Public Interest Law Journal of New Zealand

(2024) 11 PILJNZ 121

ARTICLE

Advancing Tiriti-based Constitutional Transformation for Aotearoa New Zealand's International Processes

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Aotearoa New Zealand's engagement with international affairs is becoming increasingly salient as global issues proliferate. This makes it vital that the Crown uphold its Tiriti obligations, in particular, by protecting and representing Māori interests, perspectives and priorities in formulating Aotearoa New Zealand's position on international affairs. In this article, I argue that the Crown's current approach to engaging Māori in this formulation fails to manifest the Tiriti partnership. I draw on the Matike Mai Aotearoa report, which provides several spheres-based models of a Tiriti-based constitution. This grounds my argument that engagement with international instruments must begin in a Relational Sphere with both Tiriti partners, as both partners have interests in all international engagement. I also examine the Waitangi Tribunal's recommendations in the Wai 262 claim concerning international affairs and challenge those recommendations as inappropriately privileging Crown authority over tino rangatiratanga. The Crown's current strategy for international processes, which involves consulting Māori only in a largely unilateral and sporadic manner, denies Māori their Tiriti rights. I find that the area of international instruments and processes calls, therefore, for a Tiriti-honouring model of Rangatiratanga, Kāwanatanga and Relational Spheres, before I explore the practical implementation of this model.

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I Introduction

He Whakaputanga o te Rangatiratanga o Nu Tirene and te Tiriti o Waitangi are the constitutional foundations of Aotearoa New Zealand. Te Tiriti, signed in 1840, provided both a framework and substantive agreement for the future Crown-Māori relationship, with accompanying rights and responsibilities. In art 1, Māori granted kāwanatanga to the Crown over its own people; in art 2, the Crown guaranteed Māori exercise of tino rangatiratanga over their mātauranga Māori and taonga; and in art 3, the Crown gave Māori the same rights and duties of citizenship as held by British subjects.[1]

The Crown's breaches of its Tiriti obligations have undermined, but not removed the document's constitutional significance. The need for a new Tiriti-based constitutional model has been identified by groups such as the National Iwi Chairs Forum, which established Matike Mai Aotearoa (the Independent Working Group on Constitutional Transformation) in 2010. It aimed to identify such a model for Aotearoa New Zealand, distinguished from the current Westminster constitutional system.[2] Matike Mai's report provided several indicative models based on spheres illustrating different manifestations of the Tiriti partnership.[3]

The Waitangi Tribunal was established in 1975 to investigate Māori claims of the Crown breaching te Tiriti.[4] One such claim, Wai 262, investigated the Crown's breaches of its art 2 guarantee concerning mātauranga Māori and taonga. One aspect of this claim was the making of international instruments, with the Tribunal finding that the government's procedure for engaging with Māori when entering these instruments was not reflective of the Tiriti partnership. The Tribunal's recommendations in response to this issue are outlined in chapter 8 of the Wai 262 report.[5]

I argue that te Tiriti's conception of Aotearoa New Zealand as a bicultural nation requires the state's engagement with international instruments to consistently manifest te Tiriti. Furthermore, I argue that this requires such engagement to begin in a Relational Sphere, in recognition that both Tiriti partners have interests in all international engagement. Such an approach would require the Crown to actively and consistently collaborate with Māori, rather than only when there are obvious Māori interests, as is the status quo. In this article, I argue that the Waitangi Tribunal's recommendations in chapter 8 do not go far enough. I outline how those recommendations fall short of exemplifying the Tiriti partnership, which can only be genuinely realised with constitutional transformation through a spheres-based model. This article contributes procedural recommendations to a broader dynamic conversation about protecting Indigenous interests in the context of a globalising society, where international engagement is increasingly important to respond to systemic global issues like climate change.

In this article, I acknowledge my position as a non-Māori first-generation Pākehā immigrant to Aotearoa New Zealand. Therefore, I avoid being prescriptive of Māori concepts (like tino rangatiratanga) and defer to Māori voices on those matters. I also acknowledge that my settler colonial positioning colours my understanding of, and engagement with, concepts such as international law, sovereignty and justice.

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1 Te Tiriti o Waitangi 1840.

2 *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation* (25 January 2016) at 7.

3 At 104–111.

4 Treaty of Waitangi Act 1975.

5 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 2 at 669–691.

In Part II of this article, I canvass the New Zealand government's processes for engaging and representing Māori interests when entering international instruments, followed by independent Māori engagement with international relations. In Part III, I examine Matike Mai's models for constitutional transformation, focusing on the appropriate authority and influence of each of the three spheres. In Part IV, I examine the recommendations from chapter 8 of Wai 262 and challenge them as not giving full effect to the Tiriti partnership due to inappropriately privileging Crown authority over tino rangatiratanga. In Part V, I posit that manifesting the Tiriti partnership in Aotearoa New Zealand's engagement with international instruments will only be possible with a spheres-based model. In this part, I also explore how a spheres-based model could change Aotearoa New Zealand's processes for engaging with international instruments.

II Aotearoa New Zealand's Current International Processes for Engaging with Māori

A *Overview of government policy*

In this article, I use the term "international instruments" to refer to the full spectrum of international arrangements (including treaties, covenants and conventions), whether binding or non-binding. I use "international processes" to refer to how these instruments are developed. This mirrors the language used by the Waitangi Tribunal.[6]

The Ministry of Foreign Affairs and Trade (MFAT) leads Aotearoa New Zealand's international processes. It has had formal arrangements for engaging Māori perspectives since MFAT's establishment of an internal Kaupapa Māori Division in 1990. This Division was intended to build key relationships with Māori and provide Māori perspectives on cultural and policy issues.[7] The Division was guided by a Māori outreach strategy focused on enabling MFAT to consult and communicate with Māori.[8]

MFAT then developed a "Framework for Responsiveness to Māori" in 1995, which broadly outlined "the basis for working with Maori [sic] and the expected benefits".[9] MFAT followed up this Framework by conducting outreach and relationship-building meetings with Māori between 2001 and 2006. These meetings involved general explorations of broad topics rather than specific international instruments and only approximately four to six annual meetings were held during that period.

In 2006, the Māori Policy Unit replaced the Kaupapa Māori Division. This Unit focused on building consultative relationships with Māori and departed from the Division's additional responsibilities, such as cultural competency training. This consultative work was reframed to emphasise "a whole-of-government approach" which would not "overtax" Māori through many individual government departments approaching them.[10] The Division limited itself to "general information and relationship building, not detailed consultation or discussions over specific international instruments".[11] MFAT claimed this limited scope was because detailed consultation was the responsibility of the relevant

6 *Ko Aotearoa Tēnei*, above n 5, at 669.
7 Gerard van Bohemen *Brief of evidence of Gerard van Bohemen on behalf of Ministry of Foreign Affairs and Trade* (Wai 262 doc #R34, 8 January 2007) at 17.
8 Ministry of Foreign Affairs and Trade *Māori Outreach Strategy* (Wai 262 doc #R34(00), 2007) at 1.
9 van Bohemen, above n 7, at 17.
10 At 18.
11 *Ko Aotearoa Tēnei*, above n 5, at 676.

domestic government agency and that issues of concern to Māori arise mostly in relation to domestic policy.[12]

