

REPORT

ON THE TRANS-PACIFIC

PARTNERSHIP AGREEMENT



# **REPORT ON THE TRANS-PACIFIC PARTNERSHIP AGREEMENT**

WAI 2522



WAITANGI TRIBUNAL REPORT 2016

The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Māori and Pākehā history in New Zealand as it continuously unfolds in a pattern not yet completely known

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The Tribunal wishes to acknowledge the passing of Kathy Ertel, shortly before our hearing. Kathy was counsel for the lead claimants. She was pivotal to bringing these important issues before us and made a very important contribution to the inquiry. Kathy has been a trusted adviser and fearless advocate for Māori in the courts and the Tribunal over many years. We have lost a friend and colleague. Claimants have lost a champion.

*Nō reira e Kathy, e te wahine toa, haere atu rā ki te wāhi whakamutunga mō te tangata.  
Moe mai, moe mai.*



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## ACKNOWLEDGEMENTS

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## Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

*Kia puta ki te whai ao, ki te marama*

The Honourable Te Ururoa Flavell  
Minister for Māori Development

The Right Honourable John Key  
Prime Minister

The Honourable Steven Joyce  
Minister for Economic Development

The Honourable Christopher Finlayson QC  
Attorney-General

The Honourable Murray McCully  
Minister of Foreign Affairs

The Honourable Todd McClay  
Minister of Trade

Parliament Buildings  
WELLINGTON

17 June 2016

E ngā Minita, tēnā koutou

Ka hua ake ngā whakamoemiti ki ngā mana  
katoa kua whetūrangitia.

Kei roto tō rātou wairua i ngā kaupapa kua  
whārikitia ki te aroaro o tēnei Taraipiunara,  
hei Kaitiaki mō ngā tūmanako e puritia nei e  
te Tiriti o Waitangi.

Greetings Ministers

Thanks and acknowledgements to all who  
have passed into the heavenly realms.

Their spirit is in the matters laid before  
this Tribunal as Keeper of the hopes and  
aspirations held by the Treaty of Waitangi.

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Enclosed is the published *Report on the Trans-Pacific Partnership Agreement*, the result of an urgent hearing in Wellington from 14 to 18 March 2016. This follows the release of the pre-publication version of our report in on 5 May 2016.

The primary issue for inquiry was whether or not the Treaty of Waitangi exception clause is an effective protection of Māori interests.

We conclude that the exception clause will be likely to operate in the TPPA substantially as intended and therefore can be said to offer a reasonable degree of protection to Māori interests. We have come to this view even though the clause as drafted only applies to measures that the Crown deems necessary to accord more favourable treatment to Māori. This raises a question about the scope of the clause.

From the evidence before us, it seems the most likely source of risk to Māori under the TPPA will be investor–state claims in respect of domestic measures which place Māori at a relative advantage in comparison to a foreign investor. In these instances we think the exception clause should operate to provide a reasonable degree of protection.

The development of the Treaty exception clause, and its successful incorporation in the Singapore free trade agreement and every free trade agreement since (including the TPPA), demonstrates leadership and is to the credit of successive New Zealand governments. We acknowledge that, in the context of the TPPA, it is an achievement to have maintained the clause given the number and diversity of participating states. We believe the Crown was right to argue for the inclusion of such a clause because of the significance of the Treaty of Waitangi in New Zealand's constitutional arrangements.

We therefore do not find a breach of the principles of the Treaty of Waitangi arising from the inclusion of the Treaty exception clause in the TPPA in its current form.

Despite this finding, we do have concerns. The protections and rights given to foreign investors under the TPPA are extensive. The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, may have a chilling effect on the Crown's willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures. This issue and the appropriate text for a Treaty exception clause for future free trade agreements are matters about which there should, in our view, be further dialogue between Māori and the Crown.

The second issue we identified for inquiry concerned what engagement and input is now required over steps needed to ratify the TPPA, including changes to Government policies that may affect Māori. While we make no formal recommendations, we do offer a number of suggestions. As well as improvements to routine engagement processes, these include ideas proposed by expert witnesses which could be developed into a policy to be applied in the event of an ISDS claim concerning Māori rights and interests where the Treaty exception clause may be triggered.

There is one matter arising from our second issue about which we did not have sufficient information, because the Crown is still developing its process for engagement. This is in respect of changes to be made to the plant variety rights regime and whether or not New Zealand should accede to UPOV 91. On that issue, we adjourn our inquiry with a view to assessing what (if any) further steps may be necessary once further information is available.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'MJ Doogan', with a long horizontal flourish extending to the right.

Judge MJ Doogan  
Presiding Officer

ABBREVIATIONS

art	article
ASEAN	Association of South-East Asian Nations
CA	Court of Appeal
CEP	Closer Economic Partnership
ch	chapter
doc	document
ed	edition, editor
EU	European Union
FET	fair and equitable treatment
FOMA	Federation of Māori Authorities
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
ISDS	investor–state dispute settlement
ltd	limited
MBIE	Ministry of Business, Innovation, and Employment
MFAT	Ministry of Foreign Affairs and Trade
MFN	most favoured nation
MST	minimum standard of treatment
n	note
no	number
NT	national treatment
NZLR	<i>New Zealand Law Reports</i>
NZMC	New Zealand Māori Council
p, pp	page, pages
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
RMA	Resource Management Act
SEP	Strategic Economic Partnership
TPK	Te Puni Kōkiri (Ministry of Māori Development)
TPP	Trans-Pacific Partnership (also known as the TPPA)
TPPA	Trans-Pacific Partnership Agreement
UPOV	International Union for the Protection of New Varieties of Plants
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise noted, endnote references to claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2522 record of inquiry, a select copy of which is reproduced in appendix iv. A full copy is available on request from the Waitangi Tribunal.

## CHAPTER 1

**INTRODUCTION**

This report follows the hearing under urgency of claims concerning the Trans-Pacific Partnership Agreement (TPPA). The claims were filed on behalf of a range of prominent Māori individuals and organisations. A large number of interested parties also joined in support.<sup>1</sup>

At the heart of the claims is a concern that New Zealand's entry into the TPPA will diminish the Crown's capacity to fulfil its Treaty of Waitangi obligations to Māori. Although there is a clause in the TPPA allowing the Crown to give Māori more favourable treatment, the claimants do not consider that it is adequate to protect their interests. They also say that the Crown's consultation process fell far short of its partnership obligations under the Treaty.

Although the TPPA is described as a free trade agreement, it contains provisions that reach beyond traditional trade agreements.<sup>2</sup> The negotiations were confidential.<sup>3</sup> The TPPA countries agreed that governments could provide draft text and other materials to 'persons outside government who participate in [the] domestic consultation process'.<sup>4</sup> However, it was the New Zealand Government's practice not to share text or negotiating positions with anyone outside of government.<sup>5</sup> The agreed text of the concluded agreement was not released until 5 November 2015, a month after negotiations concluded.<sup>6</sup> The agreement is substantial, consisting of 30 chapters totalling more than 9,000 pages.

The TPPA will come into force within two years if all states notify completion of domestic ratification or after 26 months if at least six states comprising a minimum of 85 per cent of the combined GDP of TPPA signatories have done so.<sup>7</sup> This means that the agreement will only go ahead if the United States and Japan notify completion of domestic ratification.<sup>8</sup>

**1.1 PROCEEDINGS**

The first claims were lodged on 23 June 2015. The claimants sought an urgent hearing and a recommendation that the Crown immediately halt progress towards signing the TPPA until there had been full engagement with Māori, and steps taken to ensure that mechanisms were in place to provide that the Crown could meet its obligations to Māori under Te Tiriti. Claimants also sought a recommendation that the Crown immediately release the draft text of the TPPA to enable informed debate. We heard argument on 23 July 2015 as to whether urgency should be granted, and issued our decision on 31 July 2015.<sup>9</sup>

At the time, it was thought that TPPA negotiations could finish in late July or early August 2015. We concluded there was no real prospect of a Tribunal inquiry and report on such complex and far-reaching issues between the filing of the first applications and probable conclusion of the TPPA negotiations. The late filing of the applications was also a factor in our decision not to recommend a delay to the TPPA negotiations or release of negotiation text. In preliminary directions on 14 July 2015 we said:

Even allowing for the fact that an assessment of prejudice is inherently difficult given the secrecy of the TPP negotiations, we are not convinced that there is a proper basis to intervene, or attempt to intervene and exercise what limited recommendatory or inquiry powers we have at this final stage of the TPP negotiations.<sup>10</sup>

We declined urgency on the terms sought by the claimants, but considered that there were grounds for an urgent hearing as and when the final text of the agreement became available.<sup>11</sup> The grounds included: the fact that the TPPA is much broader than previous trade agreements; that the efficacy of the Treaty exception in such an agreement was unclear and untested; that the secrecy of the negotiations heightened the Crown's duty of active protection; and that consultation with Māori appeared to be limited and selective, and treated Māori as stakeholders rather than Treaty partners.<sup>12</sup> We determined that the urgent inquiry should focus on the Treaty of Waitangi exception clause and the engagement with Māori required before the TPPA was ratified.<sup>13</sup>

At that time, the Crown would not confirm whether the TPPA would ultimately include a Treaty of Waitangi exception clause, saying: 'The basis of the TPP negotiations, like other negotiations, is that nothing is agreed until everything is agreed.' Crown counsel would only confirm that such an exception had been a bottom line for New Zealand in all its free trade agreements since 2001, and that the text of the exception sought for inclusion in the TPPA was essentially the same as in previous agreements. Counsel added that, while officials always reconsider the kind of text that is appropriate for a new agreement, the

exception sought for the TPPA was 'fit for purpose', and 'secures the necessary regulatory freedom for the Crown to meet its Treaty obligations'.<sup>14</sup>

We supported a proposal that an independent barrister review the Treaty exception clause in confidence, on the basis that he or she could assure the claimants that Māori interests were being protected despite limited Māori involvement. The Solicitor-General sought instructions and on 28 July 2015 advised that the Crown had declined the proposal for an independent review. The Crown's objections centred on the inadvisability of changing the Treaty exception at that stage. Crown counsel submitted that other countries would probably want to renegotiate other sensitive clauses, potentially to New Zealand's detriment. They said that even the Treaty exception itself could be put at risk.<sup>15</sup>

The TPPA negotiations were finally concluded on 5 October 2015.<sup>16</sup> On 6 November, the Crown informed us that the TPPA text had been publicly released and was available on the Ministry of Foreign Affairs and Trade (MFAT) website.<sup>17</sup> Our hearing took place in Wellington in an intensive session over five days, from 14 to 18 March 2016, and written closing submissions were subsequently filed. It is appropriate to record that such a focused inquiry into complex issues was only possible with the cooperation of counsel and witnesses, including three expert witnesses. Shortly afterwards, Crown counsel indicated that a Bill would not be introduced before early June 2016.<sup>18</sup> We have since been told by the Crown that the select committee process has been truncated and the committee will report back in the first week of May. A Bill may be introduced any time from 9 May onwards.<sup>19</sup>

## 1.2 THE ISSUES FOR INQUIRY

We granted urgency to the hearing of the claims once the text of the TPPA was available. We set the following two issues for inquiry:

- ▶ whether or not the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be; and
- ▶ what Māori engagement and input is now required

over steps needed to ratify the TPPA (including by way of legislation and/or changes to Government policies that may affect Māori).<sup>20</sup>

### 1.3 THE TREATY EXCEPTION

Clause 29.6 of the TPPA states:

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.<sup>21</sup>

### 1.4 THE SCOPE OF THIS INQUIRY

The claims before us raise matters of considerable importance, not just to Māori but to all New Zealanders. There are nonetheless important limitations on our jurisdiction and upon the scope of our inquiry, about which we need to be clear.

Our core expertise as a tribunal is not in the interpretation, negotiation, or implementation of international instruments. In the face of differing expert opinions we reach conclusions in such matters with some diffidence and only where we feel we must in order to properly address the issues for inquiry.

It is not our function to assess the merits or otherwise of New Zealand's entry into an international

instrument such as the TPPA. That is a political matter for the Government of the day, accountable to the electorate. Our role is to inquire into claims by Māori that the Crown by act or omission has acted inconsistently with the principles of the Treaty of Waitangi.

In pre-hearing directions, we observed that, if we were not persuaded that the Treaty exception clause could effectively protect Māori interests, then it might be because the Crown's process was defective in a material way. Alternatively, the Crown may not have given the Treaty sufficient priority or weight. But the core issue for inquiry was what the actual Treaty exception does or does not do, rather than what it could or should be.

We framed our inquiry within narrow terms primarily because our window to inquire and report is short. We will lose all or part of our jurisdiction upon the introduction of a Bill to Parliament ratifying the TPPA. As noted above, this could happen at any time from 9 May 2016. We have therefore expedited our reporting process to release this report prior to that date.

All parties worked hard within tight timeframes to assist us in this inquiry. We mean no disrespect to the industry of counsel, the comprehensive expert analysis, and the evidence of witnesses, but we have not been able within the time available to record our consideration of all the matters raised. We have nevertheless given careful consideration to the evidence and the arguments. Established Treaty jurisprudence and expert analysis enabled us to address the effectiveness of the Treaty exception fairly directly. We address the second issue, concerning what steps are now required during the ratification stage, against the backdrop of what we understand to be the process to date. We make a number of suggestions about future process and policy development. Because we do not have sufficient information about the proposed engagement process in respect of changes to the plant variety rights regime and UPOV 91, we adjourn that aspect of our inquiry until further information is available.<sup>22</sup>

We note that ratification is not just the passage of necessary Acts. Domestic compliance may include subsidiary legislation, Ministerial directions, and policy changes. We prioritised, for hearing, the effectiveness of the Treaty of

Waitangi exception clause in the TPPA, because we saw it as an issue of fundamental importance given the constitutional significance of the Treaty of Waitangi. We recognise that in so doing we have not been able to engage with or inquire into a range of other issues identified by claimants. They stated that several other parts of the TPPA were of importance to them, namely the obligation to accede to UPOV 91, aspects of the intellectual property chapter relating to medications, and the transparency annex, which will affect the operation of Pharmac.<sup>23</sup> While these matters were raised during hearings, they were not the focus of this inquiry, and we accordingly make no findings on these aspects of the TPPA. The focus of our inquiry was the Treaty exception and the consultation which the Crown should now undertake. We do, however, anticipate that the Crown will consult with Māori over UPOV and other matters, and so our discussion of consultation is relevant in that respect.

A significant feature of all claims is the high level of dissatisfaction expressed with the process by which the Crown has negotiated entry into the TPPA. As witness Willow-Jean Prime put it,

Maori signatories to Te Tiriti o Waitangi would not have envisaged the Crown's representation of Maori in international affairs as being an exercise of exclusion, secrecy and marginalisation, such as the process undertaken in negotiating and signing the TPPA.<sup>24</sup>

The issue of consultation is not new, and it became clear to us in considering the efficacy of the Treaty exception that the Crown has not shown that it has understood the nature and extent of Māori interests affected by the TPPA.

### **1.5 SOVEREIGNTY ISSUES: THE TRIBUNAL'S TE PAPARAHĪ O TE RAKI STAGE 1 REPORT**

Some of the claimants in this inquiry are also claimants in the Te Paparahi o te Raki inquiry. They relied on that Tribunal's stage 1 report, *He Whakaputanga me Te Tiriti*.

