening with the dispute;
- a commitment to select at least one arbitrator with knowledge of te Tiriti, tikanga and the UNDRIP;
- cooperation with the other State, or the State of the investor, to make a joint submission on interpretation of the Tiriti protection.