In 2000, MFAT and Te Puni Kōkiri developed the "Strategy for Engagement with Māori on International Treaties" to guide the government's formal engagement with Māori about international processes and instruments affecting specific Māori interests.[13] The broad objectives of this strategy were early identification of international instruments which may impact or be relevant to Māori, to ensure "the nature, extent and relative strength of the Māori interest" tailored Crown engagement with Māori, and "to ensure that engagement with Māori is effective and efficient in its use of government resources".[14] This placed responsibility on the lead government agency in an international process to determine which Māori interests were relevant and the extent of government engagement with them. Te Puni Kōkiri will rarely be the lead agency, although consultation with it may occur "if necessary" to support its identification of Māori interests.[15] While MFAT advised that "the scope of what is of relevance to Māori is increasing", it focused on international instruments "affecting the control or enjoyment of Māori resources (te tino rangatiratanga) or taonga as protected under the Treaty of Waitangi".[16] The Strategy also required MFAT to distribute a six-monthly report to iwi and Māori organisations on international treaties under negotiation to keep Māori informed of Aotearoa New Zealand's "participation in the international legal framework".[17] Despite being an active commitment from MFAT (most recently referenced by MFAT in September 2021), this reporting has not been consistently complied with.[18] However, it has been aided by a new digital system called New Zealand Treaties Online, through which government departments provide updates on treaties under negotiation.[19]

Outside of MFAT, Parliament can also engage with Māori about international instruments. In Aotearoa New Zealand, binding treaties with particular significance are presented to the House of Representatives, following Cabinet conducting a "National Interest Analysis". This process enables referral of that treaty to a Select Committee, which may seek public submissions, including from Māori.[20]

B *Analysis of government policy*

Aotearoa New Zealand's international processes do not entirely exclude Māori participation or interests. There are some opportunities for some types of international instruments for Māori to provide input. Furthermore, the Waitangi Tribunal found that MFAT's engagement and outreach strategies were "developed in good faith" even though these international processes all vest in the Crown's sole and ultimate discretion on whether to engage with Māori in its international processes.[21] With Crown attempts to enable Māori engagement with international processes often utilised only haphazardly

12 Waitangi Tribunal *Transcript: Crown Hearing* (Wai 262 doc #4.1.21, 26 January 2007) at 10–11.
13 *Ko Aotearoa Tēnei*, above n 5, at 676.
14 Ministry of Foreign Affairs and Trade *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements* (September 2021) at 38.
15 At 38.
16 At 38.
17 At 39.
18 See *International Treaty Making*, above n 14.
19 At 40.
20 van Bohemen, above n 7, at 15.
21 *Ko Aotearoa Tēnei*, above n 5, at 682.

and sporadically,[22] this authority has not been consistently exercised to represent Māori interests fully and accurately. Thus, while the Crown asserts "no decision has been taken to exclude Māori consciously", Māori have been, and continue to be, excluded from most of Aotearoa New Zealand's international processes.[23]

C *Independent Māori international engagement*

Māori have an established history of independently engaging in international relations, beyond the Crown's haphazard and sporadic representation of Māori interests. Māori have connected and communicated with other Polynesian nations from the first arrival of Māori in Aotearoa 700 to 800 years ago,[24] and with European and Western nations from 1642.[25] In the late 1700s, this international work primarily involved building relationships between European and Polynesian nations,[26] and exchanges of language, culture and geographical knowledge.[27] Māori have historically had strong connections with Australia and England for reasons including trade, politics and building an international reputation.[28] Individual iwi also have long histories of making treaties.[29]

Modern Māori international engagement generally follows the theme of pressuring the Crown to honour its Tiriti obligations; mainly through the League of Nations and later the United Nations.[30] For example, Māori were substantially involved in the drafting of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[31] despite the New Zealand state's disappointing initial response of opposition.[32] This was in their capacity as Indigenous peoples rather than as representatives of the New Zealand State. Māori also have a continued presence at the United Nations in the Permanent Forum on Indigenous Issues.[33]

Independent Māori international engagement can be seen as a manifestation of tino rangatiratanga, with:[34]

> Iwi and Hapū [as] vibrant and functional constitutional entities [with] … the right, capacity and authority to make politically binding decisions for the well-being of their people and their lands.

The importance of independent Māori international participation for affirming tino rangatiratanga should thus not be undermined. However, international law and relations

22 See at 678.
23 van Bohemen, above n 7, at 102.
24 Vincent O'Malley *Haerenga: Early Māori Journeys Across the Globe* (Bridget Williams Books, Wellington, 2015) at iv.
25 At iv and 8.
26 See at 19.
27 See Judith Binney "Tuki's Universe" (2004) 38(2) New Zealand Journal of History 215 at 215.
28 See O'Malley, above n 24, at 9, 15–22 and 64–65.
29 *Matike Mai Aotearoa*, above n 2, at 50.
30 See Sophie Rigney "On Hearing Well and Being Well Heard: Indigenous International Law at the League of Nations" (2021) 2 TWAILR 122 at 135–136.
31 *Matike Mai Aotearoa*, above n 2, at 60.
32 Valmaine Toki "An Indigenous Voice at WIPO?" (2013) 4 Te Tai Haruru Journal of Māori and Indigenous Issues 102 at 102.
33 Tracey Whare "Reflective piece on Māori and the ILO" (2020) 24 The International Journal of Human Rights 303 at 303.
34 *Matike Mai Aotearoa*, above n 2, at 8.

continue to privilege state actors and are restrictive of Indigenous peoples' participation.[35] The proliferation of non-state actors has shifted and weakened this state-centrism,[36] but it has not removed the current supremacy of the nation-state.[37] Even Aotearoa New Zealand has limited influence internationally due to its small size despite being a widely recognised nation-state.[38] This demonstrates that the New Zealand state is still the most powerful representation available to Māori on a global scale. Nevertheless, Māori can and should engage in international relations independently of the Crown. This state-centrism is why I argue that Māori are entitled by right of te Tiriti to be included in the formulation of Aotearoa New Zealand's voice in international processes while also being able to maintain international engagement independently of the Crown.

III Tiriti Partnership with a Spheres-based Model

A *Context of Matike Mai's spheres-based models*

There is a growing jurisprudence around spheres-based models in Aotearoa New Zealand to give effect to the Tiriti partnership.[39] These were first clearly articulated by the indicative models provided in the Matike Mai report.[40] The report was the synthesis of 252 hui over five years,[41] and the models translate those hui and kōrero into a constitutional vision.[42] These models are generally based on three interdependent spheres.[43] The Rangatiratanga Sphere is for Māori authority in a te ao Māori context that is not contingent on the Pākehā state. The Kāwanatanga Sphere is the authority of the Pākehā government over its people and issues. Finally, the Relational Sphere is where the other two spheres come together to make joint decisions on topics of shared importance.[44]

Matike Mai's constitutional vision is mainly in response to the "fundamental imbalance … between the Crown's exercise of constitutional authority and the constitutional powerlessness of Māori".[45] The vision "does not assimilate" or replace te Tiriti but rather "derives from" and expresses it.[46] A Tiriti-based spheres model is thus partly about creating an equitable playing field in the pursuit of decolonisation, "where all peoples have

35 Timo Koivurova and Leena Heinämäki "The participation of indigenous peoples in international norm-making in the Arctic" (2006) 42 Polar Record 101 at 102.

36 At 102; and see Eve Darian-Smith and Philip C McCarty *The Global Turn: Theories, Research Designs, and Methods for Global Studies* (University of California Press, Oakland (California), 2017) at 5.

37 Joseph Raz "Why the State?" in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, Cambridge, 2017) 136 at 155.

38 *Ko Aotearoa Tēnei*, above n 5, at 681.