They suggested that the Crown – in negotiating the TPPA – has failed to act on the Tribunal's conclusion that Māori signatories to the Treaty in the north did not cede sovereignty and instead agreed to share power.<sup>25</sup> It was argued that this Tribunal ought to be guided by the conclusions of the stage 1 report, particularly on the extent of the Crown's authority to represent Māori in negotiating international instruments.<sup>26</sup> The Crown disagreed, submitting that the findings the claimants seek in this respect would cut across stage 2 of the Te Raki inquiry, which is currently in hearing.<sup>27</sup>

In reply, counsel for Ngā Kaiāwhina a Wai 262 and Mataatua District Māori Council said: 'The claimants do not ask this Tribunal to make a finding on whether or not the sovereignty that the Crown purports to exercise is, in fact, legitimately held in accordance with the laws of New Zealand, as that is not the Tribunal's role.'<sup>28</sup> Rather, counsel submitted that in order for this (or any) Tribunal to undertake its role under sections 5 and 6 of the Treaty of Waitangi Act 1975, it must 'turn its mind to the actual meaning of the Tiriti/Treaty'. The stage 1 report, counsel submitted, 'was the first Tribunal to have undertaken an in depth inquiry into the meaning and effect of the Tiriti/Treaty', and its conclusions 'differed in a significant way from previous interpretations of what the Tiriti/Treaty meant':

Previously, the Courts had made findings on the basis that the Tiriti/Treaty had provided the Crown with the authority to govern unilaterally over all of New Zealand and over all the inhabitants of New Zealand, so long as the Crown actively protected the lands and other taonga of Maori, and this sometimes involved consultation, and at times, engagement and even informed consent.

However, the [Te Raki stage 1] Report differed significantly because it concluded that there are essentially three spheres of authority that co-exist under the Tiriti/Treaty; those being: the British Crown governing its subjects over land legitimately acquired by it or them ('British Authority'); Māori tino rangatiratanga over Māori lands and peoples ('Māori Authority');

and a partnership, to be discussed and agreed where Maori and English populations intermingled ('Shared Authority').<sup>29</sup>

Counsel submitted that this Tribunal cannot undertake its task 'without first having a correct interpretation of the Tiriti/Treaty', and that we would be 'remiss' in our statutory and legal obligations were we not to 'rely on the interpretation of the Tiriti/Treaty' contained in the stage 1 report.<sup>30</sup>

We agree that the Tribunal's stage 1 report is of great general significance. We also agree that the Tribunal, in exercising its functions under the Treaty of Waitangi Act, has the authority to determine the meaning and effect of the Treaty. We note that the Tribunal in stage 1 of the Te Raki inquiry made its determination of the meaning and effect of the Treaty for the purposes of inquiring into the claims before it – that is, the largely historical claims of Māori in the Te Paparahi o te Raki district. This is a task it continues to fulfil in stage 2.

In his letter of transmittal dated 14 October 2014, the presiding officer of the Te Raki Tribunal stated:

I reiterate that our report concerns the meaning and effect of the Treaty in February 1840. It does not contain findings in respect of claims, and nor does it make recommendations. It makes no conclusions about the sovereignty the Crown exercises today. Nor does it say anything about how the Treaty relationship should operate in a modern context.<sup>31</sup>

Those are important caveats which we bear in mind in reviewing applicable jurisprudence.

We are tasked with inquiring into claims arising from the Crown's actions in respect of the TPPA. In doing so, we may look for guidance to a range of previous Tribunal reports that have made determinations on the meaning and effect of the Treaty and the Treaty's principles, as well as any relevant jurisprudence arising from the courts. This includes, but is not confined to, any specific guidance on the Crown's obligations in entering into international agreements.

While the Te Raki stage 1 report is significant – both for the breadth of evidence underpinning the conclusions on the meaning and effect of the Treaty and for the nature of the conclusions – we must also take guidance from other relevant Tribunal reports, particularly that of the Wai 262 Tribunal.

It is not our role to consider the consequences of the Te Raki Tribunal's conclusions in the stage 1 report for Treaty principles – that is a matter for that Tribunal in stage 2. Nothing we say in this inquiry is intended to intrude into, or influence, the ongoing Te Raki inquiry. We also consider that an urgent inquiry is not the appropriate forum to address broad constitutional questions, particularly those concerning the Crown–Māori relationship in respect of international instruments. We do not have the time, evidence, or range of interested parties to properly conduct such an inquiry.

## 1.6 THE ARGUMENTS MADE BY THE PARTIES

There is a sharp divergence between claimants and the Crown over the nature, extent, and relative strength of the Māori interests put in issue by the TPPA. Broadly speaking, the Crown characterises the TPPA as a natural progression from previous free trade agreements, albeit on a larger scale. Māori interests are not seen as central to the TPPA and the agreement is not considered to have a particular impact on Māori interests under the Treaty or otherwise. The Crown says that, to the extent Māori interests are impacted, they tend to be interests held as investors, businesses, or landowners.<sup>32</sup>

Claimant counsel, on the other hand, characterise the TPPA as a quantum shift in the nature and extent of New Zealand's international commitments, which could prejudice Māori. They argue that the reach of the TPPA substantially inhibits domestic regulatory autonomy in a range of areas, including the environment, health, and intellectual property.<sup>33</sup> Central to this concern is the system of investor–state dispute settlement (ISDS), which allows overseas investors to sue the Crown over actions

which damage investors' financial interests. This right is additional to the right of one state-party to claim against another state-party. The possibility of an ISDS claim, or the threat or apprehension of a claim, is said to have a 'chilling effect' on the Government's willingness to comply with its domestic Treaty of Waitangi obligations.<sup>34</sup>

The Ngāpuhi claimants question the assumption that the Crown had the right to unilaterally decide upon negotiation and entry into the TPPA. They place reliance on the Te Raki Tribunal's stage 1 report.<sup>35</sup>

From those perspectives, the Crown and claimants draw sharply different conclusions as to the adequacy of the Treaty exception in the TPPA. During hearings, MFAT chief negotiator Dr David Walker said that 'the Crown continues to see [the Treaty exception] as entirely sufficient for the purpose of the [exception] in the international agreement.'<sup>36</sup> Claimant counsel, on the other hand, submit that the exception has several serious flaws, and see the failure of the Crown to review or update it since 2001, or involve Māori in that process, as a fundamental failure of both process and substance.<sup>37</sup>

Those differences carried forward to our second issue: the actions now required. The Crown proposes incremental and targeted engagement.<sup>38</sup> Claimants argue for remedial action on the Treaty exception, and a more fundamental and thorough-going review in terms of future international agreements of this type.<sup>39</sup> They say that the Crown has had detailed recommendations on these matters since 2011, when the Tribunal released its Wai 262 report, but has failed to act upon them.<sup>40</sup>

Our consideration of these complex issues has been greatly assisted by the evidence of three expert witnesses. Professor Jane Kelsey was briefed by claimant counsel, Dr Penelope Ridings was briefed by the Crown, and we briefed Associate Professor Amokura Kāwharu.

## 1.7 THE TREATY STANDARD

The parties identify a range of Treaty principles which they consider are relevant to this inquiry. The claimants say that the Crown has failed to act consistently with those principles in negotiating the TPPA and in drafting the

Treaty exception. The Crown, by contrast, considers it has acted consistently with Treaty principles.

For both claimants and the Crown, the starting point is the principle of reciprocity. This is the Treaty's 'essential compact' – the recognition of the Crown's right of *kāwanatanga* (the right to govern) in exchange for the guarantee of *tino rangatiratanga* (the right of full chieftainship, also known as autonomy, or self-government).<sup>41</sup>

The mutual acknowledgement of rights and authority involved in the Treaty gives rise to the principle of partnership. Partnership requires the parties to the Treaty to act reasonably and in good faith towards each other on all occasions. Included in the principle of partnership is the Crown's duty to consult with Māori. Tribunals have previously found that the Crown must consult with Māori on matters of importance to them, though this is not an open-ended requirement. The Central North Island Tribunal described the Crown's duty in the following terms:

The test of what consultation is reasonable in the prevailing circumstances depends on the nature of the resource or taonga, and the likely effects of the policy, action, or legislation. In some circumstances, a lack of consultation with iwi and hapu over their interests will mean that the Crown cannot make an informed decision. In other cases, it can make an informed decision without consultation.<sup>42</sup>

While the claimants dispute the Crown's interpretation and application of the partnership principle in negotiating the TPPA, they nevertheless see partnership as critical, as it 'denotes collectivity, working together, cooperation, and compromise'.<sup>43</sup>

The principle of active protection is of particular relevance in assessing the efficacy of the Treaty exception clause. The claimants point to the often quoted words of Justice Cooke, that 'the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.<sup>44</sup> They say that there are flaws in the Treaty exception which show that the Crown has failed to act consistently with the principles of partnership and active protection.<sup>45</sup> The Crown submits, however, that the 'duty

of active protection is not absolute or unqualified.<sup>46</sup> In this regard, claimants and the Crown cite the decision of the Privy Council in the *Broadcasting Assets* case, which said that while ‘the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.’<sup>47</sup>

Claimants and the Crown also identify the Crown’s capacity to provide redress as an additional, and critical, consideration in looking at the issues in the inquiry.<sup>48</sup> The principle of redress has it that Māori are entitled to redress in situations where the Crown has breached its obligations under the Treaty to the extent that Māori have been prejudicially affected. Parties point to the following test applied by the Supreme Court in the *Water* case:

In deciding whether proposed Crown action will result in ‘material impairment’, a court must assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity.<sup>49</sup>

In the context of this inquiry, the Crown’s ability to act in accordance with both the Treaty of Waitangi and the TPPA is crucial. The issue is whether entry into the TPPA materially impairs the Crown’s capacity to provide redress to Māori.

### 1.8 THE WAI 262 REPORT

In assessing the claims before us, we place particular weight on the findings of the Wai 262 Tribunal. This is because that Tribunal undertook a broad assessment of the Crown’s policies and practices in respect of international instruments in light of the meaning of the Treaty and its principles. The Tribunal concluded that through article 1, the Crown acquired the right to govern, included in which is the right to represent New Zealand abroad and to make foreign policy. This right, however, was acquired in exchange for the guarantee to protect Māori interests, including their full authority over their own affairs.<sup>50</sup> This, in our view, is broadly consistent with the conclusion in

the Te Raki stage 1 report that – through the Treaty – the Crown acquired the right to protect Māori from ‘foreign threats and represent them in international affairs, where that was necessary.’<sup>51</sup> We acknowledge the claimants’ view that ‘the Tribunal qualified this point by adding that “the chiefs’ emphasis was on British protection of their independence, not a relinquishment of their sovereignty”’.<sup>52</sup>

The Wai 262 report is particularly relevant because it considered whether or not the Crown’s ‘Strategy for Engagement with Māori on International Treaties’ was consistent with the Treaty and, if not, what would need to change to make it so. This is the same strategy which is referred to in the Crown’s evidence in this inquiry as its guide for engagement on the TPPA.<sup>53</sup> The Wai 262 Tribunal identified a number of problems with the Crown’s strategy. Among these was a concern about ‘how the strategy is carried out in practice, in terms of providing consistent and full information to the right people at the right time, so as to consult effectively with Māori when their interests are (sometimes vitally) affected.’<sup>54</sup>

Having considered the strategy, the Wai 262 Tribunal also set out the particular obligations that the Treaty partners owed to each other in the context of negotiating international instruments:

it is for Māori to say what their interests are, and to articulate how they might best be protected – in this case, in the making, amendment, or execution of international agreements . . . It is for the Crown to inform Māori as to upcoming developments in the international arena, and how it might affect their interests. Māori must then inform the Crown as to whether and how they see their interests being affected and protected.<sup>55</sup>

The Tribunal also said:

the degree of priority to be accorded the Māori interest depends on the scale of its importance to Māori and the nature and extent of likely impacts on it. Ultimately, this has to be ascertained by a properly informed Crown and then balanced against any valid interests of other New Zealanders and of the nation as a whole, if those interests are in tension.<sup>56</sup>

To this end, the Tribunal concluded that the Treaty of Waitangi entitles Māori interests to a reasonable degree of protection when those interests are affected by international instruments.<sup>57</sup> The Tribunal said:

We . . . acknowledge that the Crown has to operate in a complex and rapidly changing international environment. There is no doubt that New Zealand is a small player with limited influence in international processes. In this context, the Crown has to evaluate all of New Zealand's many and varied interests so as to arrive at a national position. It then has to find the best way to advance that position when more powerful currents may be pulling it elsewhere. In this environment, engagement with Māori . . . is not always going to be perfect. But, as we have said, Māori are not just another interest group; Māori are the Crown's Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances.<sup>58</sup>

In accordance with the Treaty, then, the Crown must work out a level of protection for Māori interests, as identified and defined by Māori, that is reasonable when balanced where necessary against other valid interests, and in the sometimes constrained international circumstances in which it must act.<sup>59</sup>

The Tribunal set out a 'sliding scale' along which Crown engagement with Māori should occur. The level of engagement depends on the degree and nature of Māori interests, as '[c]onsidering the broad spectrum of international matters, it would be impractical and undesirable for the Crown to engage in full-scale consultation with Māori over every international instrument'.<sup>60</sup> The sliding scale sets out the following:

- ▶ Where Māori interest is limited, very little engagement will be required, other than perhaps the provision of information.
- ▶ When Māori interests are at play but wider interests are to the fore, a very general level of engagement is justified. Sometimes the Māori interests will be a specialised one, which would warrant consultation with certain groups, such as informing and seeking the views of the Federation of Māori Authorities

(FOMA), who tend to speak on behalf of iwi business interests. When Māori interests are significantly affected, intensive consultation and discussion is required.

- ▶ On some occasions, Māori Treaty interests will be so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus. The United National Declaration of the Rights of Indigenous Peoples would be an example.
- ▶ There may even be times where the Māori interest is so overwhelming, and other interests so limited, that the Crown should contemplate delegation of its decision-making powers, or delegation of its role as New Zealand's 'one voice' in international affairs. Negotiations over the repatriation of taonga might be an example.<sup>61</sup>

The report noted that

the operation of that scale is by its nature imprecise and is dependent upon the relationship of the Treaty partners to be effective in practice. In considering the possible trigger points on such a sliding scale, the Crown will need to consider when to engage with Māori on matters Māori perceive as important to them.<sup>62</sup>

We agree with and adopt the findings of the Wai 262 Tribunal. Māori interests are entitled to a reasonable degree of protection when those interests are affected by international instruments entered into by the New Zealand Government. The challenge for us lies in applying the Wai 262 Tribunal's findings in the context of the TPPA.

## 1.9 THE STRUCTURE OF THIS REPORT

In chapter 2, we begin by evaluating the extent and nature of Māori interests under the TPPA, taking into account the parties' arguments and the ways in which the TPPA differs from earlier free trade agreements. We then discuss the Crown's assessment of Māori interests in chapter 3, touching on the process which took place during the TPPA negotiations. We do so in order to assess the extent to

which the Crown informed itself of the nature and extent of Māori interests, and in order to inform our conclusion on the second issue. In chapter 4, we examine the Treaty exception itself, assessing the level of protection which it appears to provide for Māori interests. Finally, in chapter 5, we set out our conclusions.

