



## The Making of International Instruments

*“...indigenous rights and the role of the indigenous voice in international forums are areas where New Zealand should be leading the world. The special place [of Māori]... in our systems of governance is a foundation for our national identity and cohesion..”*

– *Ko Aotearoa Tēnei: Taumata Tuarua*, Chapter 8.

*Ko Aotearoa Tēnei* is the Waitangi Tribunal’s report into the claim known as Wai 262, which concerns the place of Māori culture, identity and traditional knowledge in contemporary New Zealand law, and government policy and practice.

Chapter 8 relates to the processes by which the Crown engages with Māori when it is developing New Zealand’s position on international instruments (such as treaties and declarations) that affect Māori culture, identity and traditional knowledge. This factsheet provides a brief overview of that chapter.

### Key points

The Crown has a right to represent New Zealand internationally and to make foreign policy.

When international instruments affect Māori interests in their culture, identity or traditional knowledge, the Crown is obliged to actively protect those interests.

This requires the Crown to inform and consult Māori when it is developing New Zealand’s position on those instruments; in rare cases, Māori consent should be sought.

Current Crown strategies and practices fall short of this standard.

### What are international instruments and why do they matter to Māori?

‘International instruments’ are arrangements between sovereign states, including agreements, treaties, conventions, declarations, and so on. Some are legally binding, while others – such as United Nations declarations – are non-binding but still have political or moral force.

In the last two decades, as the world has become increasingly globalised, New Zealand has signed or ratified a wide range of international instruments with other states. While many concern trade, investment, and tax, others have addressed a broad range of issues from biodiversity and climate change to international security and human rights.

Some of these instruments have significant implications for the rights of Māori and other indigenous people. Examples include the United Nations Declaration on the Rights of Indigenous People (DRIP); and the Convention on Biological Diversity (CBD), which (among other things) requires parties to respect, preserve, and maintain the traditional knowledge of indigenous people relating to conservation and the sustainable use of biological diversity.

The Wai 262 claimants were concerned that the Crown had entered into international instruments

that affected their Treaty rights without consulting them or adequately involving them in the development of New Zealand's position.

### **What the Treaty requires**

The Treaty gives the Crown the right to govern, but in return requires the Crown to protect the tino rangatiratanga (full authority) of iwi and hapū in relation to their 'taonga katoa' (all that they treasure, including their own affairs).

In this context, the Treaty allows the Crown to represent New Zealand internationally and to develop foreign affairs policies. But in doing so the Crown must actively protect Māori interests in taonga, including interests relating to the culture, identity and traditional knowledge of iwi and hapū.

### **What the Tribunal has found**

The Tribunal recognises that the New Zealand has limited influence in international affairs. Nonetheless, in its international relations it is obliged to protect Māori interests to the extent that is reasonable and practical under the circumstances.

This requires a dialogue in which the Crown informs Māori of upcoming international developments and how these might affect Māori interests, and Māori inform the Crown as to whether and how they believe their interests should be protected. The level of engagement between the Crown and Māori, and the level of priority accorded Māori interests, should depend on the importance of those interests to Māori and on the likely impact of the relevant international instrument on those interests.

The Crown has a Strategy for Engagement with Māori on International Treaties in place, which sets requirements for consultation with Māori over legally binding instruments such as treaties, and the Ministry of Foreign Affairs and Trade has run an outreach programme aimed at building relationships with iwi and Māori organisations. This strategy should also cover engagement over non-binding instruments that affect Māori interests.

The Tribunal also found that engagement should not always be limited to consultation. When an international instrument relates to matters of core

importance to Māori interests (such as DRIP and the CBD clause relating to traditional knowledge referred to above), engagement should go beyond consultation to consensus and, preferably, negotiated agreement.

The Tribunal also had concerns that existing policies were not effectively implemented – for example that information was not provided to the right people at the right time so that effective consultation could take place.

The Tribunal recommended reforms including:

- that the Crown amend the Strategy for Engagement with Māori on International Treaties to require engagement over both binding and non-binding instruments, and to provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest
- that the Crown identify relevant Māori bodies which could serve as partnership forums for discussion about international instruments, and create partnership bodies where they do not exist
- that the Crown adopt a policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums
- that the Crown put in place accountability mechanisms, including regular reporting about Crown actions relating to international instruments to iwi and Māori organisations, and to Parliament's Māori Affairs Select Committee; and that the National Interest Analysis carried out when Parliament considers international instruments includes consideration of any effect on Treaty rights and interests.

**See *Ko Aotearoa Tēnei* chapter 8 for full details of the Tribunal's findings and recommendations.**