39 See, for example, Morgan Godfery "The political constitution: from Westminster to Waitangi" (2016) 68 Political Science 192; and Heather Came, Maria Baker and Tim McCreanor "Addressing Structural Racism Through Constitutional Transformation and Decolonization: Insights for the New Zealand Health Sector" (2021) 18 Journal of Bioethical Inquiry 59.

40 A general passing reference to differing "spheres of influence" of Māori and the Crown is, however, first seen in Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at xxii.

41 *Matike Mai Aotearoa*, above n 2, at 7.

42 At 9.

43 At 9.

44 At 28.

45 At 12.

46 At 14.

a respected constitutional place in this country as envisaged in Te Tiriti".[47] While a constitutional spheres model (particularly a Rangatiratanga Sphere) may appear "utopian, … it is not unprecedented".[48] A distinct Rangatiratanga Sphere has been seen with te Paremata Māori and the Kīngitanga movements. At the same time, the Māori Councils Act 1900 and the Māori seats in Parliament are both examples of "mana within the kāwanatanga sphere" rather than expressions of tino rangatiratanga.[49]

The spheres provided in the Matike Mai report all share a "source jurisdiction" of tikanga Māori.[50] Tikanga is the set of Māori beliefs underpinning the practices followed in conducting affairs and is validated intergenerationally and adapted to practical circumstances.[51] Matike Mai explains that "Tikanga may be defined as both a law and a discrete set of values", which "mutually reinforced each other".[52] Tikanga Māori is the first law of Aotearoa,[53] and is increasingly recognised within New Zealand law as an independent and authoritative source of law.[54] While te Tiriti may source any rights of the Crown and tāngata Tiriti, it merely reaffirms Māori rights and rangatiratanga.[55] This ensured tikanga Māori prevailed as Aotearoa's first law, making the Crown's subsequent development of its own Pākehā law "firmly subject to" and needing to "be negotiated with reference to tikanga".[56] Tikanga Māori is particularly important as a foundation for a Tiriti-based constitutional model because it also governs relationships, identification and all social situations.[57] The Matike Mai report uses an analogy of the arrival of the Crown as manuhiri in the marae of Aotearoa: [58]

> Iwi and Hapū were keen to treat with the Crown so that it would bring order to the Pākehā manuhiri who came onto the "marae" that is Aotearoa. Like any manuhiri, the Crown's authority, its "mana", would be acknowledged when it entered the marae but would ultimately be subject to the kawa or tikanga that prevailed there.

Māori being tangata whenua was not, and could not be, displaced by permitting Crown subjects to live in Aotearoa New Zealand. Furthermore, the mana of rangatiratanga or kāwanatanga is dependent on the customs and structures of tikanga Māori, which itself has constitutional value.[59] In addition to this source jurisdiction of tikanga, the Matike Mai report's spheres are all underpinned by seven values identified through Matike Mai's

47 At 17.
48 Godfery, above n 39, at 202.
49 At 202.
50 *Matike Mai Aotearoa*, above n 2, at 104.
51 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2006) at 24.
52 *Matike Mai Aotearoa*, above n 2, at 41.
53 Joseph Williams "Lex Aotearoa: an Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 2.
54 Claire Charters "Recognition of Tikanga Māori and the Constitutional Myth of Monolegalism: Reinterpreting Case Law" in Richard Benton and Robert Josephs (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 611 at 611; and see generally Law Commission *He Poutama* (NZLC SP24, 2023).
55 Ani Mikaere "Seeing Human Rights Through Māori Eyes" (2007) 10 Yearbook of New Zealand Jurisprudence 53 at 54.
56 At 55 and 57.
57 Mead, above n 51, at 16.
58 *Matike Mai Aotearoa*, above n 2, at 51.
59 At 42–43.

consultative work. In addition to tikanga, those values are community, belonging, place, balance, conciliation and structure.[60]

B *The Rangatiratanga Sphere*

The Rangatiratanga Sphere is where Māori exercise authority over their people and taonga, in accordance with art 2 of te Tiriti. This sphere revitalises an independent Māori sovereignty as a site of "constitutional uniqueness".[61] This uniquely Māori sphere is intended to be sensitive to the whakapapa of Māori politics and constitutionalism, in recognition of tino rangatiratanga "as a taonga handed down from the tīpuna".[62] Although independent of the Kāwanatanga Sphere, the Rangatiratanga Sphere shares the mutual foundation of a conciliation value by existing in an interdependent relationship with the Crown.

Significantly, the Rangatiratanga Sphere is not premised or structured around the Kāwanatanga Sphere and its policies. This marks a departure from many Crown-created entities "for" Māori, such as Māori seats in Parliament, which are focused on supporting Māori to access, limit or otherwise influence Crown activities. For tino rangatiratanga to be manifest in this sphere, it cannot be a structure created by the Crown (such as Te Puni Kōkiri or the Waitangi Tribunal), despite the Crown's suggestion otherwise in Wai 262.[63]

Conceptualising the Rangatiratanga Sphere requires recognising that Māori are not one homogenous nation. Rather, iwi and hapū differ significantly, have their histories and tikanga, and have "constructed their own concepts and sites of power".[64] Furthermore, the building block of the Rangatiratanga Sphere is likely to be the hapū rather than the iwi,[65] because "political and constitutional power prior to 1840 rested in the hapū",[66] which "remained the dominant unit of political life".[67] The hapū was the site of decision-making that most directly impacted lives.[68] For example, he Whakaputanga is premised on hapū, and te Tiriti also references hapū, even though Crown policies have not reflected this.[69] There is, in fact, "a quite considerable degree of frustration and in some cases anger with the dominance that the Crown is seen to have accorded Iwi in recent years".[70] Benedict Kingsbury warns about this assimilatory effect of colonial governments forcing Indigenous

60 At 69.
61 At 112.
62 At 112.
63 See *Ko Aotearoa Tēnei*, above n 5, at 690.
64 *Matike Mai Aotearoa*, above n 2, at 33.
65 See Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c. 1769 to c. 1945* (Victoria University Press, Wellington, 1998) at 30.
66 Interview with Moana Jackson, Constitutional Lawyer (He Tohu Exhibition, 8 June 2017) transcript provided by National Library of New Zealand (Wellington).
67 *Te Paparahi o Te Raki*, above n 40, at 153.
68 *Matike Mai Aotearoa*, above n 2, at 35.
69 See *Matike Mai Aotearoa*, above n 2, at 48. He Whakaputanga o te Rangatiratanga o Nu Tirene 1835 is known in English as the Declaration of Independence of the United Tribes of New Zealand of New Zealand. In it, the initial 34 rangatira signatories, all from north of Hauraki, declared their rangatiratanga, kīngitanga and mana over their territories. See *Te Paparahi o Te Raki*, above n 40, at ch 4 for an in-depth analysis of the meaning and effect of He Whakaputanga by the Waitangi Tribunal.
70 At 49.

groups to transform their cultural groupings into those most palatable to secular legal society to access many Indigenous rights.[71]

He Whakaputanga provides a helpful starting point and precedent for the type of independent Māori authority that is the Rangatiratanga Sphere. That international instrument refers to Te Wakaminenga o ngā Hapū o Nu Tireni (the United Tribes of New Zealand in the English text).[72] This was a relatively novel conception of collaborative intra-hapū decision-making in response to the growing presence of French and English colonial powers.[73] It was an "institutionalisation of some form of unity" of Māori across hapū,[74] and shows the kotahitanga in action that is envisioned for a Rangatiratanga Sphere.[75]

C *The Kāwanatanga Sphere*

The Kāwanatanga Sphere, as an independent Crown authority that is sovereign over its own people, already exists as the New Zealand government. As with the Rangatiratanga Sphere, the Kāwanatanga Sphere would exercise authority over its people, without interference from the Rangatiratanga Sphere. The Kāwanatanga Sphere would still be grounded in its Westminster history of sovereignty but would source its legitimacy from the mutually forged Tiriti partnership with Māori, rather than the unstable justifications of settler colonisation.[76] This different sourcing of sovereignty would allow the Kāwanatanga Sphere to consist of tangata Tiriti (all those non-Māori present in Aotearoa New Zealand under the auspices of te Tiriti), as opposed to only settler colonists. The authority of the Kāwanatanga Sphere would not need to be dominating, indivisible or unchallengeable; rather, it could prioritise relationships.[77] It would be founded in the Matike Mai values, particularly those of conciliation and balance.