### Notes

1. See appendix 1 for an outline of the claims and interested parties.
2. See document A2, p 20, for a description of the TPPA as a free trade agreement, and see document A48(a) for an indication of the range of areas covered by the TPPA.
3. Document A2, p 15
4. Document A1(a), exhibit z, p 353
5. Transcript 4.1.1, pp 50–51
6. Document A12, pp 3–4; doc A13, p 2
7. Document A12, p 8
8. Transcript 4.1.2, p 443
9. Memorandum 2.5.9
10. Memorandum 2.5.6, p [2]
11. Memorandum 2.5.9, pp 15–16
12. Ibid, pp 17–18
13. Ibid, p 17
14. Submission 3.1.41, pp 13–14
15. Submission 3.1.43, p 1
16. Submission 3.1.66, p 1
17. Submission 3.1.76, p 1
18. Submission 3.1.132
19. Submission 3.4.10
20. Submission 2.5.9, p 17
21. Document A13(a), p 6096
22. UPOV 91 is the most recent (1991) version of the International Convention for the Protection of New Varieties of Plants, which aims to encourage the creation of new plant varieties by protecting the intellectual property rights of plant breeders over the new varieties they create. The Wai 262 report explored the concept of intellectual property rights over living things in detail. Claimants in that inquiry were opposed to systems of intellectual property which give exclusive legal rights over taonga species to anyone other than the kaitiaki of that species. Among other things, the Wai 262 Tribunal recommended that New Zealand's Plant Variety Rights Act be amended to allow plant variety rights to be refused on the grounds that it would affect kaitiaki relationships with taonga species. There is a question about whether or not this would be allowed under UPOV 91: Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 206.
23. Submission 3.3.16, pp 8–9; submission 3.3.25, pp 44–46, 50–52; doc A14; doc A26, p 17; doc A29, pp 5–7
24. Document A26, pp 10–11
25. Submission 3.3.24, pp 3–4; submission 3.3.21, pp 24–34; submission 3.3.20, pp 7–8; submission 3.3.23, pp [6]–[8]
26. Transcript 4.1.2, pp 33–37, 501
27. Submission 3.3.27, pp 8–9
28. Submission 3.3.36, p [5]
29. Ibid, pp [5]–[6]
30. Ibid, p 6
31. 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*, 2 vols (Wellington: Legislation Direct, 2014), vol 1, pp xxii–xxiii
32. Document A36, p 40
33. Claim 1.1.1, pp 5–6, 10–11, 17–18; Wai 2523 RO1, claim 1.1.1, pp 10–11; Wai 2530 RO1, claim 1.1.1, p [6]; Wai 2531 RO1, claim 1.1.1, pp 8–10; Wai 2532 RO1, claim 1.1.1, p 4; Wai 2551 RO1, claim 1.1.1, p 3
34. Claim 1.1.1, p 18; submission 3.3.16, p 9; submission 3.3.20, pp 14–16; submission 3.3.21, p 42; submission 3.3.22, pp 4–6; submission 3.3.23, p 12; submission 3.3.24, pp 14–19; submission 3.3.25, pp 7–8; submission 3.3.26, p 11
35. Wai 2523 RO1, claim 1.1.1, pp 9–12; Wai 2530 RO1, claim 1.1.1, pp [3]–[4]; Wai 1427 RO1, claim 1.1.1(b), p 2; Wai 2533 RO1, claim 1.1.1, p [9]
36. Transcript 4.1.2, p 453
37. Submission 3.3.16, pp 6–8; submission 3.3.17, p 14; submission 3.3.19, pp 3, 20–29; submission 3.3.20, pp 10–12; submission 3.3.21, pp 56, 61–65; submission 3.3.22, pp 8–14; submission 3.3.23, p 14; submission 3.3.24, pp 10, 13–14; submission 3.3.25, pp 14–27; submission 3.3.26, pp 9–15
38. Submission 3.3.27, p 77
39. Submission 3.3.20, p 33; submission 3.3.21, p 72; submission 3.3.22, p 19
40. Submission 3.3.19, p 70; submission 3.3.20, p 33; submission 3.3.22, p 19; submission 3.3.23, p 19; submission 3.3.26, p 28
41. Submission 3.3.19, pp 12–13; submission 3.3.21, pp 39–42; submission 3.3.27, pp 17–18
42. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1237
43. Submission 3.3.21, p 49
44. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664
45. Submission 3.3.21, p 60
46. Submission 3.3.27, p 18
47. *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) at 517; submission 3.3.21, p 52; submission 3.3.27, p 18
48. Submission 3.3.22, pp 2–3; submission 3.3.27, pp 16–17
49. *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (SC) (the *Water* case) at 64
50. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, p 680
51. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, vol 2, p 529
52. Submission 3.3.21, p 40

- 53. Document A2, pp 12–13
- 54. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, p 683
- 55. Ibid, p 681
- 56. Ibid
- 57. Ibid
- 58. Ibid, p 682
- 59. Ibid, p 684
- 60. Ibid, p 681
- 61. Ibid, p 682
- 62. Ibid

## CHAPTER 2

**MĀORI INTERESTS IN THE TPPA**

We will now consider the nature, extent, and relative strength of the Māori interests affected by the TPPA. The answer to this question speaks directly to the nature of the Crown's duty to protect those interests in the negotiation and implementation of the TPPA. We first consider the extent to which the TPPA is significantly different from previous free trade agreements. This is a key factor when we turn to consider the effectiveness of the Treaty exception clause in the TPPA.

We address this issue also because the Crown's 'Strategy for Engagement with Māori on International Treaties', as approved by Cabinet, requires an assessment of Māori interests. This requirement is also emphasised in the recommendations of the Wai 262 Tribunal. That Tribunal found that the Crown must properly assess Māori interests before entering into international agreements.

**2.1 THE SCOPE OF THE TPPA**

In pre-hearing directions we expressed a preliminary view that the TPPA, in both substance and reach, was substantially different from previous free trade agreements (FTAs).<sup>1</sup> The Crown in response submits that, contrary to our preliminary assumptions, the obligations agreed to in the TPPA 'are not substantially different' to previous FTAs.<sup>2</sup> For the reasons that follow, we do not think it is that simple.

The consolidation of investment and trade provisions in an agreement of this scale makes the TPPA's exceptional reach and significance difficult to dispute. The TPPA is the biggest FTA that New Zealand has ever joined, encompassing almost 40 per cent of global GDP, traversing 800 million people and including, as partners, the first and third biggest economies in the world.<sup>3</sup> Furthermore, its intertwining of investment, traditional trade, and services means its scope is very broad.<sup>4</sup> The inclusion of 'most-favoured-nation' clauses in New Zealand's other FTAs also means that New Zealand will owe TPPA obligations to other states with which it has FTAs.<sup>5</sup>

Associate Professor Amokura Kāwharu emphasised (and was not contradicted) that there are crucial differences between the TPPA and the Singapore FTA for which the Treaty exception was drafted. Her table on New Zealand's investment commitments since 2001, which we have included as appendix 2, highlights those differences.<sup>6</sup> Unlike the TPPA, the Singapore agreement does not include binding investor-state dispute settlement (ISDS), and the protections given to investors in that agreement are much narrower than in the TPPA. She told us that the Treaty exception was designed for the New Zealand-Singapore

Agreement, which she described as an apple, but is now being used for the TPPA, which she described as an orange.<sup>7</sup>

New Zealand has already signed up to FTAs that provide for the binding nature of ISDS decisions, but it has not done so in all recent FTAs, and it has never done so in an FTA containing national treatment and most-favoured-nation provisions (pre-establishment commitments) where the GATT and GATS general exceptions do not apply to the investment provisions (see appendix 2). There are also new or extended provisions, including increased scope for what constitutes an investment,<sup>8</sup> what constitutes direct and indirect expropriation,<sup>9</sup> and provisions allowing investors to bring an arbitration claim for alleged breaches of contractual rights under contracts with TPPA governments.<sup>10</sup>

The Crown does acknowledge that the TPPA is a ‘game changer’, insofar as it includes five of New Zealand’s top 10 trading partners, and insofar as one takes into account the collective size of the TPPA parties’ economies.<sup>11</sup> However, it argues that the TPPA is still substantially similar to New Zealand’s existing FTAs.<sup>12</sup> But there is no escaping the fact that, in size and effect, the TPPA presents a notable change to New Zealand’s international trade and investment relationships. An investment protection provision between two parties is fundamentally different in a 12-party agreement, particularly when many are powerful economies, and with at least one having investors with a proven propensity to litigate.<sup>13</sup> As Kāwharu notes:

New Zealand’s involvement in the investment treaty arbitration system will expand significantly through the TPPA, as will its exposure to claims. The increased exposure to claims results not just from the large number of TPPA parties, but also (a) from the fact that a significant proportion of investment into New Zealand is sourced from TPPA countries, including the most litigious in this arena – the United States, (b) the wider scope of the investor protections . . . relative to the other FTAs to which New Zealand is a party, and (c) the application of Section B [on ISDS] to investment contracts and authorizations.<sup>14</sup>

This has relevance to the Crown’s submission that the Treaty of Waitangi exception clause has never been triggered before, which it relies on as evidence that it must be effective, or that the threat of ISDS is low.<sup>15</sup> This overlooks the effect of increasing the number of states and potential investors to whom New Zealand owes an obligation, and the corresponding increase in the probability of an ISDS claim. We therefore place little weight upon past experience as a guide to future exposure to ISDS.

The Crown notes that few measures in the agreement require ‘specific implementation’, and that the TPPA ‘largely confirms current New Zealand domestic economic settings and regulatory policy and practice.’<sup>16</sup> This does not mean that the TPPA does not impose many new obligations, however, because there are numerous obligations which are legally binding despite not requiring specific domestic implementation. Once the TPPA is ratified and in force, future New Zealand Governments cannot act domestically in ways that contravene TPPA provisions. New Zealand’s policies, subsidiary legislation, and exercise of Ministerial and regulatory authority discretions must align with the TPPA, even if changes to statutes are not required.

The Crown argues that, ‘to the (limited) extent that TPPA has different substantive provisions, appropriate safeguards have been developed conjunctively.’<sup>17</sup> However, the Treaty exception was not developed in this way. It has remained unchanged since its inclusion in New Zealand’s FTA with Singapore in 2001. The Crown argues that the exception remains effective, thus amendments are unnecessary. This is based on its assumption that the TPPA does not substantially affect Māori interests in a manner different to the Singapore agreement or any other FTA.

Having now heard evidence and argument, we stand by our provisional conclusion that the TPPA, in both subject matter and size, is substantially different from previous FTAs, and in particular the 2001 Singapore FTA for which the Treaty exception clause was designed. We also see a much greater risk of investor–state litigation under the TPPA, given the number and character of the participating states. In this context, we note that Australia and New

Zealand have entered into a side agreement, opting not to allow ISDS claims against each other. It would appear that each country thought ISDS had more disadvantages than advantages for them. We consider the extent of the risk in our discussion of the effectiveness of the Treaty exception clause in chapter 4. Central to considering the risk to Māori is a consideration of the nature, extent, and relative strength of the Māori interest that would be put at risk by the TPPA.

## 2.2 NATURE, EXTENT, AND RELATIVE STRENGTH OF THE MĀORI INTEREST

Assessing the level of Māori interest in the TPPA is no easy task, and nor is stating exactly what a Māori ‘interest’ is under the TPPA. This is in part because the TPPA potentially puts at issue a wide range of interests, but only (and again, potentially) to the extent that the Treaty exception does not protect the Crown’s ability to meet its Treaty obligations. We agree with the Wai 262 Tribunal that it is for Māori to say what their interests are, and it is from that perspective that we begin.

### 2.2.1 Claimants’ views

All claimants are concerned that the TPPA restricts the Crown’s policy options. They feel that, under the TPPA, it would be difficult or impossible for the Crown to make changes to law and policy which fully recognise Māori rights under the Treaty of Waitangi. In particular, claimants are worried about the effects on Treaty settlements; acknowledgement and protection of tino rangatiratanga over significant taonga, including recognition of Māori rights to fresh water; and environmental and health policy.<sup>18</sup> There is widespread concern about investor–state dispute settlement, and the power of foreign corporations.<sup>19</sup> Some claimants see the restriction of the Crown’s policy-making abilities as a cession of sovereignty to overseas interests. Those who argue that the Crown had usurped their hapū’s sovereignty are particularly aggrieved that, in their view, it is now giving that sovereignty away.<sup>20</sup>

Claimants also say that there is a strong interest in the

possible health impacts of the TPPA. They point out that Māori are significantly more likely than non-Māori to suffer ill health and to die prematurely than non-Māori, and argue that the Crown has a duty to alleviate this disparity. As well as their concern about the impact of ISDS on health policy, claimants also consider that their interests would be harmed by changes to Pharmac and the impact of intellectual property changes on medication affordability and availability.<sup>21</sup>

Another area in which several claimants identify Māori interest is traditional knowledge and intellectual property rights. They are particularly concerned that the TPPA will prevent the Crown from taking action on the recommendations of the Wai 262 Tribunal.<sup>22</sup>

### 2.2.2 Crown view

By contrast, the Crown says that the potential for adverse impacts of the TPPA on Māori interests is ‘of minimal or of generalised effect, or as having Māori interests in play but other interests to the fore, or (for a limited number of matters) a specialised interest.’<sup>23</sup> In summary, ‘Māori interests are neither central to the TPP, nor significantly affected by it.’<sup>24</sup>

The Crown states that it assessed the level of Māori engagement required against the scale of Māori interests impacted by the TPPA. It did so according to the first three categories of the ‘sliding scale’ set out in the Wai 262 report.<sup>25</sup> It determined that most aspects of the TPPA fit within the first category of the sliding scale, where Māori interest is limited. Māori interests in the environment and natural resources were identified as fitting into the second category, which required a mix of information and general engagement. Only the matters of intellectual property provisions and UPOV 91 were identified as interests requiring more targeted processes of engagement.<sup>26</sup>

The Crown submits that the TPPA is ‘neutral in its effect on Treaty claims and will not prevent the Crown responding appropriately to avoid or remedy breaches of Treaty principles.’<sup>27</sup> It also submits that the TPPA ‘will not have any significant impact on the accessibility or affordability of pharmaceuticals or related health outcomes for Māori.’<sup>28</sup>

MFAT trade negotiations manager Martin Harvey says that a post-negotiation assessment of the scale and nature of Māori interests carried out by various unspecified Government departments concluded that

the majority of legislative and policy obligations agreed to in TPP are of a general commercial nature . . . and will have no particular impact on Māori interest whether under the Treaty of Waitangi or otherwise. To the extent that Māori interests are impacted, those interests are primarily held as investors, or business or land owners.<sup>29</sup>

### 2.2.3 Our view

We find ourselves unable to accept the Crown's characterisation of Māori interests put at issue by the TPPA as primarily those they may hold as investors, businesses, or landowners. This seems to us to be an overly reductionist approach to Māori interests, and to the reach of the TPPA. It also misses in fundamental ways the findings and recommendations of the Wai 262 Tribunal. We will return to this aspect in more detail in our consideration of the second issue of this inquiry, which is what is required now during the ratification stage (see section 5.2).

