United Nations Expert Mechanism on the Rights of Indigenous Peoples Seminar on treaties, agreements and other constructive arrangements between states and indigenous peoples (the Expert Seminar)

**Te Tiriti o Waitangi, the Waitangi Tribunal and Treaty Settlement Processes: Mechanisms with the competence to resolve conflicts between States and indigenous peoples about treaties, agreements, and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition. Joint problem-solving approaches that facilitate constructive dialogue between States and indigenous peoples.**

Dr Claire Charters

Associate Professor

Auckland Law School

29 Nov – 1 Dec 2021

**Mihi**

* Greeting in Māori language.

**Introduction**

This paper is informed by previous UN seminars and research on treaties, agreements and other constructive arrangements between Indigenous peoples and states, including:

* Study on treaties, agreements and other constructive arrangements between States and indigenous populations E/CN.4/Sub.2/1999/20 (the Final Report);
* Third progress report of the Special Rapporteur on the study on treaties, agreements and other constructive arrangements between States and indigenous populations E/CN.4/Sub.2/1996/23 (the Third Report);
* Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Second progress report submitted by the Special Rapporteur E/CN.4/Sub.2/1995/27 (the Second Report); and
* Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Second progress report submitted by the Special Rapporteur E/CN.4/Sub.2/1992/32 (the 1992 Report).

It is also informed by the 2003 and then 2012 OHCHR Expert Seminars on treaties, agreements and other constructive arrangements between Indigenous peoples and states.

**Context: Te Tiriti o Waitangi**

1. Te Tiriti o Waitangi|the Treaty of Waitangi has international recognition as an example of a “good” treaty between the coloniser and Indigenous peoples. Unfortunately, this is an inaccurate description.
2. Signed in 1840, te Tiriti came shortly after the 1835 He Whakaputanga or Declaration of Indepence by Māori chiefs in the north of Aotearoa/New Zealand and recognised by British Crown representatives. It was a clear statement of Māori sovereignty.
3. Te Tiriti says different things in the English and Māori versions. In the Māori version, Māori retain their sovereignty/self-determination and all rights to their taonga/treasures. Under the English language version, Māori ceded sovereignty to the British Crown.
4. For a long time te Tiriti was misinterpreted as Māori consent to British sovereignty. It definitively does not do this.
5. Te Tiriti o Waitangi was signed by many, though not all, Māori chiefs in the North Island.
6. Questions remain as to how and when the Crown acquired sovereignty over Aotearoa/New Zealand. It is clear that it was not legitimately acquired not legally as a matter of international or Māori law.
7. The British Crown asserted sovereignty over the South Island under the doctrine of discovery.
8. Te Tiriti is not enforceable unless it has been explicitly incorporated into legislation. This is rarely done and, when so, statutes most commonly refer to “the principles of the Treaty of Waitangi” thereby avoiding the textual differences as well as that Māori did not cede sovereignty under it.
9. However, when te Tiriti has been incorporated into legislative it has sometimes been generously interpreted by the courts with significant effect.
10. There have been more progressive interpretations of Treaty principles recently, especially in a recent Supreme Court case involving Māori rights and efforts to mine off-shore. The Taranaki iwi|tribal nation won and mining could not proceed.
11. Moreover, te Tiriti has a significant constitutional status even if it is difficult to explain. It informs policy and government and is often the “thing” around which all Māori claims coalese e.g. even though te Tiriti does not include a lot of detail, it is assumed to include all Māori rights in, say, the Declaration on the Rights of Indigenous Peoples.

**Mechanisms with competence to resolve conflicts between states and Indigenous peoples: The Waitangi Tribunal**

1. The Waitangi Tribunal was established in 1975 in response to Maori protests throughout the 1960s and 70s against the loss of land and rangatiratanga.
2. Under the Treaty of Waitangi Act 1985 the Waitangi Tribunal can consider historical and contemporary claims by Māori that the Crown has breached the principles of te Tiriti.
3. The Waitangi Tribunal has considered numerous historical claims by iwi since 1975. Their reports are generally very comprehensive, especially given that it is common for claimants to present far-reaching historical evidence to the Waitangi Tribunal hearings.
4. The Waitangi Tribunal conducts its hearings in a less formal way and more consistent with Māori approaches to dispute resolution.
5. There are many important Waitangi Tribunal reports including in relation to:

* almost all areas in Aotearoa, including those where territories were confiscated from Māori;
* the Crown’s claim to sovereignty under the Treaty. The Waitangi Tribunal found that northern chiefs had not ceded sovereignty;
* to the Crown’s jurisdiction to regulate Māori organisations;
* oil and gas;
* Māori health; and
* Rights to specific territories.