D *The Relational Sphere*

The Relational Sphere is the space where both the Rangatiratanga Sphere and the Kāwanatanga Sphere come together to truly work under the value of conciliation. This is where issues of shared (although not necessarily equally shared) importance are discussed, and decisions made jointly about them. The premise of this sphere is that each Tiriti partner comes to it as an equal, with their interests, needs and perspectives equally respected and considered. The Crown and Māori not intruding into the other's respective realm enables an "area where the partnership between the two concepts and the two peoples has its domain", namely, the Relational Sphere.[78] This sphere would be sourced from the mutual obligations stemming from te Tiriti, he Whakaputanga and tikanga Māori to support the pursuit of equal respect and recognition.[79]

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71 Benedict Kingsbury "First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society" (2002) 3 Chicago Journal of International Law 183 at 189–190.

72 He Whakaputanga o te Rangatiratanga o Nu Tirene 1835.

73 *Te Paparahi o Te Raki*, above n 40, at 499–502.

74 *Matike Mai Aotearoa*, above n 2, at 47.

75 See at 47.

76 Tahu Kukutai and others "New Normal: Same inequities or engaged Te Tiriti partnership?" (2020) 9 MAI Journal 12 at 13.

77 *Matike Mai Aotearoa*, above n 2, at 112.

78 Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai 776, 1999) at 63.

79 *Matike Mai Aotearoa*, above n 2, at 49.

The Relational Sphere itself would enable the Crown and Māori to interact in a new way, challenging the colonial power imbalances and structures of their present relationship. This subversion of current power imbalances is crucial and foundational to a Relational Sphere. This is particularly in terms of Māori being given full participation rights as one of two Tiriti partners, as opposed to the role of observer or interest group into which Indigenous peoples are often relegated.[80] The Relational Sphere must be a permanent forum with the goal of active participation and full consultation with both Tiriti partners on all matters that enter the Sphere. The tikanga underpinning this Sphere must be determined by culturally appropriate leaders, rather than unilaterally by "the state or other non-Māori entities or persons".[81]

IV Examining and Challenging the Waitangi Tribunal's Recommendations

In considering the Wai 262 claim, the Waitangi Tribunal found that the Crown's international processes were not fully compliant with the Tiriti partnership. The Tribunal made this finding based on three flaws it identified in the Crown's approach: that the MFAT strategy was confined to legally binding instruments; that the strategy is restricted to consultation; and that the strategy has practical issues.[82] The primary flaw was that Crown policy limited consultation with Māori about international processes to only legally binding international instruments. The Crown argued this was because the New Zealand State does not sign non-binding instruments unless it intends to abide by those instruments.[83] However, as explored by the Tribunal, the issue here is that even non-binding international instruments have an impact, albeit more persuasive than legal. Signing any international instrument, binding or not, shapes Aotearoa New Zealand's international reputation, obligations and relationships. This affects both Tiriti partners, regardless of which are involved in formulating that position.

An additional key recommendation made by the Waitangi Tribunal was that the Crown should develop mechanisms to keep its balancing of Māori interests against others transparent and fair.[84] The Tribunal suggested that Parliament's Māori Affairs Select Committee was an appropriate external body to promote this transparency and accountability. This is problematic, as Select Committees, sitting in Parliament and comprising Members of Parliament, are not bodies that are external to the Crown. This is one example of the Tribunal attempting to cast parts of the Crown (for example, Te Puni Kōkiri) as neutral and external. It obscures the reality that all parts of the Crown operate in a Crown jurisdiction and worldview, so cannot equally, fairly and fully adjudicate between Māori and the Crown.

The remainder of Part IV challenges the principles and frameworks underpinning the Waitangi Tribunal's recommendations.

80 Koivurova and Heinämäki, above n 35, at 104.
81 Tracey Mihinoa Tangihaere and Linda Twiname "Providing Space for Indigenous Knowledge" (2011) 35 Journal of Management Education 102 at 114.
82 *Ko Aotearoa Tēnei*, above n 5, at 683.
83 At 683.
84 At 687–689.

A *The voice of the nation of Aotearoa New Zealand*

Te Tiriti established an enduring partnership between two groups, Māori and tāngata Tiriti, who both have claims and connections to this land. Both groups thereby have an interest in the international engagement of Aotearoa New Zealand. As such, I argue that te Tiriti allocates the international relations of the New Zealand state to be the shared responsibility of both partners. This stands in contrast to the Waitangi Tribunal's interpretation of art 1, which underpins the Tribunal's chapter 8 recommendations. The Tribunal posits:[85]

> In article 1 of the Treaty of Waitangi, the Crown acquired kāwanatanga (the right to govern), which involved, among other things, the power to make policies and laws for the government of this country. Included in this, we think, was the right to represent New Zealand abroad *and to make foreign policy*.

I argue that any representative power of kāwanatanga is limited to a domestic level, and that allocating the Crown the exclusive right to represent Aotearoa New Zealand internationally is a barrier to each Tiriti partner having sovereignty over their own people. The Tiriti partnership is a framework for balancing the different but real claims that each partner has to this nation. That is not to say that those claims are equal or equally legitimate,[86] but that a mutual recognition of each partner's distinct relationship to this land is a requirement for "engaging in a just relationship".[87] There is not "unity of purpose, but [there is] a shared history with people whom they recognise as different".[88] This is supported by the text of te Tiriti, where the grant of kāwanatanga in art 1 is inherently qualified by art 2's guarantee of tino rangatiratanga, and where art 3 provides the same rights and duties of citizenship to Māori as to tāngata Tiriti. If New Zealand and Aotearoa are conceptualised as different nations sharing the same physical space, then te Tiriti is the relationship agreement which defines their partnership. The text of te Tiriti indicates the founding of a bicultural nation of Māori and tangata Tiriti.