### Notes

1. Memorandum 2.5.19, p 3
2. Submission 3.3.27, p 21
3. Document A12, pp 4–5; doc A43, p 1; doc A12(a), p 2
4. Document A2(a), exhibit J, p 536
5. Document A35, p 12
6. Document A35(b)
7. Transcript 4.1.2, p 572
8. Amokura Kāwharu, 'TPPA: Chapter 9 on Investment', p 6, Expert Paper 2, Trans-Pacific Partnership Agreement New Zealand Expert Paper Series, <https://tpplegal.wordpress.com>, accessed 27 April 2016
9. Ibid, pp 12–13
10. Ibid, pp 7
11. Submission 3.3.27, p 22
12. Ibid, p 23
13. Document A1(a), exhibit Q, p 122
14. Amokura Kāwharu, 'TPPA: Chapter 9 on Investment', p 17
15. Submission 3.3.27, p 31
16. Ibid, p 20
17. Ibid, p 22

18. Claim 1.1.1, pp 5–6, 10–11, 17–18; Wai 2523 RO1, claim 1.1.1, pp 10–11; Wai 2530 RO1, claim 1.1.1, p [6]; Wai 2531 RO1, claim 1.1.1, pp 8–10; Wai 2532 RO1, claim 1.1.1, p 4; Wai 2551 RO1, claim 1.1.1, p 3
19. Claim 1.1.1, pp 6, 17–18; Wai 2531 RO1, claim 1.1.1, pp 8–10; Wai 2532 RO1, claim 1.1.1, pp 4–5
20. Wai 2523 RO1, claim 1.1.1, pp 9–12; Wai 2530 RO1, claim 1.1.1, pp [3]–[4]; Wai 1427 RO1, claim 1.1.1(b), p 2; Wai 2533 RO1, claim 1.1.1, p [6]
21. Claim 1.1.1, p 6; Wai 2523 RO1, claim 1.1.1, p 11; Wai 2530 RO1, claim 1.1.1, pp [5]–[6]
22. Claim 1.1.1, pp 15–16; Wai 2530 RO1, claim 1.1.1, p [3]; Wai 2535 RO1, claim 1.1.1, pp 7–8
23. Submission 3.3.27, p 5
24. Ibid
25. Ibid, p 74
26. Ibid, p 75
27. Ibid, p 16
28. Ibid, p 29
29. Document A36, p 40

## CHAPTER 3

**CROWN ASSESSMENT OF MĀORI INTERESTS**

We have not seen sufficient evidence of the Crown's initial determination of Māori interests in the TPPA to make a definitive assessment of this process. In part this may be due to our decision to focus the scope of our inquiry on future-looking consultation. However, we received Crown submissions and affidavit evidence from Crown witnesses who were examined at some length as to the Crown's conduct, almost exclusively from a Ministry of Foreign Affairs and Trade (MFAT) perspective.

The only evidence we have seen of internal Crown processes on the determination of Māori interest is one instance of correspondence between MFAT and Te Puni Kōkiri (TPK). MFAT trade negotiations manager Martin Harvey stated in his evidence that MFAT engaged with the Business Development Unit for TPK to engage Māori participation in the stakeholder consultation.<sup>1</sup> However, TPK requested that this wording be amended when it was being considered for inclusion in the National Interest Analysis. TPK suggested that MFAT 'engaged with the Māori Business Facilitation Service at Te Puni Kōkiri to confirm an approach for stakeholder engagement concerning Free Trade Agreements, and [MFAT] applied this approach for the TPPA outreach'.<sup>2</sup>

That is, TPK specified that MFAT consulted them on FTA outreach programmes in general, but not the TPPA in particular. Harvey suggests that this amendment was intended to clarify the fact that MFAT held a series of consultations with TPK in 2015 on outreach following the Korea FTA. He contends that the idea was that anything learned from that consultation could be applied in the imminent TPPA post-negotiation outreach.<sup>3</sup> It would appear that TPK did not want it said that it had done stakeholder consultation, because it had not been engaged to do so.

This does not give us a clear picture of the way the Crown came to its understanding of the level of Māori interest in the TPPA, so as to inform itself in negotiating with other states. However, we have seen some evidence of consultation during negotiation of the TPPA. It is from this evidence – the level and scope of consultation between the Crown and Māori – that we can make some inference as to the accuracy of the Crown's determination of the level of Māori interest. Moreover, we address consultation prior to the signing of the TPPA in this focused way as it informs the process of consultation to be expected going forward.

We now turn to consider the consultation that occurred for the TPPA; whether it enabled the Crown to make a fully informed assessment of Māori interests; and

consequently how best to protect those interests in the negotiation of the agreement.

The TPPA has required a degree of confidentiality with regard to the specific details of the agreement and the negotiating positions of the parties. According to MFAT, the Government's position on the confidentiality of the negotiation of trade agreements depends on the position of the other negotiating partners. Harvey asserts that this confidentiality does not preclude members of the public from meaningfully engaging in the consultation process.<sup>4</sup> Claimants contend that it has meant they have not been meaningfully engaged. What one party calls confidentiality, the other calls secrecy.

Consultation occurred via two main channels: stakeholder meetings, whether open to the public or with specific organisations; and web presence, through information published online on various web pages, and disseminated by email to stakeholders. We consider each of these channels in turn.

### 3.1 STAKEHOLDER MEETINGS, 2009–16

MFAT has stated that it does not begin FTA negotiations without being informed of stakeholder views and concerns. To this end, MFAT invited public submissions in October 2008, when the United States expressed an interest in entering negotiations.<sup>5</sup> There were 65 responses to this invitation, one of which was from Ngāti Kahungunu Iwi Incorporated. Ngāti Kahungunu made submissions specifically regarding consultation at this early stage, expressing a wish to be 'fully and meaningfully involved in the negotiations process . . . and certainly prior to any agreement being reached.'<sup>6</sup> In their submissions they 'acknowledged and appreciated that, in this case, the Crown has sought submissions on the negotiations prior to their commencement'.<sup>7</sup>

In 2011, a second invitation for public submissions on the TPPA was made, following expressions of interest from other countries to join the negotiations. In this instance, MFAT received 15 responses to their invitation.<sup>8</sup>

Harvey says that hundreds of meetings have taken place with a broad range of stakeholders for the TPPA,

many with targeted businesses and organisations, and others open to interested parties. Invitations to meetings have been advertised on MFAT's website, sent by email to a list of stakeholders, and disseminated through business groups. Between 2012 and 2015, there were 11 public meetings around the country, at which stakeholders could meet the chief negotiator, receive updates on the negotiations, and ask questions about their areas of interest.<sup>9</sup>

MFAT also hosted stakeholder engagement programmes for the two negotiating rounds of the TPPA that were held in New Zealand, in 2010 and December 2012 in Auckland. For the 2012 round, MFAT organised a programme that Harvey notes as having in attendance 72 New Zealand stakeholders, as well as stakeholders from overseas. According to MFAT, representatives from Te Kupenga Hauora Māori, the University of Auckland, and Te Whakaminenga o Ngā Hapū o Ngāpuhi were present for this meeting.<sup>10</sup>

MFAT has noted that attendance at their hui required registration. The invitations to a series of meetings in 2015 in particular gave little advance warning of the meetings that were to take place.<sup>11</sup> On 4 May 2015, MFAT published an invitation regarding a meeting in Wellington only two days later, on 6 May.<sup>12</sup> Similarly, on 14 April 2015 a notice was published regarding a meeting in Dunedin, again, two days later.<sup>13</sup> Both notices advised stakeholders that those wishing to attend must register, with the April meeting requiring registration one day after the invitation was published.

While MFAT was the lead Crown agency for the TPPA, it said that other Government agencies led consultation where their policy areas were more relevant. For example, it was the role of the Ministry of Business, Innovation, and Employment (MBIE) to inform the Wai 262 claimants that TPPA negotiations were under way. Harvey told us that officials from MBIE met with representatives of Ngāti Kahungunu Iwi Incorporated in September 2010.<sup>14</sup> Similarly, in November 2012 and April 2015 the Ministry of Health, together with MFAT and MBIE, met with clinician groups including Te ORA (Te Ohu Rata o Aotearoa, Māori Medical Practitioners Association) regarding the health policy-related issues in the TPPA.<sup>15</sup> Harvey

also notes that meetings with the Federation of Māori Authorities (FOMA) occurred in August 2010, November 2012, March 2014, and June 2014.<sup>16</sup>

In addition to MFAT's more general stakeholder engagement, it has a strategy to proactively engage with New Zealand businesses, including Māori business interests. Part of this is an annual business outreach programme which focuses on New Zealand's top 100 exporters. Harvey explains that, through this process of outreach, MFAT has built up a list of stakeholders who have or are developing an export focus and with whom MFAT can engage on the negotiation of FTAs such as the TPPA.<sup>17</sup> He states that a number of Māori businesses have been engaged as part of this outreach, including in 2013 and 2014: Te Awanui Huka Pak, Tainui Group Holdings Limited, Ngāi Tahu Holdings Corporation, Sealord, Te Rūnanga o Ngāi Tahu, and Te Tumu Paeroa.<sup>18</sup>

Of all the stakeholder meetings, it is not clear whether any focused on Māori interests in free trade agreements in general, or even Māori interests specifically in the TPPA. Indeed, Harvey notes that 'Te Puni Kōkiri encourage[d] those who represent Māori business interests to attend [MFAT's] FTA seminars, *including* those on the TPPA' (emphasis added).<sup>19</sup> Adele Whyte, chief executive of Ngāti Kahungunu Iwi Incorporated, attended the MBIE-sponsored hui held in September 2010. She does not recall the meeting as focusing on the TPPA. Instead it was a general discussion relating to intellectual property and traditional knowledge.<sup>20</sup> She told us that, since this meeting, Ngāti Kahungunu Iwi has not received any further contact from the Crown, nor has it been consulted in relation to the TPPA.<sup>21</sup> This is despite the fact that in their initial submission in 2008, Ngāti Kahungunu, as one of the six iwi claimants in Wai 262, raised a substantive concern about intellectual property matters arising in the TPPA.<sup>22</sup>

Similarly, the representation of Te Whakaminenga o Ngā Hapū o Ngāpuhi at the 2012 stakeholder meeting for the Auckland round of negotiations is contested by Natalie Baker, chairperson for Te Waimate Taiaamai Claims Alliance. The alliance was formed to represent various hapū from Ngāpuhi in the Waimate Taiaamai ki Kaikohe rohe in Waitangi Tribunal claims.<sup>23</sup> Baker has

informed the Tribunal that it was in fact one woman at the stakeholder meeting stating Ngāpuhi affiliation. The alliance does not know who the woman was, and contends that neither she, nor the group calling themselves Te Whakaminenga o Ngā Hapū o Ngāpuhi, speak on behalf of Ngāpuhi: in Ngāpuhi, Baker states, the hapū speak.<sup>24</sup> This discrepancy came to light after the alliance made a request under the Official Information Act in 2015 for documents generated by MFAT in relation to consultation with Māori.<sup>25</sup>

On 27 January 2016, shortly before the signing of the TPPA but after the text had been finalised, representatives of the Iwi Chairs Forum met with the Minister of Trade and the Minister for Māori Development to discuss the TPPA. Chief negotiator Dr David Walker was also present at this meeting, along with an official from MFAT's Māori Policy Unit.<sup>26</sup> On 28 January, the Iwi Chairs Forum followed up this meeting with a letter to the Ministers of Māori Development and Foreign Affairs and Trade. The letter stated that the iwi chairs saw the meeting as, among other things, an opportunity for the Crown to 'begin to address some of the shortcomings in the process of engagement with iwi, to date'.<sup>27</sup> The iwi chairs acknowledged the brief time period between their meeting and the signing of the agreement on 4 February, but assured the Ministers of their commitment to working with officials to reach a 'high-level, principled agreement' ahead of this date.<sup>28</sup>

On 4 February, the same day the TPPA was signed, the Minister of Trade, Todd McClay, responded to the iwi chairs' letter. He assured the iwi chairs that nothing in the TPPA would prevent the Crown from meeting its Treaty of Waitangi obligations. The Minister said he would welcome advice from the iwi chairs at the series of hui planned as part of the outreach programme after the signing of the agreement.<sup>29</sup>

The Prime Minister also wrote a letter to the iwi chairs following their meeting with the Ministers. It stated:

Nothing in the TPP will prevent the Crown from meeting its Treaty obligations to Māori, and the Treaty provision in the Agreement ensures the government retains the ability to

make legitimate public policy decisions and to take measures to implement that policy.<sup>30</sup>

### 3.2 ONLINE INFORMATION

MFAT has stated that, for those international treaties which relate to Māori interests, twice-yearly updates are sent to a list of Māori stakeholders regarding international agreements that New Zealand has either entered into or is in the process of negotiating.<sup>31</sup> The contact information for this list is provided by TPK from their 'Te Kāhui Māngai' website.<sup>32</sup> The list comprises around 143 groups that represent Māori interests. Initially the updates were distributed in hard copy, but in 2012 MFAT decided to publish the information on its website 'New Zealand Treaties Online', with email updates sent to the Māori stakeholders. However, between July 2012 and June 2014 the website was not operating, and so during that time the updates were not sent to the Māori stakeholders listed.<sup>33</sup>

Moreover, as at 9 February 2015, the list of Māori stakeholders contained at least one out-of-date email address.<sup>34</sup> MFAT had out-of-date contact information for Ngāti Kahu's representative body Te Runanga-a-Iwi o Ngāti Kahu, despite the fact that Ngāti Kahu had up-to-date contact information both on its own website and on MFAT's source for the contact details – Te Puni Kōkiri's 'Te Kāhui Māngai' website. Te Runanga-a-Iwi o Ngāti Kahu did not receive the updates on the TPPA negotiations, and contends it has not received any information from MFAT about the TPPA.<sup>35</sup>

In 2011, MFAT established an internet column, 'TPP Talk'.<sup>36</sup> Harvey states that the column, in addition to the information published on MFAT's website, was established to encourage feedback on the TPPA from the public. Harvey further states that MFAT sought to introduce a balanced perspective on 'TPP Talk' by including links to views that express opposition to the TPPA, in order to encourage debate on the issues. For example, a link to Professor Jane Kelsey's website was included.<sup>37</sup> In Kelsey's evidence, she states that the MFAT website includes 'formal statements from ministers' meetings, press releases about

negotiations, and speeches supporting the negotiations, but no substantive information on the negotiations'.<sup>38</sup> The strategy for the column, which was released to Kelsey in an Official Information Act request, shows that the column was deliberately not given a comment functionality.<sup>39</sup> It also stated that the two target audience types are 'stakeholders (both supportive and critical) and media', with the purpose being to 'provide a soft vehicle for publicising MFAT's perspective on TPP negotiations'.<sup>40</sup> Kelsey also notes that the website is rarely updated, with the last two entries on 5 May 2015 and 11 November 2014. Some of the links to critical web pages are outdated.<sup>41</sup> Whatever the purpose, excluding a comment function is not consistent with encouraging feedback, and the online notices (even when online) were so far away from genuine consultation as to be of marginal relevance here.