1. Ongoing claims include in relation to Māori women.
2. The Waitangi Tribunal is, however, severely under-funded, which means that hundreds of claims remain to be heard.
3. The findings of the Waitangi Tribunal are recommendations to the Crown only meaning that they cannot be enforced (with one minor exception relation to land transferred by the Crown to state-owned enterprises).
4. A notorious example of the Crown ignoring the Waitangi Tribunal recommendations relates to Māori claims to the foreshore and seabed. The Waitangi Tribunal found Crown policy to breach the Treaty and human rights, as did the UN Committee on the Elimination of Racial Discrimination (on rights grounds) and, later, the UN Special Rapporteur on the Rights of Indigenous Peoples. The Government implemented its policies into legislation despite this criticism.
5. The Waitangi Tribunal refers on occasion to the UN Declaration on the Rights of Indigenous Peoples when interpreting te Tiriti.
6. The Waitangi Tribunal provides an excellent mechanism for the Crown and Māori to contest, negotiate and provide a sense that Māori have been heard.
7. The inability of the Waitangi Tribunal to enforce its findings remains, however, problematic and highlights the Crown’s ongoing control of this process. This undermines any sense of a “joint problem-solving” approach.

**Mechanisms with competence to resolve conflicts between states and Indigenous peoples: The Treaty of Waitangi Settlement Process**

1. The government established a settlement process in the early 1990s. The objective of the settlement process is to settle Crown historical breaches of the te Tiriti.
2. The goal of finding ways and means to redress the historical process of dispossession as an essential element for the establishment of a new relationship between indigenous peoples and States based on an effective partnership is admirable.
3. However, the current Aotearoa/New Zealand te Tiriti settlement process has not been an “ideal” model, although newer approaches and mechanisms have been developed recently and offer greater promise.
4. Certain rights integral to Maori and guaranteed to Maori under the te Tiriti are not on the negotiating table. For example, the government refuses to recognise or negotiate Maori self-government and Maori rights to oil and gas reserves.
5. Despite the government’s negotiating principle of “fairness between claims”, the level of redress received by iwi|Māori nations differs.
6. The government imposes onerous conditions on iwi, hapu and whanau that seek the benefits of settlement. For example, the Crown will only deal with “large natural groupings”. Maori do not necessarily associate in “large natural groupings” but instead in iwi, hapu and whanau groupings. The requirement to form “large natural groupings” is an arbitrary requirement that is inconsistent with Maori practice.
7. There is no independent body to oversee and monitor treaty settlements in Aotearoa/New Zealand. Instead, an arm of the government is both the government’s negotiator and policy setter. This raises serious questions of conflict of interest.
8. As stated earlier, a condition of settlement is that Maori agree that it is full and final and settles all Maori historical grievances.
9. On the other hand, there have been some significant developments of late – even joint problem-solving – including the recognition of a river, maunga|mountains and areas e.g., national parks as legal persons with combined Crown and Māori management. There is also the example of co-management of the large Waikato river.
10. Increasingly there are requirements for the Crown to meet with iwi Māori|Māori nations to hear their views on matters of importance to the tribal nations.

**Looking into the future**

1. Developments in the courts, Waitangi Tribunal and in treaty settlements show some promise but fall short of recognition of Māori sovereignty or self-determination. In this way they do not provide an ideal mechanism to resolve conflicts.
2. Ongoing international oversight of these mechanisms – by the Expert Mechanism, by UN human rights treaty bodies and the UN Special Rapporteur on the rights of Indigenous peoples – remains important to balance the bias in these processes towards the Crown.
3. There is important work going on in New Zealand that has the potential to enhance the mechanisms to resolve conflicts between states and Indigenous people including the development of a national plan of action to realise the Declaration on the Rights of Indigenous Peoples.

**Closing**