The relationships between the Crown and its subjects, and with other states, were later than, and are contingent on, the Crown's first relationship with Māori.[89] Thus, the Tiriti partnership requires more than the Crown merely considering Māori interests in its own formulation of Aotearoa New Zealand's position on international affairs. Rather, tino rangatiratanga is not subordinate to the Crown and its exercise can occur internationally. It is problematic to position Māori as falling within the Crown's jurisdiction as a minority group because Māori were never Crown subjects in the first place, let alone a minority within that group.[90]

Furthermore, the Tribunal's depiction of Māori interests conflicting with a "national" interest is a false and dangerous dichotomy. Māori are not separate from the nation of Aotearoa New Zealand, as te Tiriti established a bicultural nation of Māori and tangata Tiriti. Māori do have distinct interests in Aotearoa New Zealand's international relations in an expansive sense, not limited to only certain international instruments. However, these

85 *Ko Aotearoa Tēnei*, above n 5, at 680 (emphasis added).
86 See Charters, above n 54, at 613.
87 James Tully *Public Philosophy in a New Key—Volume 1: Democracy and Civic Freedom* (Cambridge University Press, Cambridge, 2008) at 229.
88 At 241.
89 At 237.
90 At 237.

are not to the detriment of other people in this nation. In fact, the history of association between Indigenous peoples and settlers in their land becomes part of the national identity.[91]

This argument challenges the recurring theme in the Crown's international processes that the Crown has the right to speak for Aotearoa New Zealand with one voice,[92] although the Tribunal endorses that Crown assertion.[93] Rather, I argue that the Tiriti partnership "demands a democratic dialogue in which partners listen to and speak with, rather than for, each other".[94] This is not a question of permission but rather one of collaboration.[95] The Tribunal concedes that international instruments "have the potential to affect New Zealanders in almost all aspects of their lives" and that Māori interests in particular "are all profoundly affected by international instruments".[96] Thus, I argue that Māori must be able to participate in Aotearoa New Zealand's international processes in a capacity larger than other affected groups. This is to protect against the omission or removal of Māori perspectives, priorities and participation from Aotearoa New Zealand's international engagement.

The Tribunal attempts to justify the "one voice of the Crown" argument by referring to the ability of Māori to participate in international agencies like the United Nations in an independent Indigenous capacity.[97] It also recommends that the Crown fund this independent Māori engagement in international forums.[98] However, the Tribunal advocates for limiting this to participation "in an NGO capacity" that is divorced from "the official New Zealand position".[99] As discussed in Part II, Māori have an international presence independent of the New Zealand state. However, this should be in addition to, not in replacement of, equal contribution to the state position. Reducing Māori participation to that of an NGO is a particularly concerning recommendation given that it excludes Indigenous peoples "from international law-making processes" and "leads to unjust and bizarre outcomes, with industrial and environmental associations put on the same footing as indigenous peoples".[100] Indigenous peoples' international concerns tend to be about rights and peoples, while other associations tend to be concerned with private interests and capital, making for a concerning conflation.[101]

A key concern raised with having distinct representation of Māori and Crown interests through Tiriti-based international processes is that Aotearoa New Zealand's status as only a small actor on the international stage makes this impractical. The Crown in particular argues that:[102]

> New Zealand is a small country that depends for the fostering and protection of its interests on the making of rules that bind or influence more powerful nations to act in agreed ways. Without this process of making international rules, our interests might receive little or no consideration and protection.

91 At 241.
92 van Bohemen, above n 7, at 8.
93 *Ko Aotearoa Tēnei*, above n 5, at 685.
94 Tully, above n 87, at 240.
95 *Statement of Response of the Crown* (Wai 262 doc #2.256, 28 June 2002) at 27–28.
96 *Ko Aotearoa Tēnei*, above n 5, at 680.
97 At 686–687.
98 At 687.
99 At 687.
100 Koivurova and Heinämäki, above n 35, at 102.
101 At 102.
102 At 681.

This is a legitimate concern, as Aotearoa New Zealand is not in a position to impose its own negotiating timetables, nor unilaterally delay negotiations to allow domestic engagement. However, this is even more reason to establish a well-resourced and well-coordinated Relational Sphere. This means that both Tiriti partners are engaged from the outset of an international process around an international instrument, so the Crown is not left to hurriedly fit in a rushed Māori engagement where convenient.

While Aotearoa New Zealand may not wield dominating international power, this does not negate or lessen the Crown's responsibilities as a Tiriti partner. There is a need to evaluate all of Aotearoa New Zealand's many and varied interests to arrive at a national position. Both partners must then find the best way to advance that position when more powerful currents may be pulling it elsewhere. In this environment, engagement with Māori—or with any sector of Aotearoa New Zealand society—is not always going to be perfect, but, as found by the Tribunal, the Crown "cannot just receive advice from Maaori as it would that of another 'interest group'".[103] Rather, Māori are the Crown's Tiriti partner and Māori interests are always entitled to active protection.[104] Starting Aotearoa New Zealand's international process in the Relational Sphere directly contributes to the goal of building a strong, resilient process that both enables and encourages durable international outcomes.

B *The sliding scale*

The Tribunal's chapter 8 recommendations are premised on what the Tribunal calls the "sliding scale of Māori interest and Crown engagement in relation to international instruments".[105] This broadly conceptualises the different levels of engagement interests from each Tiriti partner, depending on the substance of a particular international instrument. The Tribunal suggests this scale represents a continuous dialogue between Māori and the Crown, which enables Māori interests in international instruments to be "readily identified and understood, and a means of protection devised".[106] This language of dialogue bears some alignment with a spheres-based model, as it could reflect a constitutional relationship between equal, mutually recognised partners.[107] However, the Tribunal restricts a true constitutional dialogue by casting doubt on whether this forum can be permanent and fixed.[108]

Part of the Tribunal's position on sliding scales is that they are already being applied to an extent, although implicitly, in the Crown's consultative work with Māori about some international instruments. The Tribunal uses the example of the UNDRIP to illustrate this. The UNDRIP is a non-binding international instrument, and so under MFAT policy, did not require consultation with Māori.[109] However, the Crown recognised early on that the UNDRIP was "clearly of major significance to Māori and that engagement was

103 Waitangi Tribunal *Haumaru: The COVID-19 Priority Report* (Wai 2575, 2023) at 91 (footnote omitted).
104 *Ko Aotearoa Tēnei*, above n 5, at 682; and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.
105 *Ko Aotearoa Tēnei*, above n 5, at 685.
106 At 681.
107 See Tully, above n 87, at 229.
108 *Ko Aotearoa Tēnei*, above n 5, at 684.
109 See Part II(A).

necessary",[110] and "did seek to consult about [the UNDRIP] from time to time".[111] The Crown did not support the development of a unified Māori view on the instrument through consultation,[112] "despite numerous Māori attempts to engage the Crown in discussions", illustrating that consultation was not extensive nor significant.[113] However, this Crown attempt at consultation departed from its strategy to only consult Māori on binding international instruments. It "occurred despite the strategy, not because of it".[114] The Tribunal determined that this showed the Crown soliciting "engagement tailored to the 'nature, extent and relative strength' of the Māori interest" instead of whether an instrument was binding.[115] The implicit decision-making criteria were about the relative interests and authorities of Māori and the Crown; in other words, a sliding scale. This illustrates a disconnect between the formal Crown policy of binary categories and the realities of its implementation on a sliding scale. The sliding scale is shown to be tenuous and ad hoc, determined solely by the Crown. For Māori participation, perspectives and priorities to be properly articulated in Aotearoa New Zealand's international positions, a spheres-based model must be developed and implemented.

C *The Crown's inability to appropriately and fully address Māori interests*

Another issue with the Tribunal's chapter 8 recommendations is that they incorrectly determine that the Crown, acting independently, can appropriately assess Māori interests in an international instrument. Finding that Māori interests must be ascertained by "a properly informed Crown and … balanced against … valid interests of other New Zealanders and of the nation as a whole" inhibits a Tiriti-honouring dialogue.[116] This is because this approach inappropriately vests authority in the Crown over what is fundamentally a Māori matter: of determining Māori interests in an international instrument.