### 3.3 CLAIMANTS' VIEWS

The process by which the Crown negotiated entry into the TPPA is, to claimants, a matter of constitutional significance, and their arguments 'go to the very core of the Crown/Māori relationship'.<sup>42</sup> As Maanu Paul, chair of the Mataatua District Māori Council and then co-chair of the New Zealand Māori Council (NZMC), puts it:

The exclusion of Māori from the Crown's decision-making process significantly and adversely affects the overall well-being of Māori in Aotearoa, and at the end of the day, exacerbates the long held and continuing distrust between Māori and the Crown.<sup>43</sup>

With regard to the process of consultation during the negotiation stages of the TPPA, the claimants' views have been summarised by claimant counsel as follows:

- There was insufficient, or no assessment by the Crown of the TPPA's impact upon the guaranteed rights of Māori under the Treaty;
- there was inadequate, or no consultation with Māori as to the TPPA's effect upon the guarantees under the Treaty;

- in entering into the TPPA negotiations the Crown adopted a procedure that is inconsistent with the rights of Māori under the Treaty.<sup>44</sup>

The claimants make three major arguments. First, it is for Māori to decide the nature and extent of their interests in the TPPA.<sup>45</sup> Secondly, it is for Māori, who best know their own interests, to articulate how those interests can be best protected; if the Crown has not sought Māori input in negotiating for these interests, Māori cannot know they are being protected.<sup>46</sup> Thirdly, Māori are not simply stakeholders to be informed of progress on trade agreements; Māori are partners with the Crown under Te Tiriti.<sup>47</sup>

In practical terms, in the claimants' view, this means Māori were not given the opportunity to make their views known at a time when they could have had any real influence on the TPPA outcomes. They were not made aware of the efforts the Crown was making to protect their interests. This was a result of the Crown's lack of transparency and openness regarding the negotiations, and due to the Crown's selectivity in choosing who represented Māori interests and thus whom it consulted.

The claimants argue that part of the Crown's obligation to actively protect Māori and act in good faith is being seen to be acting in good faith when doing so.<sup>48</sup> Consultation is regarded not only as a means for the Crown to be adequately informed before making decisions, but also a tool to engage with Māori and demonstrate good faith.<sup>49</sup> The claimants note:

New Zealand could have released the text [of the TPPA whilst under negotiation] to other parties outside of Government in confidence if it had wanted to, but chose not to . . . The Crown did not elaborate on why New Zealand has chosen not to share information with select groups, just that it is New Zealand's policy not to share information.<sup>50</sup>

Restricted access to information, and a lack of transparency on the Crown's part, has led to claimant frustration and mistrust of the consultation process. Natalie Baker explains:

There was a lot of mistrust about the TPPA and the motivations behind it. Rumours spread that it was to do with the flag change, that is was a corporate takeover . . . I don't accept that any of these particular rumours have any basis, but I think the fact they did gain currency is a reflection of the poor job the Crown did in educating people about what the TPPA really represented.<sup>51</sup>

The selectivity of MFAT in deciding which Māori or Māori representatives to engage with is also of significant concern for claimants, who are doubtful that their interests are being protected. In particular, engagement at hapū level has been absent. Pita Tipene, for example, is involved in the governance of Ngāti Hine through various roles including as the deputy chairman of Te Rūnanga o Ngāti Hine. He is also a member on the executive of FOMA as the Taitokerau representative.<sup>52</sup> This Tribunal has been told by the Crown that FOMA was consulted by MFAT once in 2010, once in 2012, and twice in 2014.<sup>53</sup>

In contrast, Tipene submits that the people of Ngāti Hine have been shut out of the TPPA process. He states that, 'Due to the secrecy that has shrouded the TPPA process and the Crown's complete failure to engage with us on its development, our people are confused, suspicious, agitated and aggrieved.'<sup>54</sup>

Similarly, Maanu Paul, who submitted evidence on behalf of the Mataatua District Māori Council, explains that the role of the NZMC, as established by the Maori Community Development Act 1962, is to 'not only encourage the development and protect and promote the interests of Māori, but most importantly to represent Māori by collaborating with the Crown on various matters of benefit to Māori'.<sup>55</sup> Paul submits that the NZMC, and in his district the Mataatua Council, are the appropriate bodies to protect, promote, and advocate for Māori interests, yet the Crown has not engaged with the NZMC or District Councils at all regarding the TPPA.<sup>56</sup> Paul says that collaboration with the Māori Councils would have meant Māori could have 'actively played a role' in the formation of the TPPA, which would have helped Māori to reap the purported benefits of the TPPA, and allowed the NZMC to

honour its legislative obligation to promote, encourage, and develop Māori interests.<sup>57</sup> Waimarie Bruce-Kīngi of Ngāti Kahu o Torongare me Te Parawhau captures well the frustration at the Crown's engagement over the TPPA: 'we are being told to "go outside and play", while the "adults" talk at the "big table"'.<sup>58</sup>

### 3.4 CROWN VIEW

The Crown's position on its engagement with Māori throughout the TPPA process is that it has taken reasonable steps to inform itself of Māori interests, and that its ability to meet its obligations to Māori is not compromised by the TPPA.<sup>59</sup> The Crown argues that its process of engagement during the negotiation stage of the TPPA was in line with the nature, extent, and relative strength of Māori interests, as determined by the Crown in accordance with the 'sliding scale' of the Wai 262 report.

The Crown also contends that its assessment of the strength and nature of Māori interests in relation to any international agreement cannot be 'viewed in a silo related solely to that agreement or negotiation'. Instead, any assessment must be seen in the context of an ongoing Crown-Māori dialogue: Crown agencies make evaluations of impact based on their cumulative institutional knowledge gained in ongoing engagement with Māori.<sup>60</sup> The Crown argues that, as a result of this and implicit in the Wai 262 sliding scale, in some cases the Crown may already possess sufficient information about Treaty implications for it to act in accordance with Treaty principles without any specific consultation.<sup>61</sup>

Harvey acknowledges that 'most stakeholders who take an active approach to the Ministry's engagement operate in the business sector'.<sup>62</sup> However, MFAT has made it clear that the stakeholders engaged in the consultation process are not limited to those with a particular business or economic focus. Harvey states that MFAT has made itself accessible to stakeholders and has signalled its openness to considering a wide range of views, including those critical of the TPPA. Stakeholders engaged in consultation included local councils, unions, health sector representatives, NGOs, and individuals, as well as business groups.<sup>63</sup>

The Crown views consultation as a mutual obligation. Reference is made to the High Court support of this notion, in that 'in a context where broad consultation was undertaken, an iwi might be expected to raise issues it was concerned about and, had they not taken advantage of opportunities to do so, the Crown should not be held responsible'.<sup>64</sup>

In his affidavit, Harvey concludes his remarks on consultation with Māori by stating:

While the Ministry actively seeks engagement with Māori over business interests generally and FTA's specifically, notwithstanding the Ministry's clear notification of the progress of negotiations and opportunities to engage, Māori have in general not taken up these opportunities for direct engagement. Aside from Official Information Act requests leading to the claimants' submissions and the other instances mentioned . . . there have been few attempts to engage directly with Ministry negotiators over the TPPA.<sup>65</sup>

Harvey also says that, through MFAT's engagement process, a diverse range of views within Māoridom with regard to the TPPA have been highlighted.<sup>66</sup> That is, not all Māori are critical of the agreement. As evidence of this, Harvey cites the 'public support' for the agreement by FOMA.<sup>67</sup>

The open letter to the Prime Minister declaring this support was written in 2012 by the Right Honourable James Bolger, chairman of the New Zealand United States Council, and Graeme Harrison, chairman of the New Zealand International Business Forum. The letter was written on behalf of 'major New Zealand companies and leading business organisations', with the chief executive of FOMA at that time listed at the bottom.<sup>68</sup> The letter declares broad support for New Zealand's involvement in free trade, and confidence in the Minister of Trade's ability to seek solutions which meet New Zealand's interests. It makes no mention of the specifics of the consultation process, nor of issues of particular concern to Māori.

Crown counsel acknowledges that '[i]nvariably one will look back and may take a view that more could have been done. But with respect, that isn't our focus . . . The issues

in this hearing don't focus on that.<sup>69</sup> Instead, the Crown looks to its future engagement plans and contends that, while they are not set in stone, they are Treaty compliant:

The planned combination of general and Māori-specific, informative and consultative, engagement will provide Māori with appropriate opportunities to engage with, discuss, and have input into the implementation of TPP obligations . . . to make informed decisions concerning the ratification of TPP, and to prepare to take advantage of the opportunities under the Agreement. The engagement indicated is proportionate to the impacts of the TPP on the Māori interests at play, and therefore aligns with the Tribunal's recommendations.<sup>70</sup>

Moreover, the Crown's position is that the claimants have provided little comment on what Māori engagement and input is now required over steps needed to ratify the TPPA.<sup>71</sup>

#### Notes

1. Document A2, p 26
2. Document A41(a), exhibit B, p 2
3. Transcript 4.1.2, p 690
4. Document A2, p 15
5. Ibid, p 23
6. Document A2(a), exhibit M, p 623
7. Ibid
8. Document A2, p 23
9. Ibid, pp 23–24
10. Ibid, p 25
11. Transcript 4.1.2, p 693
12. Document A2(a), exhibit P, p 696
13. Ibid, exhibit Q, p 698
14. Document A2, p 24
15. Ibid, p 25
16. Ibid, pp 26–27
17. Ibid, pp 11–12
18. Ibid, p 14
19. Ibid
20. Document A4, pp 2–3
21. Ibid, p 3
22. Document A2(a), exhibit M, pp 624–625
23. Document A30, p 2
24. Ibid, p 8
25. Ibid, p 6
26. Document A36, p 46
27. Document A20(a), exhibit C, p 3
28. Ibid, p 4
29. Document A36(a), exhibit J, pp 198–200
30. Document A50
31. Document A2, p 13
32. Ibid
33. Ibid
34. Document A44, p 1
35. Transcript 4.1.2, pp 684–685
36. Document A1, p 20
37. Document A2, p 26
38. Document A1, p 20
39. Document A1(a), exhibit AM, p 375
40. Ibid
41. Document A1, p 20
42. Submission 3.3.26, p 5
43. Document A28, p 4
44. Submission 3.3.25, pp 3–4
45. Document A26, p 14
46. Document A29, p 4; submission 3.3.26, p 4
47. Document A30, p 7
48. Submission 3.3.16, pp 2–3
49. Submission 3.3.23, p [5]
50. Submission 3.3.16, p 4
51. Document A30, pp 5–6
52. Document A27, p 2
53. Document A2, p 26
54. Document A27, p 3
55. Document A28, p 3
56. Ibid
57. Ibid
58. Document A6, p 8
59. Transcript 4.1.2, p 278
60. Submission 3.3.27, p 73
61. Ibid, pp 73–74
62. Document A2, p 22
63. Ibid, p 23
64. Submission 3.3.27, p 71; *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422 at paras 135–136, 139–140
65. Document A2, p 27
66. Ibid
67. Ibid
68. Document A2(a), exhibit V, p 734
69. Transcript 4.1.2, p 280
70. Submission 3.3.27, p 77
71. Ibid, p 68



## CHAPTER 4

## THE TREATY EXCEPTION

We now turn to consider in more detail the Treaty exception itself, and whether it provides the level of protection which the Crown says it does.

#### 4.1 THE HISTORY OF THE TREATY EXCEPTION

A precursor to the current Treaty exception clause can be found in the World Trade Organization's General Agreement on Trade in Services (GATS), which entered into force in 1995. GATS obliges member countries to give service providers from other countries equal treatment with local providers. According to MFAT chief negotiator Dr David Walker, there was general concern that this obligation would prevent governments from creating 'affirmative action' programmes to help disadvantaged groups. In this context, the Crown negotiated an exception stating that measures are allowed 'according more favourable treatment to any Maori person or organisation in relation to the acquisition, establishment or operation of any commercial or industrial undertaking'.<sup>1</sup>

When negotiating the New Zealand–Singapore Closer Economic Partnership, the Crown recognised the need for a similar exception. The preliminary understanding between the two countries, signed in September 1999, provided that New Zealand would be allowed to adopt measures 'to fulfil its obligations under the Treaty of Waitangi', provided that they were 'not used as a means of arbitrary or unjustified discrimination against persons of either economy or as a disguised restriction on trade or investment'.<sup>2</sup>

The following year, MFAT held five hui with Māori around the country.<sup>3</sup> Hui attendees showed strong support for a Treaty exception, although they were worried that it would not be strong enough. There was concern that it should protect the 'Closing the Gaps' programme, intended to remove socio-economic disparities between Māori and non-Māori.<sup>4</sup> Many attendees also felt that it was inappropriate for the Government to determine when the exception should apply.<sup>5</sup> As a result of the hui, changes were made

to exempt interpretation of government's rights and obligations under the Treaty from the dispute settlement clauses of the Agreement, and ensure measures for Māori that do not necessarily stem from Treaty obligations, such as Closing the Gaps policies, are also protected.<sup>6</sup>

MFAT expanded the scope of the GATS exception to cover measures that 'New Zealand deems necessary to accord more favourable treatment' to Māori and Māori organisations

‘including in fulfilment of its obligations under the Treaty of Waitangi.’ TPK supported the changes, and also suggested replacing ‘Māori persons or organisations’ with ‘Māori’, as this would ‘avoid debates regarding interpretation’.<sup>7</sup>

By September 2000, the drafting was complete.<sup>8</sup> The Treaty exception in the Singapore agreement reads:

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Part 10 shall otherwise apply to this Article. An arbitral tribunal appointed under Article 61 may be requested by Singapore to determine only whether any measure (referred to in paragraph 1) is inconsistent with its rights under this Agreement.<sup>9</sup>

In its submission on the Singapore agreement, TPK said that the exception

protects the ability of future governments to determine the nature of rights and obligations arising under the Treaty of Waitangi, and to take steps to implement policies to fulfil these obligations.<sup>10</sup>

Apart from chapter numbers, the Treaty exception in the Singapore agreement is identical to the Treaty exception in the TPPA.<sup>11</sup> Virtually identical exceptions can be found in each of New Zealand’s trade agreements following the Singapore agreement.<sup>12</sup> The only trade agreement without a Treaty exception is the Closer Economic Relationship agreement with Australia, which came into force in 1983. However, Australian investors are subject

to the ASEAN Australia New Zealand FTA (AANZFTA), which does contain the Treaty of Waitangi exception.<sup>13</sup>

#### 4.2 WHAT IS ISDS?

Investor-state dispute settlement, or ISDS, is a system by which investors can sue the country hosting their investment if they feel that the investment has been damaged by the state. The TPPA allows ISDS cases between New Zealand and every other country in the TPPA except Australia.<sup>14</sup>

Chapter 9 of the TPPA sets out the rights which investors have in each other’s countries. The most important of these can be summarised as follows:

- The right to be treated at least as well as local investors, and investors in like circumstances from other foreign countries (the principles of national treatment and most-favoured-nation).<sup>15</sup> There are several exceptions to this in the TPPA, including the Treaty exception.<sup>16</sup>
- The right to the normal protections of international customary law, including being treated fairly and equitably, and not being denied justice or due process. This group of rights is generally known as ‘the minimum standard’.<sup>17</sup>
- The right not to have an investment expropriated (seized) or indirectly expropriated (destroyed or seriously damaged by state action) except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and with fair compensation. The TPPA states that non-discriminatory actions taken to protect public welfare objectives such as health, safety, and the environment are not normally indirect expropriation, ‘except in rare circumstances’. What these rare circumstances would be is not defined.<sup>18</sup>

According to Dr Penelope Ridings, the ‘vast majority of international arbitration claims are based on an alleged breach of one or more of these obligations’.<sup>19</sup>

The obligations have been interpreted in different ways by different ISDS tribunals. The minimum standard has

proved to be contentious, as there is no general agreement on what it specifically includes.<sup>20</sup>

If an investor considers that their rights have been breached and that their investment has suffered measurable damage (which may include loss of future profits), they can bring an ISDS claim against the host country. A three-person tribunal will be set up to decide the case; the investor and the country each pick one member, and the third is chosen by mutual agreement. If the tribunal decides in favour of the investor, it can order the country to pay monetary compensation, or restitution of property, and legal costs, but not to change its laws or practices. As with any proceeding, settlement is possible by agreement at any time, on terms which may or may not be public. This raises concerns that a state may agree to change its laws or practices, or agree that some action will not be repeated.