This approach is inappropriate because it fails to recognise Māori and the Crown as equal but distinct Tiriti partners, by subsuming Māori as one of many interest groups which the Crown must balance. The Crown cannot be truly representative of Māori because it does not centre Māori. The Crown has many interests, only one of which is the Tiriti partnership. The Tribunal's recommendation in its Wai 262 report that Te Puni Kōkiri take the lead in assessing Māori interests in an international instrument is not acceptable, because a government department (an organ of the Crown) is not a substitute for the Rangatiratanga Sphere.[117] As the Tribunal found later in its *Haumaru* report, "[Māori] representation in Parliament and in Cabinet is not itself a manifestation of tino rangatiratanga, but of the article 3 guarantee of citizenship rights".[118] Counsel for Ngāti Koata in the Wai 262 proceedings stated that "This disjointed approach and reliance on [Te Puni Kōkiri] for a Māori view … is prejudicial to Māori in general and does not reflect

110 *Ko Aotearoa Tēnei*, above n 5, at 674.
111 At 683.
112 *Updating Evidence of Tracey Whare and Claire Charters on Behalf of Ngati Kahungunu* (Wai 262 doc #P13, 11 August 2006) at 6.
113 *Ko Aotearoa Tēnei*, above n 5, at 674.
114 At 683.
115 At 682.
116 At 681.
117 At 685.
118 *Haumaru*, above n 103, at 113.

the treaty relationship",[119] and furthermore that Te Puni Kōkiri did not have "capacity or institutional knowledge" about international instruments.[120]

These prejudicial impacts are evident where the Crown failed to sufficiently assess the Māori interests in international instruments which clearly engaged them. The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the UNDRIP are two key examples.[121] The UNDRIP is arguably the most important international instrument concerning Indigenous rights, yet as covered earlier, the Crown did not conduct comprehensive consultation with Māori. The only engagement was outreach on general information about the UNDRIP's context, rather than a detailed discussion of the instrument itself. Regarding TRIPS, Parliament's Commerce Select Committee decided "the Bill did not adversely affect Māori interests" despite Māori submissions saying the opposite.[122] This disconnect illustrates the subordination of Māori within the Crown's jurisdiction as just one of many interests to be considered. The Tiriti partnership requires Māori interests to be considered distinctly from those of Crown subjects, as the Crown is one of two Tiriti partners, not a neutral third party.

However, in a spheres-based model, the Crown not being representative of Māori is not an issue, as the Rangatiratanga Sphere does centre Māori and enables Māori to speak authoritatively on Māori interests. Yet achieving this balance between the spheres and trusting that Māori interests will be articulated does depend on the Rangatiratanga Sphere being adequately empowered, resourced and respected. Thus, while the Tribunal posits that "the Treaty partnership does not need to be manifested in all international relations … [but only] in matters of obvious Treaty importance", it would be more appropriate to always manifest (and adjust) the Tiriti partnership along the three spheres.[123] To uphold tino rangatiratanga, authority over assessing Māori interests must be left to Māori.

D *The Tribunal's findings in its report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*

In this article, I focus on the Waitangi Tribunal's report on the Wai 262 claim. However, there has been subsequent Tribunal jurisprudence on the matters discussed in that report. In the time since the publication of the Wai 262 report in 2011, the Tribunal released its Stage One report into Te Paparahi o Te Raki (Wai 1040) inquiry. It found that in signing te Tiriti, Māori did not cede their sovereignty nor "their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor".[124] This seminal finding holds substantial implications for New Zealand's international processes, not least by challenging the Tribunal's previous interpretation of the Treaty principles. These implications were brought into issue by the Wai 2522 claimants in the Waitangi Tribunal's inquiry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[125] The Wai 2522 claimants

119 *Closing Submissions of Counsel on Behalf of Ngāti Koata* (Wai 262 doc #S4, 18 April 2007) at 90.

120 *Ko Aotearoa Tēnei*, above n 5, at 678.

121 Malcolm McNeill *'A Critique of GATT:TRIPS', a report prepared for the Waitangi Tribunal for the hearing of the Treaty of Watangi Flora and Fauna Claim (Wai 262)* (Wai 262 doc #A17, 2 February 1997) at 11.

122 *Ko Aotearoa Tēnei*, above n 5, at 671.

123 At 685.

124 *Te Paparahi o Te Raki*, above n 40, at xxii.

125 Waitangi Tribunal *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2021) at 17–18.

argued the Wai 1040 finding meant the Crown lacked "authority to treat unilaterally with other states [on matters concerning] … Māori tino rangatiratanga, natural resources, and other taonga".[126] The Tribunal in Wai 2522, however, found it "not appropriate … to address broad constitutional questions, … concerning the Crown–Māori relationship in respect of international instruments", confirming its preference to continue the Wai 262 approach of privileging Crown kāwanatanga over Māori tino rangatiratanga.[127]

The Tribunal in Wai 2522 emphasises the reciprocity of the Treaty agreement, where the Crown gained its kāwanatanga in return for guaranteeing tino rangatiratanga.[128] However, this purported reciprocity is undermined by the Tribunal's characterisation of the Crown's kāwanatanga as inclusive of an effectively unilateral right to represent Aotearoa New Zealand internationally. The Crown does not guarantee tino rangatiratanga by making it subordinate to kāwanatanga, including in an international arena. The Tribunal finds, as in its other reports, that a kāwanatanga power of international relations is qualified by the Crown's responsibility to protect Māori interests in a manner consistent with Māori views about those interests.[129] I argue that those conditions and qualifications are consistently shared authority through the Relational Sphere. This argument is supported by the Tribunal's finding that joint decision-making between the Crown and Māori goes beyond mere consultation, to power-sharing.[130]

V Applying a Spheres Model

Having canvassed the issues with the Crown's current international processes and the shortcomings of the Waitangi Tribunal's assessment and response to those issues, I propose a model to uphold te Tiriti when Aotearoa New Zealand enters into international instruments. This is a spheres model and is broadly structured around an initial assessment in a Relational Sphere of how a particular international instrument engages the interests of the Kāwanatanga and Rangatiratanga Spheres. The outcome of that analysis then indicates whether further engagement with that instrument would either remain in the Relational Sphere or progress to either the Rangatiratanga or the Kāwanatanga Sphere. It ensures that both Tiriti partners have meaningful input in the process, but this is tailored to the relative strength of their interests.

A *Initial assessment in the Relational Sphere*

There are several questions to be addressed at this stage. First, the structure of the Relational Sphere itself to assess international instruments and the Tiriti partners' interests in it. Second, how that assessment is to be conducted.

126 At 16.
127 At 16–17 and 20.
128 At 21.
129 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2022) vol 1 at 196 as cited in *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, above n 125, at 20.
130 At 22–23.

(1) Structure of the Relational Sphere

The Relational Sphere must feature representatives from each of the Rangatiratanga and Kāwanatanga Spheres. These representatives must be of sufficient standing and expertise in their respective spheres to authoritatively represent and negotiate with their peoples' interests, needs and perspectives. The representatives cannot be mere messengers, as cross-sphere negotiations must occur in the Relational Sphere itself rather than merely being symbolic. Representatives in the Relational Sphere would likely hold leadership roles in their sphere of origin and have a high level of understanding of, and connection to, their sphere's values and priorities. It is essential that the Crown not pressure the Rangatiratanga Sphere to provide representatives in a colonial corporatisation model,[131] but rather allow it to pick representatives in a tikanga-consistent manner that is "reflective of, and accountable to, their community's needs and values".[132]

Expertise in international law and international relations will also be essential to ensure that the conversations in the Relational Sphere go deeper than surface level. This expertise enables this shared deliberative body will be able to come to an informed, considered and tangible position on the international instrument in question.

Furthermore, the Relational Sphere must be fit to engage with the diverse and technical topics it must consider, which requires a range of expertise from many disciplines needed. The representatives from each of the Rangatiratanga and Kāwanatanga Spheres would be able to complement each other's knowledge bases, supporting this aim. However, there would need to be a diversity of experience and expertise between the representatives of each of the Spheres.

In terms of how the Relational Sphere would form its membership, this could look like a forum with many members representing each sphere. The Arctic Council, established in 1996, is a helpful example and case study. This Council is a high-level forum that seeks to coordinate and facilitate cooperation between the Arctic States and both directly and meaningfully engage the Indigenous peoples of the Arctic in this pursuit. The Indigenous representatives on this Council are not mere observers but are "permanent participants" with access to "active participation and full consultation".[133] This Council's conception of "full consultation" constitutes "close to a de facto power of veto", which is what properly distinguishes this Indigenous engagement from participation in a quasi-Kāwanatanga Sphere, to something much closer to a Relational Sphere.[134]

It may be helpful for each of the Kāwanatanga and Rangatiratanga Spheres to appoint subject matter experts to be included in their representation in the Relational Sphere. For example, if the international instrument in question was about trade relations, then an expertise base in commerce would be necessary. Similarly, if the international instrument in question concerned the protection of intellectual property, then it would be necessary for the Rangatiratanga and Kāwanatanga representatives to be knowledgeable in areas such as copyright, patents, trademarks and mātauranga Māori.

131 Marcia Langton and Lisa Palmer "Modern Agreement Making and Indigenous People in Australia: Issues and Trends" (2003) 8(1) AILR 1 at 6.

132 Russell Taylor "Towards More Effective Governance for Australian Indigenous Organisations—Values Contracts for Boards" (2004) 4 Journal of Indigenous Policy 103 at 109 as cited in Langton and Palmer, above n 131, at 21.

133 Andrew Jenks "Canada-Denmark-Finland-Iceland-Norway-Russian Federation-Sweden-United States: Joint Communique and Declaration on the Establishment of the Arctic Council" (1996) 35 ILM 1388 at 1389.

134 Koivurova and Heinämäki, above n 35, at 104.

It would also be necessary for sphere representatives to be trained in negotiations and advocacy. This would ensure that the final position adopted by Aotearoa New Zealand is as reflective as possible of the many people within it. It would also mitigate any disparities in bargaining power and skill between Aotearoa New Zealand and other nations. The Crown negotiating with Māori does not in itself "guarantee equitable outcomes" for Māori.[135] The nature of these negotiations would need to be culturally appropriate and based in the cultural traditions of both the Rangatiratanga and Kāwanatanga Spheres, to facilitate an intercultural dialogue.[136]

Ngā Toki Whakarururanga, an organisation which advances and protects Māori interests in trade, is a recently formed example of significant progress towards a Relational Sphere for Aotearoa New Zealand's international processes. Ngā Toki Whakarururanga provides te Tiriti o Waitangi assessments, audits and resources to inform communities of the impacts of trade agreements and ensures accountability to te Tiriti.[137] With the organisation's specialist membership holding expertise across various relevant sectors and its direct communication with the Crown (particularly MFAT), it is immensely significant. That is because it provides a tangible step towards a Relational Sphere in action for Aotearoa New Zealand's international processes. A fully effective Relational Sphere would also require the Crown to acknowledge and engage with it as such, and its membership to be determined by fully-resourced Rangatiratanga and Kāwanatanga Spheres.

(2) Process and functioning of the Relational Sphere

It is essential that the Relational Sphere be a permanent forum. This would be a change from the Crown's current policy of ad hoc consultations and information sharing only when it decides these are relevant. Thus, in line with the Waitangi Tribunal, I argue that "there must be a commitment to permanent engagement on international issues".[138] Furthermore, the Relational Sphere cannot be a body that is external to the Kāwanatanga and Rangatiratanga Spheres. The Relational Sphere at its most basic is a joint deliberative body premised on relationships and collaboration, so an external body would directly obstruct this purpose. It is also doubtful that an appropriate, truly external body could be identified.

This is not to say that the Relational Sphere would not be a dynamic entity. In fact, as covered earlier, it is crucial that the Relational Sphere be able to adapt to different international instruments and circumstances of international relations. A single static committee would likely be inappropriate and ineffective. At the very least, representatives of the Rangatiratanga and Kāwanatanga Spheres would need to regularly change to give the Relational Sphere the tailored expertise and experience it requires for each matter. However, it is also important that the Relational Sphere be adaptable in terms of how it conducts itself. For example, it would need to be flexible in terms of timelines when an international instrument is being considered under urgency, while still enabling proper engagement from each of the Rangatiratanga and Kāwanatanga Spheres.

135 Langton and Palmer, above n 131, at 1.
136 See Tully, above n 87.
137 Ngā Toki Whakarururanga "Who We Are" <www.ngatoki.nz>.
138 *Ko Aotearoa Tēnei*, above n 5, at 680.

Given that all three spheres share a source jurisdiction of tikanga Māori, the functions and processes of the Relational Sphere would need to be culturally appropriate.[139] This means the Relational Sphere would likely focus on such priorities as building relationships through whakawhanaungatanga and ensuring that the experience of engaging in the Relational Sphere enhances the mana of each participant. The Relational Sphere is not a purely Māori space, but it is situated in the cultural context of Aotearoa New Zealand and the historical and contemporary injustices of its colonisation. This means there would be a strong focus on respecting and upholding tikanga Māori through all the practices of the Relational Sphere.

The focus on whanaungatanga is even present in the naming of the Sphere, where it is all about relationships. It is important that the Relational Sphere is not adversarial and does not pit each of the Tiriti partners against each other. Rather, it is premised on building a collaborative relationship where each Tiriti partner contributes to the shared kaupapa. The Relational Sphere is all about coordinating the formulation of Aotearoa New Zealand's position on an international instrument. Thus, for both process and outcome to be cohesive, efficient and inclusive, this Sphere cannot be adversarial.

This does not mean that the representatives of the Kāwanatanga and Rangatiratanga Spheres cannot disagree at any stage. In fact, the Relational Sphere is dependent on each Tiriti partner accurately representing its peoples' views, interests and needs, perhaps especially when they conflict with those of the other Tiriti partner. The Tiriti partners should negotiate with each other in this way "to engage in mutually beneficial nation building".[140] The Relational Sphere requires open, transparent and vigorous dialogue. The strong value base of the spheres model ensures the productivity of this dialogue. The spheres are all founded in the values of community, belonging, place, balance, conciliation and structure, as discussed in Part III(A). These values all relate to and enable productive disagreements and promote outcomes acceptable to both Tiriti partners. They particularly ensure that the contributions of each sphere are taken seriously and not dismissed.

The need for the Crown to treat and mutually recognise the Rangatiratanga Sphere as equal is a key issue raised with the National Iwi Chairs Forum. When the Forum was established in 2005 at a national hui, it was intended to support the pursuit of a Tiriti-based relationship with the Crown. Its main aim was to "provide a vehicle through which Iwi might share information and support each other in matters of common interest as they pertained to the Crown".[141] However, this attempt has been undermined by the Crown's failure to meaningfully engage with the recommendations of the Forum, where "in some cases such as the foreshore and seabed any options offered by Māori simply seemed to be ignored or subordinated to Crown policy imperatives".[142] This lacks the good faith that should be expected from each Tiriti partner towards the other. Other principles of international relations, such as reasonableness, are also applicable here. These principles set an important baseline for what behaviour and interactions are acceptable in this context, despite not being the primary values of this manner of spheres model. It also highlights the need for strong, grounded relationship building when the Relational Sphere is first established to ensure there are clear expectations among representatives of the Kāwanatanga and Rangatiratanga Spheres.