#### 4.3 ISDS AND THE TREATY EXCEPTION

We annex as appendix 3 a table prepared by Ridings which summarises the stages of an ISDS case and the point at which the Treaty exception may come into play. We have made one change to the table, which was to shift the Treaty exception back in line with all other defences against a breach. Ridings confirmed in evidence that this was appropriate.<sup>21</sup>

Any ISDS case against New Zealand would arise out of the Crown, local government, a court, or any entity exercising delegated authority taking some action which significantly harmed an investment owned or controlled by an overseas investor. The investor would then take action against the Crown. If the two could not come to an agreement within six months, the case would begin. In the first stage, the investor would have to show that:

- it is based in a TPPA country other than New Zealand or Australia;
- it has an investment in New Zealand;
- the claim is not about a tobacco control measure, an Overseas Investment Act decision, or any other excluded matter; and

- the claim is not ‘manifestly without legal merit’.<sup>22</sup>

The Treaty exception would not be triggered at this stage.

If the ISDS tribunal found in favour of the investor on all four points, the case would go to the merits phase. The Crown could put forward a range of arguments, depending on the facts. One of those arguments could be that the Crown action was covered under the Treaty exception – that is, that the measure was deemed by the Crown to be necessary to accord more favourable treatment to Māori, and was not arbitrary or unjustified discrimination against overseas investors, or a disguised restriction of trade. The ISDS tribunal would then decide if the Treaty exception applied. How a tribunal might interpret the Treaty exception clause is analysed in section 4.4.

It is important to note that the Crown does not have to do anything until such time as a claim is made. It does not need to incorporate the Treaty exception into New Zealand law, or formally state that it considers that a particular measure is covered by it. In the event of an ISDS claim under the TPPA, the exception can be deployed as a shield. To expect the Crown to implement the Treaty exception, or enact it in law, is to misunderstand the way it operates.

The Treaty exception does not impose any additional obligation on the Crown to meet its obligations under the Treaty of Waitangi. The purpose of the Treaty exception is to protect the Crown’s ability to fulfil its domestic responsibilities under the Treaty.

#### 4.4 THE TEXT OF THE TREATY EXCEPTION

We now take a detailed look at the Treaty exception, explaining what some of the terms mean, and outlining differences of opinion between the witnesses as to how they would be interpreted.

##### 4.4.1 The ‘chapeau’

The Treaty exception begins:

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the

other Parties or as a disguised restriction on trade in goods, trade in services and investment . . .

This is known as the chapeau (hat) of the exception. It influences the interpretation of all that follows. Its purpose is to prevent New Zealand from abusing the Treaty exception by applying it to laws and policies which do not benefit Māori and have little or nothing to do with the Treaty of Waitangi.<sup>23</sup> As Ridings says, it is unlikely that other countries would agree to an exception without a chapeau, since New Zealand could then break any of its commitments under the TPPA and grant immunity to itself just by asserting the Treaty exception, even if the assertion had no merit.<sup>24</sup>

There is some disagreement between the expert witnesses about what would be counted as ‘arbitrary or unjustified discrimination’ or ‘a disguised restriction on trade.’ Professor Jane Kelsey argues that it is impossible to predict how an ISDS tribunal would interpret the chapeau, while Ridings and Associate Professor Amokura Kāwharu consider that the risk would be minimal as long as there was a good policy reason for the conduct.<sup>25</sup>

#### **4.4.2 ‘[N]othing in this Agreement shall preclude’**

This part of the exception means that the Treaty exception can be used in relation to any obligation under the TPPA, and that there is no part of the TPPA which can override the exception.<sup>26</sup>

#### **4.4.3 ‘Measures it deems necessary’**

The Treaty exception applies to ‘measures.’ These are positive acts adopted by New Zealand to give effect to Māori interests. A ‘measure’ is defined in the first chapter of the TPPA as ‘any law, regulation, procedure, requirement or practice.’<sup>27</sup> There was some discussion between the expert witnesses about whether or not judicial decisions were ‘measures’ under the TPPA.<sup>28</sup> Towards the end of the hearing they agreed that it would at least be possible for a judicial decision to be considered a ‘measure.’<sup>29</sup>

The phrase ‘it deems necessary’ means that, if New Zealand says that a measure is necessary, investment tribunals have to accept that it is necessary.<sup>30</sup> They have

no jurisdiction to look behind the particular measure and test whether or not it is necessary to accord Māori more favourable treatment, including in fulfilment of the Crown’s Treaty of Waitangi obligations. This means that the exception is ‘self-judging’ in this respect.

#### **4.4.4 ‘More favourable treatment to Māori’**

The Treaty exception says that New Zealand can adopt measures which provide ‘more favourable treatment to Maori . . . including in fulfilment of its obligations under the Treaty of Waitangi.’ Measures do not have to be related to the Treaty of Waitangi; they could be taken to improve Māori health or education, for example, even if the measures were not seen in Treaty terms.<sup>31</sup>

All three expert witnesses agreed that the exception would apply to measures ‘specifically targeted to advantage Māori.’<sup>32</sup> For example, if the Government gave special grants to Māori-owned businesses, this would clearly accord more favourable treatment to Māori and would therefore be covered by the Treaty exception. The experts also agreed that such measures would still be covered even if some non-Māori benefited.<sup>33</sup> If the grants were given to businesses with any degree of Māori ownership, for example, this would also benefit non-Māori who co-owned businesses with Māori. But as long as the grants were specifically intended to benefit Māori, rather than business owners generally, the exception would apply. Where a measure is designed for a general public policy purpose (for example, regional development), and benefits Māori incidentally, the Treaty exception would not apply.<sup>34</sup>

There was considerable disagreement between the experts on other scenarios, particularly those in which measures are intended to give some benefit to Māori, but do not clearly give them more favourable treatment than some other group. For example, Ridings argues that measures intended to produce more favourable outcomes for Māori would be covered.<sup>35</sup> Kelsey disagrees, saying that this interpretation would be ‘a stretch.’<sup>36</sup> In relation to measures which addressed Māori concerns, but did not clearly provide Māori with more favourable treatment, Kelsey argues that only measures which involve

preferential treatment to Māori, in contrast with non-Māori, would be covered.<sup>37</sup> By contrast, Ridings argues that the treatment could simply be more favourable than that provided to Māori in the past; Kelsey disputes this.<sup>38</sup> In relation to a case study proposed by Kāwharu, involving Māori land law, Ridings argues that the operation of Te Ture Whenua Māori Act would constitute more favourable treatment of Māori, since the bedrock principle of the Act recognises the interests of Māori above others.<sup>39</sup> Kāwharu disagrees, saying that it would be difficult to argue that the Act itself involves ‘more favourable treatment’.<sup>40</sup>

More generally, Kāwharu agrees with Kelsey that the favourable treatment is clearly intended to be in comparison to the treatment of overseas investors, given that the Treaty exception essentially seeks to justify discrimination which would otherwise be in violation of New Zealand’s obligations under the TPPA.<sup>41</sup> Kāwharu notes that, if the purpose of the exception was to cover all improvements to the Crown’s treatment of Māori, this could have been better achieved with different phrasing.<sup>42</sup>

Claimant counsel put forward case studies involving the Resource Management Act (RMA), and the extent to which the TPPA will allow Māori values and traditional rights to be taken into account when making decisions under the Act.<sup>43</sup> It was not clear whether the denial of a resource consent because of Māori spiritual, cultural, or other concerns would be ‘more favourable treatment’. The expert witnesses note that in some cases the Overseas Investment Act would apply.<sup>44</sup> Where it does, decisions under the Act are not subject to ISDS, and Kāwharu and Ridings agree the Crown can set any approval criteria, including a requirement for a Treaty of Waitangi assessment.<sup>45</sup> Where the Overseas Investment Act does not apply, Māori would be reliant on the RMA to protect their taonga and kaitiakitanga.

There was disagreement between the witnesses about the extent to which an RMA ruling denying a consent in order to uphold Māori cultural or spiritual concerns would be vulnerable to review by an ISDS tribunal. Kelsey notes that investment arbitrators are not required under the TPPA to have any knowledge or understanding of

Māori culture, and argues that it is unlikely that they would regard Māori spiritual or cultural concerns as ‘reasonable, objective and impartial’ reasons to deny a consent.<sup>46</sup> Kāwharu agrees that arbitrators might have difficulty understanding ‘local context’, but notes that the Crown would be able to call witnesses and experts in defence against an ISDS claim. She says that in ‘any case where the Treaty exception is invoked, it would be in New Zealand’s best interests to call Maori witnesses and experts who could support its defence’.<sup>47</sup> However, she also notes that the overseas investor would probably also be unfamiliar with Māori values, and might consider that it was unreasonable or unfair to require consultation with multiple kaitiaki groups, for example. If this disadvantaged the investor, an ISDS tribunal might agree that it was arbitrary discrimination.<sup>48</sup> Ridings, on the other hand, says that it would be ‘far-fetched’ to suggest that an RMA decision which followed the law, and acknowledged the protections granted to Māori under the Act, would breach the investment chapter.<sup>49</sup>

Where an RMA decision declining a consent is based on concern about the environment or health, the outcome of any ISDS claim is hard to predict and would depend on the process and rationale behind the decision. Kāwharu argues that a claim would have a limited chance of success if the decision was clearly based on scientific evidence, for example, about the ecological impact of the proposed development.<sup>50</sup> In addition, she and Ridings agree that investors in new or controversial areas such as fracking would know that there was a possibility of such activities being restricted or banned, and would therefore be less likely to succeed in a claim than investors in areas where the possibility of restriction was more remote.<sup>51</sup> Kelsey disagrees, citing cases in which the consenting authority was found by the ISDS tribunal to have made decisions arbitrarily and without real scientific support.<sup>52</sup>

Some measures are protected under the non-conforming measures annexes. For example, annex II allows New Zealand to ‘adopt or maintain any measure with respect to water’.<sup>53</sup> This means that the Crown can discriminate against overseas investors with regard to water policy.<sup>54</sup> Kelsey acknowledges this, but states that the Crown would

still have to show that the measures were necessary to address a particular policy goal, and did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade.<sup>55</sup> The Crown can similarly discriminate against overseas investors in relation to a range of social policy areas including health, public education, and public housing.<sup>56</sup> It does, however, have to treat overseas investors fairly and equitably in other respects. In these areas, use of the Treaty exception would generally not be necessary, as it would not matter whether or not the Crown action was ‘more favourable treatment’ as long as the minimum standard of treatment of overseas investors was met.

Tobacco control measures, meanwhile, are protected from ISDS under article 29.5 regardless of whether or not they favour Māori or how overseas investors are treated. Tobacco is the only substance treated in this way; there are no similar clauses relating to other threats to health.

The expert witnesses agree that the Treaty exception does not cover each and every act which the Crown might perform in fulfilment of its Treaty of Waitangi obligations. In part this is because the phrase ‘more favourable treatment’ narrows the scope of measures to which the exception might apply. There was significant disagreement over exactly which measures would be covered, but it may exclude a range of law and policy in fulfilment of the Treaty of Waitangi. There was also disagreement over the extent to which measures, which might not be covered by the Treaty exception, would be protected by other parts of the TPPA.

#### 4.4.5 The second paragraph

The second paragraph of the Treaty exception reads:

The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred

to in paragraph 1 is inconsistent with a Party’s rights under this Agreement.

The intent of the paragraph is that the interpretation of the Treaty of Waitangi and the Crown’s obligations under the Treaty will not be subject to dispute settlement procedures. This means that an investment tribunal cannot say that the Crown has misunderstood the Treaty of Waitangi or that the matter does not relate to obligations to Māori under the Treaty (unless the general good faith obligation in the chapeau is breached).

Some of the claimants were unhappy that this paragraph essentially relies on the Crown’s interpretation of the Treaty of Waitangi.<sup>57</sup> A similar point has also been made about the phrase ‘measures [New Zealand] deems necessary’.<sup>58</sup> We do not see this as a significant issue. If the Crown relies on the exception it will do so based on its own understanding of the Treaty and the obligations stemming from it. If policy is made based on an incorrect understanding of the Treaty, this is a domestic issue that can be challenged in domestic political or legal processes.

A significant issue is the meaning of the second and third sentences of the second paragraph. It can be argued that there is ambiguity about whether the paragraph covers ISDS, or only state-to-state disputes. The first sentence of the paragraph refers only to ‘the dispute settlement provisions of this Agreement’, which would normally include both investor–state disputes and state-to-state disputes. However the second and third sentences refer only to chapter 28, which deals exclusively with state-to-state disputes. This raises the possibility that the paragraph does not apply to investor–state disputes and that an ISDS tribunal would be able to look at the interpretation of the Treaty of Waitangi and the nature of rights and obligations under it.

The ambiguity was identified by Ridings in her first affidavit, although she concluded that it would be reasonable to assume that the entire paragraph refers to investor–state as well as state-to-state disputes.<sup>59</sup> By the time of our hearing, she considered that the paragraph was fairly clear.<sup>60</sup> She explains that the main job of a state-to-state

dispute tribunal is to interpret the trade agreement. The second paragraph therefore explains that a state-to-state tribunal cannot interpret the Treaty of Waitangi or the Crown's duties under it, 'but may otherwise fulfil its task' of interpreting the TPPA.<sup>61</sup> The interpretation of the TPPA is less of a concern for ISDS tribunals, she argues, and so there is no need for the second and third sentences to explicitly refer to ISDS tribunals.