139 See Part III.
140 Langton and Palmer, above n 131, at 5.
141 *Matike Mai Aotearoa*, above n 2, at 12.
142 At 12.

Having strong, grounded relationships between the Rangatiratanga and Kāwanatanga Spheres would also aid where there are disagreements about each Tiriti partner's relative interests in an international instrument. This sort of dispute has already been seen where the Crown denied the existence of Māori interests in the TRIPS Agreement, despite Māori submissions to the contrary.[143] The likely outcome of this sort of disagreement would be that the international instrument would not progress to either the Rangatiratanga or Kāwanatanga Sphere, but would rather remain in the Relational Sphere, as this would require the Crown and Māori to share responsibility for formulating the position of Aotearoa New Zealand. If disagreement persisted, this would likely mean that the nation would either abstain from supporting that international instrument, present a moderated position on it or seek to present the two differing perspectives.

The existence of disagreement does not negate the spheres model but rather strengthens the need for it, because these disagreements will exist regardless of whether a spheres model is operating. However, this model enables direct and productive engagement and discussion around disagreement, rather than excluding the Māori voice entirely. It is particularly important when considering that international instruments are inherently political, so the exercise of deciding whether to endorse any particular instrument is a political question. Thus, a spheres model could helpfully shift the discussion around the political topic away from whether Māori should have a voice or perspective on that topic at all, and towards discussing how to balance and recognise Māori interests with Crown interests. A spheres model implicitly affirms the sovereignty of each Tiriti partner.

B *Progression to Rangatiratanga or Kāwanatanga Sphere*

When the Relational Sphere first convenes for a particular international instrument, it would likely start with the representatives from each of the Rangatiratanga and the Kāwanatanga Spheres sharing how their respective interests are engaged by that international instrument. These engaged interests may be about the broader context of the instrument and its expected implications and impacts, or they may be about the substantive content of the instrument. The Rangatiratanga and the Kāwanatanga Spheres could collaborate in putting together an agenda of the broad topics under which their interests are engaged, to facilitate a productive and cohesive dialogue around them. While collaboration is important at all stages of the functioning of the Relational Sphere, it would also be important that each of the Rangatiratanga and the Kāwanatanga Spheres have dedicated time and space to share their perspectives and interests in an uninterrupted way. Doing so would ensure that they are properly heard and listened to and place a focus on understanding, rather than just on response. This goes back to the need for the Relational Sphere to be collaborative, not adversarial. It is also possible that one of the Rangatiratanga or Kāwanatanga Spheres would indicate they had no specific engaged interests in a particular international instrument and so that instrument would proceed directly to the other Sphere.

How the Relational Sphere would progress an international instrument after initial assessment would depend on the relative strength and importance of the respective interests of the Rangatiratanga and the Kāwanatanga Spheres. MFAT's description of assessing "the nature, extent and relative strength of the Māori interest" accurately

143 See Part IV.

describes the assessment.[144] The issue remains, however, that MFAT assumed responsibility, as part of the Crown, for conducting this assessment of Māori interests. Rather, the Relational Sphere involves both the Crown and Māori jointly weighing up their comparative interests and coming to a joint decision on which of the three spheres should have ultimate authority for leading Aotearoa New Zealand's position on the international instrument under consideration. Where the Relational Sphere progresses an international instrument to either the Rangatiratanga or Kāwanatanga Sphere, this does not preclude the other sphere having input into formulating Aotearoa New Zealand's position. In fact, it would very likely be mutually agreed that both spheres would have reasonable opportunity to provide input, although only one of them would lead that process. The Waitangi Tribunal even alludes to such a situation where it says that in some cases, the interests of one sphere will be "so overwhelming, and other interests by comparison so narrow or limited", that decision-making and/or representative powers will need to be delegated to just one sphere.[145] Even though the Tribunal privileges the Crown as having authority to speak for Aotearoa New Zealand with "one voice", it nonetheless acknowledges that "it may be necessary to place the Māori voice as the New Zealand voice in the international arena".[146]

It is also important to note that this functioning of the Relational Sphere takes place on a domestic level. Applying a spheres model in this context alters how Aotearoa New Zealand internally organises itself to participate in international processes, without requiring similar transformation of international relations.

C *The necessity of constitutional transformation*

A spheres model such as that I explore in this article is often dismissed as unrealistic because it is premised on radical Tiriti-based constitutional transformation, which remains a controversial topic in the politics of Aotearoa New Zealand. I respond that while it may be difficult, and require long-term change, "seeking constitutional transformation is simply the tika thing to do … [even though] any change of this magnitude will take time".[147] The magnitude of the constitutional project does not diminish its worth or necessity. Thus, even if this spheres model may not be implemented soon, or even at all, exploration and testing of a Tiriti-based constitutional model is still a valuable contribution towards responding to the injustice of colonisation through this journey of maturity into a truly bicultural nation of Māori and tāngata Tiriti:[148]

> Parliament or the [City] Council is where the table's at right now but that doesn't mean that's where it should always be at or even where it's meant to be at.

Te Tiriti was signed less than 200 years ago and the current electoral system of Aotearoa New Zealand has only existed for less than 40 years, so further significant change is conceivable. Constitutional transformation is a long-term project, made all the more meaningful by its immense scale.

An additional practical concern is the relation between Aotearoa New Zealand's international and domestic law-making processes. Aotearoa New Zealand has a dualist

144 *International Treaty Making*, above n 14.
145 *Ko Aotearoa Tēnei*, above n 5, at 682.
146 At 685.
147 *Matike Mai Aotearoa*, above n 2, at 22.
148 At 26.

legal system, meaning that its international instruments, even if ratified, are not binding domestically until incorporated into domestic law.[149] The impact of this was seen with the UNDRIP, where the New Zealand State only endorsed the UNDRIP three years after it was adopted by the United Nations General Assembly with an explicit statement that it was only "an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework".[150] This concern is therefore about the incompatibility between a Tiriti-compliant system for international processes in Aotearoa New Zealand, and the fact that the Crown and Māori may jointly endorse or ratify an international instrument, but then see no practical impact of it if the Crown does not then incorporate it into domestic legislation. I respond that a Kāwanatanga Sphere that is properly formulated in affirmation of te Tiriti would hold itself accountable through domestic implementation of its international agreements. A Relational Sphere would likely also have more power to ensure this accountability.

VI Conclusion

Aotearoa New Zealand's engagement with international instruments and processes is becoming increasingly salient as the world is faced with an increasing number of global issues that transcend state boundaries. It is important that as Aotearoa New Zealand's international engagement increases, Māori interests, perspectives and priorities are not excluded.

The current Crown strategy for international processes inappropriately privileges the Crown to the detriment of Māori and in contravention of te Tiriti. With Māori being consulted only sporadically, and only on legally binding instruments where the Crown has deemed there to be Māori interest, Māori are denied access to their constitutional role as a Tiriti partner in the bicultural nation of Aotearoa New Zealand. International instruments and processes therefore call for a Tiriti-honouring model with Rangatiratanga, Kāwanatanga and Relational Spheres. It is only with a spheres-based model that tino rangatiratanga can be fully manifested in this international setting.

149 Susan Glazebrook "Cross-Pollination or Contamination: Global Influences on New Zealand Law" (2015) 21 Canta LR 60 at 62.

150 *Ko Aotearoa Tēnei*, above n 5, at 674.