Kelsey argues that the paragraph is ambiguous, and does not prevent an ISDS tribunal from reviewing the entire Treaty exception, and the Government's interpretation of the Treaty of Waitangi.<sup>62</sup> She suggests that this was an inadvertent error on the part of New Zealand's negotiating team, indicating that 'the New Zealand government did not put its mind to the risks associated with ISDS when it drafted the Treaty Exception.'<sup>63</sup> Kelsey is broadly supported by Kāwharu, who also believes that there is significant ambiguity in the paragraph, and notes that ISDS tribunals 'do not read limitations into their jurisdiction lightly.'<sup>64</sup>

Ridings argued during our hearings that any ISDS tribunal which did attempt to interpret the Treaty of Waitangi or the Crown's obligations under the Treaty would be acting outside its jurisdiction. Its award could therefore be annulled.<sup>65</sup> Kāwharu feels that things are not quite that simple, but nevertheless agrees with Ridings that the risk of an investment tribunal misunderstanding this paragraph was relatively low.<sup>66</sup> Kelsey continues to argue that the risk of misinterpretation is quite high, since an ISDS tribunal would be unlikely to limit its own power.<sup>67</sup>

We do not consider it within our expertise to make a definitive statement on how an ISDS tribunal would be likely to interpret paragraph two. All three of the expert witnesses acknowledged that there was some ambiguity. Despite Ridings' conclusion that the ambiguity is insignificant, this causes us some concern. The fact that the wording is materially unchanged from the Singapore FTA, which did not have ISDS provisions, is also of concern. All three experts agree that removing the second and third sentences would eliminate the ambiguity without damaging the exception as a whole.<sup>68</sup>

#### 4.5 THE CHILLING EFFECT

Many critics of ISDS, including Kelsey and most of the claimants, argue that the system has a 'chilling effect' on policy making.<sup>69</sup> The chilling effect means that governments will be deterred from passing laws or making policy by the threat or the apprehension of an ISDS claim.

It is claimed that one example is the New Zealand Government's decision to delay progress on plain tobacco packaging legislation until the resolution of legal challenges to a similar law in Australia.<sup>70</sup> Ridings described this as a prudent risk assessment rather than a chilling effect.<sup>71</sup> It seems to us that this is a difference in terminology rather than substance. Regardless of whether it is seen as chill or prudence, it is a clear matter of fact that the possibility of a claim against the Government was a factor in the Government delaying a law it otherwise intended to promote.

The chilling effect is also said to occur in the broader sense of politicians and public servants deciding not to pursue some types of policy because of how investors might react. Again, Ridings says that policy makers do not consider themselves 'chilled', but make a prudent assessment of risk.<sup>72</sup>

Kelsey argues that the chilling effect is the real purpose of ISDS; it is not intended to win investors compensation, but to deter governments from regulating international corporations.<sup>73</sup> She also says that the threat of an ISDS claim is a low-cost and fairly effective way for overseas investors to influence government decision-making.<sup>74</sup> While the risk of ISDS, and therefore the chilling effect, has potentially been in effect for some time, Kelsey argues that the TPPA significantly increases it due to the inclusion of the United States, whose investors have been shown to be the most prolific users of ISDS.<sup>75</sup>

#### Notes

1. Document A36, p 17; doc A15(a), exhibit O, p 378
2. Document A15(a), exhibit P, p 410
3. Document A36, p 18
4. Document A15(a), exhibit P, pp 410, 418–424. For an explanation of 'Closing the Gaps', see Tariana Turia, 'Closing the Gaps', 7 June 2000,

<https://www.beehive.govt.nz/speech/closing-gaps>, accessed 13 April 2016.

5. Document A15(a), exhibit B, p 420

6. Ibid, p 435

7. Ibid, p 404

8. Ibid, pp 434–435

9. Article 74, *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, <https://mfatgovtnz.cwp.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/singapore>, accessed 13 April 2016

10. Document A15(a), exhibit B, p 438

11. The Singapore version also reads ‘a disguised restriction on trade in goods and services or investment’ where the TPPA version reads ‘a disguised restriction on trade in goods, trade in services and investment’. We do not consider this to be a significant difference.

12. See New Zealand–Thailand Closer Economic Partnership Agreement, art 15.8; Trans-Pacific Strategic Economic Partnership Agreement (the P4), art 19.5; New Zealand–China Free Trade Agreement, art 205; ASEAN, Australia and New Zealand Free Trade Agreement ch 15, art 5; New Zealand–Malaysia Free Trade Agreement, art 17.6; New Zealand–Hong Kong, China Closer Economic Partnership Agreement, ch 19, art 3. Texts of all these agreements can be found via <https://mfatgovtnz.cwp.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force>.

13. See ASEAN, Australia and New Zealand Free Trade Agreement, ch 15, art 5, [https://mfatgovtnz.cwp.govt.nz/assets/\\_securedfiles/FTAS-agreements-in-force/AANZFTA-ASEAN/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area-1.pdf](https://mfatgovtnz.cwp.govt.nz/assets/_securedfiles/FTAS-agreements-in-force/AANZFTA-ASEAN/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area-1.pdf), accessed 18 April 2016. There is also a Treaty exception in the Protocol on Investment to the New Zealand–Australia Closer Economic Relations Trade Agreement (art 23), [https://mfatgovtnz.cwp.govt.nz/assets/\\_securedfiles/FTAS-agreements-in-force/Australia/CER-investment-protocol-16-2-11.pdf](https://mfatgovtnz.cwp.govt.nz/assets/_securedfiles/FTAS-agreements-in-force/Australia/CER-investment-protocol-16-2-11.pdf), accessed 18 April 2016. In any case, New Zealand and Australia have opted out of ISDS in relation to each other, making the Treaty exception less necessary.

14. TPPA (doc A48, pp 9155–9158)

15. Ibid, arts 9.4, 9.5 (pp 6513–6514)

16. Others include annex 9-H, which prevents ISDS cases over Overseas Investment Act decisions, and the policy areas listed in the non-conforming annexes. These include water, the sale of State-owned enterprises, and the provision of social services.

17. TPPA, art 9.6 (doc A48, pp 6514–6515)

18. Ibid, art 9.8 (pp 6516–6517)

19. Document A16, p 30

20. Document A16(a), exhibit CC, pp 1392–1426

21. Transcript 4.1.2, p 744

22. Document A39

23. Document A35, p 22

24. Transcript 4.1.2, p 771

25. Document A16, p 5; doc A17, p 10; doc A18, p 10; doc A35, p 22

26. Document A16, p 10; doc A35, p 10

27. TPPA, art 1.3 (doc A48, p 5)

28. Document A35, p 46; transcript 4.1.2, pp 578–579, 627–628

29. Transcript 4.1.2, pp 751–752

30. Ibid, p 291

31. Document A16, p 17. It appears that the exception was not limited to Treaty obligations because of concern that the then-Government’s ‘Closing the Gaps’ policy would not be covered: see section 4.1 above.

32. Document A17, p 8; see also doc A16, p 14

33. Document A17, p 8; doc A18, pp 6–8; doc A35, p 16

34. Document A16, p 14; doc A17, p 8

35. Document A16, p 13; doc A18, pp 8–9

36. Document A15, p 9; doc A17, p 7

37. Document A17, p 8

38. Document A16, p 13; doc A17, pp 7–8

39. Transcript 4.1.2, p 752

40. Document A35, pp 46–47

41. Ibid, p 14

42. Ibid

43. Submission 3.1.103, pp 1–2

44. Document A19, pp 3–4; doc A21, p 28; doc A35, pp 47–50

45. Document A19, pp 2–4; doc A35, pp 48–50

46. Document A15, p 37; see also doc A21, pp 30–31

47. Document A35, pp 29–30

48. Ibid, pp 60–62

49. Transcript 4.1.2, p 742

50. Document A35, pp 52–54

51. Document A18, p 24; doc A35, pp 51, 57

52. *Lone Pine Resources v Canada* and *Bilcon v Canada*: see doc A15, pp 33–35.

53. TPPA, annex II (New Zealand) (doc A48, p 7201)

54. The provision does not cover the ‘wholesale trade and retail of bottled mineral, aerated and natural water’. Ridings notes that the ‘processing and manufacturing’ of bottled water is covered, meaning ‘that you can take measures to limit the involvement of foreigners in bottled water production’: transcript 4.1.2, pp 741–742.

55. Document A21, pp 36–37

56. TPPA, annex II (New Zealand) (doc A48, pp 7199–7200)

57. For example, see submission 3.3.20, p 12.

58. Submission 3.3.20, pp 22–23

59. Document A16, p 26

60. Transcript 4.1.2, pp 296, 343

61. Ibid, p 296

62. Document A17, pp 12–13

63. Ibid, p 13

64. Document A35, p 24

65. Transcript 4.1.2, p 762

66. Ibid, pp 760, 762

67. Ibid

68. Ibid, p 760

69. Document A1, pp 13, 31; claim 1.1.1, pp 18, 21; submission 3.3.16, p 9; submission 3.3.20, pp 14–16; submission 3.3.21, p 42; submission 3.3.22, pp 4–6; submission 3.3.23, p 12; submission 3.3.24, pp 14–19; submission 3.3.25, pp 7–8; submission 3.3.26, p 11

- 70. Tariana Turia, 'Government Moves Forward with Plain Packaging of Tobacco Products', 19 February 2013, <https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>, accessed 13 November 2015; transcript 4.1.2, p 166
- 71. Transcript 4.1.2, p 421
- 72. Ibid, pp 420–421
- 73. Document A15, p 18
- 74. Transcript 4.1.2, p 749
- 75. Document A17, pp 13–14. For figures on the relative litigiousness of United States investors, see document A1(a), exhibit Q, p 122.



## CHAPTER 5

**FINDINGS AND CONCLUSIONS**

We now ask, in light of the evidence before us, whether there has been a breach of the principles of the Treaty of Waitangi. We do so only in relation to the first of our two issues: the adequacy of the Treaty exception to protect Māori interests. We then go on to address our second issue: what action the Crown should take in relation to ratification and ongoing implementation of the TPPA. We reiterate that these are relatively narrow questions when compared with the wide range of issues that have been raised before us in relation to the TPPA. Our inquiry did not examine in any depth issues such as UPOV 91, intellectual property, or the future of Pharmac. These are important matters, but are outside the scope of this inquiry and consequently we make no findings in relation to them.

That said, there are two points to note:

- ▶ The TPPA does not end with ratification. Once in force, ongoing compliance of future New Zealand policies, practices, institutions, and laws is required.
- ▶ The TPPA will not be New Zealand's last FTA; others are in the pipeline. What we have to say about the engagement process and the Treaty exception will hopefully inform the process for future FTA negotiations.

**5.1 THE TREATY EXCEPTION CLAUSE**

Our first issue is whether the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be.

We agree with Associate Professor Amokura Kāwharu that the development of the Treaty exception and its successful incorporation in the Singapore FTA, and every FTA since, demonstrates leadership and is to the credit of successive New Zealand Governments.<sup>1</sup> In the context of the TPPA it is an achievement to have maintained the exception given the number and diversity of the participating states. We believe the Crown was right to argue for the inclusion of such an exception because of the significance of the Treaty in New Zealand's constitutional arrangements.

The TPPA is a large and complex international instrument. The text of the TPPA has only recently become available. It was negotiated under conditions of confidentiality, meaning that no one outside of Government was allowed to know what New Zealand's actual negotiating position on any particular issue was. It is now presented for ratification on a take-it-or-leave-it basis. It is touted as a twenty-first-century or high-standard

agreement. Such agreements impose obligations on the Crown which constrict domestic policy.

There is a Treaty exception clause in the TPPA, but it has not changed since it was first developed for the New Zealand–Singapore free trade agreement in 2001. Neither the exception nor the Crown's engagement strategy appear to have been revisited, despite the Wai 262 report and the changes in international and Treaty of Waitangi jurisprudence since 2001. Very little independent New Zealand expert analysis of the TPPA is yet available.<sup>2</sup> The concern voiced by Māori about the Crown's willingness to honour its Treaty of Waitangi obligations is therefore both understandable and predictable.

The claimants' concern that entry into the TPPA will diminish the Crown's capacity and willingness to fulfil its Treaty obligations to Māori is largely centred on the rights the TPPA confers on foreign investors, and in particular rights given to investors to sue governments under binding arbitration rules. A major concern raised before us is the potential chilling effect such actual or potential litigation may have on Government action.

The essence of the chilling process is the threat, not necessarily the actuality, of repercussions. Uncertainty lies at the heart of chilling: uncertainty over how serious the threat is (in the sense that the threatening party would actually carry through its threat); uncertainty over the outcome of legal proceedings in which novel decisions may well be made by the relevant tribunals – especially when these do not have to follow precedent, lie outside the country's jurisdiction and may be following unfamiliar legal rules; uncertainty over whether the policymaker's democratic mandate might suffer at the hands of the electorate if a dispute with a foreign corporation turns ugly.<sup>3</sup>

The Treaty exception is only available as a defence against claims that relate to measures adopted by New Zealand that accord Māori more favourable treatment. The exception is not engaged at all in circumstances where the Government decides not to take action in favour of Māori. Of itself we do not see this as problematic. There is an issue about the scope of the exception, but how the

Crown chooses to honour its obligations under the Treaty of Waitangi has always been a matter for domestic political determination. This will not change by reason of the TPPA. There is clearly a concern that TPPA investment protections might modify or inhibit domestic political behaviours in ways that may prejudice Māori Treaty rights, but the TPPA is not the place for a statement of Crown obligations to its Treaty partner. The issue is whether the Treaty exception is an effective protection.

We do not have the time, expertise, or a sufficient evidential base to make findings as to whether the investment regime in the TPPA is likely to chill the capacity or willingness of the New Zealand Government to honour its Treaty obligations to Māori. If the TPPA is ratified, it will be a complex question of fact to determine whether a particular Crown act or omission in the face of an ISDS claim (or the threat or apprehension of one) is the result of prudent risk management, or the improper curbing of legitimate policy action due to a chilling effect. While the debate over the chilling effect can be factually and semantically complex, we do not doubt that it is an issue.

Our particular focus is on whether or not the Treaty exception is an effective protection of Māori interests. On this issue it is noteworthy that the Prime Minister, in a letter to the Iwi Chairs Forum, stated:

Nothing in the TPP will prevent the Crown from meeting its Treaty obligations to Maori, and the Treaty provision in the Agreement ensures the government retains the ability to make legitimate public policy decisions and to take measures to implement that policy.<sup>4</sup>

Undoubtedly, that is an important statement of political commitment. Our concern is whether the Treaty exception will be effective.

It is difficult to assess the risks to Māori interests from the ISDS system under the TPPA, particularly prior to ratification and implementation. What states or investors may do in years to come is open to conjecture. The risks to Māori interests identified by claimants, and the questions over interpretation and application of the Treaty exception are all potential risks. It is inherently difficult

to assess with any precision the magnitude of a particular risk at the pre-ratification stage, when all governments are expressing confidence in how the TPPA will work. Arbitral tribunals do not operate under a system of precedent, meaning that outcomes are less predictable than those from courts with independent judges operating publicly under a system of precedent. Whilst some innovations have been introduced into the ISDS procedures under TPPA, areas of uncertainty and risk remain.<sup>5</sup> Professor Jane Kelsey cautioned us against placing too much weight on what might be the ‘best legal interpretation’ because there are usually many possible interpretations, and investors will use whichever one suits them. The unpredictable nature of arbitral tribunals means that it is never possible to know which arguments they will accept, she argued.<sup>6</sup>

The Crown maintains that the Treaty exception clause is fit for purpose by reference to four criteria. The Crown maintains that the exception is:

- self-judging;
- has broad scope of application;
- is subject to a good-faith requirement; and
- ensures that the Treaty of Waitangi, and the Crown’s understanding of it, are not subject to interpretation by a dispute settlement body.<sup>7</sup>

We deal with each in turn.

### 5.1.1 Self-judging

The reference in the first paragraph in the Treaty exception clause to adoption by New Zealand of measures ‘it deems necessary’, and the first sentence of the second paragraph, have the effect of making a decision to adopt a measure self-judging. It is for New Zealand to determine when such measures may be necessary. This avoids the need to justify the rationale for the measure before a tribunal, providing that the measure is adopted in good faith and not as a means of arbitrary or unjustified discrimination or a disguised restriction on trade. All experts agree that the exception needs to be self-judging, and that it is self-judging in relation to the necessity of the measure.<sup>8</sup> There was some disagreement over whether or not the phrase ‘more favourable treatment’ was self-judging; that is, whether an ISDS tribunal would have to accept that a

measure was more favourable treatment if the Crown said it was. Dr Penelope Ridings considers this to be the case. After some discussion Kāwharu also said that this was a reasonable interpretation, although not the only interpretation which could be made.<sup>9</sup>

### 5.1.2 Has broad scope of application

There was disagreement between the expert witnesses about the range of measures which would be covered by the phrase ‘more favourable treatment’. Ridings says that the phrase is self-judging. She also considers that the term is broad in scope, for example, including ‘treatment that is more favourable than what has been provided in the past’.<sup>10</sup> Kāwharu and Kelsey both interpret the term more narrowly. Kāwharu thinks that the phrase arose out of a particular concern to protect positive discrimination measures when the exception was formulated for the Singapore FTA. She considers that the adequacy of the exception is compromised because it does not fully reflect the comprehensive nature of the TPPA, has not evolved in light of changing jurisprudence, and its scope does not account for the range of policy choices and administrative regimes that may be needed to protect Māori interests now and into the future.<sup>11</sup>

Kāwharu considers that limiting the operation of the exception to measures that accord ‘more favourable treatment’ to Māori restricts the scope of the exception. She points out that Māori Treaty rights are vested permanent rights that consist of far more than limited and time-bound positive discrimination initiatives.<sup>12</sup> Accordingly, she recommends removing the reference to more favourable treatment and focusing the exception on measures that the Crown deems necessary to fulfil its obligations to Māori under the Treaty of Waitangi.<sup>13</sup> Kelsey also thinks the exception should focus on the Crown’s obligations under the Treaty, and possibly also measures taken to ‘address the particular, but not necessarily exclusive, concerns of Maori in relation to social, cultural, spiritual, environmental or other matters of importance to them’.<sup>14</sup>

Discussing the phrase with claimant counsel, Ridings agreed that ‘if you’re looking at it from a domestic perspective it kind of jars’.<sup>15</sup> However, she went on to say that

‘more favourable treatment’ has to be looked at in an international law perspective, as the converse to the usual obligation to provide overseas investors with ‘no less favourable treatment’ than local investors.<sup>16</sup> Crown counsel accept that the Crown–Māori relationship extends beyond positive discrimination, but argue that in the international context, the term ‘more favourable treatment’ is ‘meaningful and appropriate . . . and is understood to require broad interpretation.’<sup>17</sup>

### 5.1.3 Be subject to a good faith requirement

Ridings states that, no matter how a Treaty exception was worded, there would still be an obligation to use it in good faith.<sup>18</sup> She also argues that other countries would require express wording to that effect. Without a chapeau or similar provision, ‘it would be extremely difficult to actually get that over the line.’<sup>19</sup> Kāwharu and Kelsey’s views on the need for a chapeau can be seen in the alternative Treaty exceptions which they each provided after the hearing; Kāwharu’s contains the same chapeau as the current exception, while Kelsey’s did not include a good faith provision.<sup>20</sup>

### 5.1.4 Ensure the Treaty of Waitangi is not subject to interpretation by a disputes settlement body

All experts agree that interpretation of the Treaty of Waitangi should not be a matter to be determined by an investment arbitration tribunal. It should be a matter for New Zealand to interpret. There is a difference of views among the experts as to whether the exception achieved that objective. All experts initially agreed there was an ambiguity in the second and third sentences of the second paragraph of the Treaty exception. During the course of the hearing, Ridings came to the view that there was no ambiguity sufficient to warrant any redrafting of the second paragraph. Kāwharu and Kelsey disagree. All three witnesses agreed that the best way to remove any ambiguity would be to delete the second and third sentences of paragraph two.<sup>21</sup>

### 5.1.5 Should the Treaty exception be amended?

The expert witnesses hold a range of views on the

adequacy of the Treaty exception, and consequently on whether it should be altered. Kelsey considers that the exception is fundamentally flawed, and proposes an entirely different exception, ideally for the TPPA but certainly for future FTAs.<sup>22</sup> Kāwharu agrees that the exception is flawed, but not to the extent that Kelsey does. She also proposes a revised version of the current exception, which removes the last two sentences and the reference to ‘more favourable treatment.’<sup>23</sup> She considers that it is too late to change the exception in the TPPA, but feels that alterations are required for future FTAs.<sup>24</sup> By contrast, Ridings considers the exception entirely fit for purpose and does not consider that any changes are required.<sup>25</sup>

Kelsey suggests that it is still possible to alter the Treaty exception in the TPPA, or get an agreed interpretation on its meaning from the other TPPA countries, outside the text of the agreement.<sup>26</sup> Ridings responds that, even if these things were possible, neither would bind investors or ISDS tribunals.<sup>27</sup> Kāwharu considers that it is too late to change the exception in the TPPA.<sup>28</sup>

Given that the prospects of changing the TPPA are non-existent prior to ratification, the only comprehensive alternative is for New Zealand to refuse to ratify the TPPA. To do so because of concerns about an exception that New Zealand itself proposed and won acceptance for, but now has reservations about, is unrealistic and would affect New Zealand’s credibility.

In relation to future FTAs, Ridings argues that there is an inherent risk in changing the Treaty exception text. She said that, from an international legal perspective and also a practitioner’s perspective, leaving the exception as it is is the best way to protect the Government’s position on the meaning and interpretation of the Treaty exception into the future:

Tinkering with the clause (and I don’t like using that word and I apologise if it sounds pejorative) but altering the clause will potentially have adverse consequences which the New Zealand Government may have to live with in the future. And, that those consequences are going to be potentially worse for Māori and for Māori interests in the current clause and I think that is my fundamental concern.<sup>29</sup>

Crown counsel argue that changing the exception in future FTAs would be risky, because other states would view the changes as an attempt to change the scope of the exception, or as conceding a deficiency which could be exploited.<sup>30</sup> They also say that, once a Treaty exception clause has been successfully concluded in an FTA, it is not a matter of rolling it over to the next FTA but rather ‘using that previous acceptance by other states to encourage further states to accept it’.<sup>31</sup> Given the Crown’s position that there is nothing wrong with the current exception, they argue that it would be unwise to expend limited negotiating capital to seek changes. In their view, such changes would have no significant impact on the legal effect of the provision, and could even result in other countries imposing changes which might be harmful to Māori interests.<sup>32</sup>

We understand the points that the Crown makes, and we accord them some weight. We are nonetheless troubled by the fact that ambiguity in the second paragraph seems to have arisen because template text from previous agreements has not been adjusted to ensure coherent links to the various dispute resolution processes within the TPPA.

If so, this in turn raises a question about the extent to which the Crown truly turned its mind to the operation of the Treaty exception clause in the TPPA.

#### **5.1.6 Does the exception provide an adequate degree of protection to Māori interests?**

We agree with Kāwharu that, given the long-term nature of trade and investment treaties, foresight is needed to ensure that the Treaty exception clause properly responds to the changing international context and the particular agreement under negotiation. We share a number of the concerns she expressed as to whether the Treaty exception clause has been assessed by the Crown in light of changes in jurisprudence since the Singapore FTA of 2001, and in light of the much more comprehensive scope of the TPPA. The fact that this is New Zealand’s first trade and investment treaty with the United States is also significant given the potential exposure this brings to litigation from American corporations.

The first issue we identified for inquiry responded to the proposition that the Treaty exception clause is a valuable

and effective protection of Māori interests affected by the TPPA. The Crown, however, goes further and says that nothing in the TPPA will prevent the Crown from meeting its Treaty obligations to Māori. We have two reservations about this claim.

The first is a concern that the Treaty exception clause as presently structured may not encompass the full extent of the Treaty relationship. We agree with Kāwharu that not all Crown actions or policies that may be necessary to protect Māori Treaty interests consist of measures that accord more favourable treatment to Māori. We note that, had the exception been phrased to put the reference to the Treaty first, then this question would not arise.<sup>33</sup>

The way the phrase ‘more favourable treatment’ is used gives rise to some uncertainty as to how the exception will be interpreted and applied. Possible issues discussed by the experts include the relevant comparator, and how ‘in like circumstances’ will be viewed for the purposes of the national treatment obligation. They also had differing views on the application of the minimum standard of treatment, and how fair and equitable treatment and full protection and security will operate, given there remains uncertainty as to what might constitute an investor’s legitimate expectations. These are all issues that go to the scope of the Treaty exception clause.

Our second reservation arises from uncertainty about the extent to which ISDS may have a chilling effect on the Crown’s willingness or ability to meet particular Treaty obligations in the future or to adopt or pursue otherwise Treaty-consistent measures.

The protections and rights given to foreign investors under the TPPA are extensive. One commentator describes the kind of rights conferred under trade and investment treaties as having constitution-like features which represent ‘a form of constitutional pre-commitment, binding across generations, that unreasonably constrain the capacity for self government’.<sup>34</sup>

Our concern is that, by qualifying the Treaty exception clause to that aspect of the Treaty relationship which may allow the Crown to adopt or implement measures more favourable to Māori, the full constitutional reach of the Treaty relationship may not be as clearly protected and

preserved under the TPPA as it might be. As a number of courts and tribunals before us have noted, the Treaty relationship is not static; it is a relationship akin to a partnership, the precise terms of which are still being worked out.<sup>35</sup>

We are not in a position to reach firm conclusions on the extent to which ISDS under the TPPA may prejudice Māori Treaty rights and interests, but we do consider it a serious question worthy of further scrutiny and debate and dialogue between the Treaty partners. We do not accept the Crown's argument that claimant fears in this regard are overstated. Ultimately only time will tell, but whether the ISDS system is suffering from 'a crisis of legitimacy' (Kelsey) or 'in need of reform' (Kāwharu), we think its application under the TPPA is uncertain.<sup>36</sup>

More particularly, under the TPPA investors do not have to exhaust domestic remedies before commencing ISDS. Once they commence ISDS, a foreign investor thereby foregoes any future recourse to New Zealand courts or tribunals. Under the TPPA, ISDS is allowed for contract claims for the first time and, while the TPPA makes provision that regulation in the public interest may in 'rare circumstances' constitute an indirect expropriation, there is no definition of 'rare circumstances'. Previous FTAs did not allow claims resulting from public welfare regulation, even in 'rare circumstances'.<sup>37</sup> While we think the Crown fairly pointed to various provisions in the TPPA designed to preserve state regulatory autonomy and improve the operation of ISDS, we remain unconvinced that ISDS under the TPPA is low risk or not substantially different from exposure to ISDS under existing FTAs to which New Zealand is party.

Our particular focus is on whether or not the Treaty exception clause is an effective protection of Māori interests. The applicable Treaty standard is a reasonable degree of protection, not perfection.

Overall, we conclude that the exception would be likely to operate in the TPPA substantially as intended. The exception, in our view, could be said to offer a reasonable degree of protection to Māori interests affected by the TPPA. In coming to this view, we have had particular regard to the points of agreement and disagreement

between the experts and the nature and extent of any changes to the exception they proposed.

We agree that in structure and reach the Treaty exception needs to be self-judging, have broad application, be subject to a good faith requirement, and ensure that the Treaty of Waitangi is not a matter to be interpreted by an arbitration panel. We believe that, in conjunction with other protections in the TPPA, the Treaty exception achieves, or substantially achieves, these objectives. We come to this view even though the exception applies only to measures the Crown deems necessary to accord more favourable treatment to Māori. Any such measure must be 'in respect of matters covered by this Agreement'. Whilst more favourable treatment does not encompass the entire Treaty relationship, neither does the TPPA.

Where Māori rights and interests are put in issue, it seems to us that the most likely source of risk will be in respect of matters where domestic policy, or measures consistent with the Treaty, place Māori at a relevant point of difference or advantage to a foreign investor. In these instances the Treaty exception should be available if necessary.

We have also accorded some weight to the practical matters raised by the Crown about difficulties and risks associated with any attempt to renegotiate or change the exception.

Finally, we have considered the exception alongside other provisions in the TPPA that have some potential to mitigate risk to Māori, particularly the ability of states to rule out ISDS in respect of tobacco-control measures, and the non-conforming measures in relation to matters including the foreshore and seabed, cultural heritage, water, and social services. We again note that Australia and New Zealand have opted not to allow ISDS claims against each other. It follows that we do not find a breach of the principles of the Treaty of Waitangi arising from the inclusion of the Treaty exception clause in its current form in the TPPA.

For completeness, we note that it is not possible to assess with any precision the extent of actual or potential prejudice that may arise if the TPPA is ratified. Any ISDS proceedings will be some years away and, as the evidence

before us in relation to the proposed case studies shows, anticipating outcomes and scenarios that may give rise to a future claim is difficult. Based on our view of the evidence before us, we are unable to determine that an identifiable prejudice arises due to a particular deficiency in the drafting or likely operation of the Treaty exception clause.

If prejudice is alleged in future because of some Crown action or omission (short of introduction of a Bill) or inaction, then it remains open for Māori to submit a claim alleging a breach of the principles of the Treaty.

In relation to our first issue, we conclude that the Treaty exception clause offers a reasonable degree of protection to Māori interests affected by the TPPA. It is unquestionably a good thing that the New Zealand Government has successfully negotiated the inclusion of the Treaty exception in the TPPA. We do not know whether the exception will ultimately prove to be the effective protection of Māori interests the Crown says it is, but we are satisfied that in terms of the applicable Treaty standard it does provide a reasonable degree of protection.

## 5.2 NEXT STEPS

Our second issue is what Māori engagement and input is now required over steps needed to ratify the TPPA, including by way of legislation or changes to Government policies which may affect Māori.

### 5.2.1 Steps required for ratification

Once negotiations are concluded, the following steps are necessary before the TPPA can come into force:

- ▶ approval of the text by Cabinet, and authorisation of signature;
- ▶ signature by parties;
- ▶ parliamentary treaty examination;
- ▶ passage of legislation; and
- ▶ notification and ratification.<sup>38</sup>

The official signing took place in Auckland on 4 February 2016. The signature did not legally bind the member countries, but rather signalled that they intended to be bound by the TPPA in the future.<sup>39</sup>

In New Zealand, parliamentary treaty examination involves the presentation of the TPPA to Parliament, together with a National Interest Analysis which outlines the advantages and disadvantages of joining. Both documents are then examined by the Foreign Affairs, Defence and Trade Select Committee, which reports back to Parliament.<sup>40</sup> Cabinet will not take any action relating to the agreement until the select committee has reported, or 15 sitting days have passed, whichever is sooner. The select committee may make recommendations, but the Government is not obliged to follow them.<sup>41</sup>

The Government will then introduce any legislation required to give effect to the TPPA.<sup>42</sup> Biological medicines can be granted additional market protection without changes to New Zealand law or regulations.<sup>43</sup> New Zealand must also either sign up to the UPOV 91 treaty or implement a plant variety rights system which gives effect to it. However, action is not required until three years after the TPPA comes into force.

Once all necessary legislation has been passed, the Government can notify the other TPPA parties that it has completed the steps required to ratify the agreement.

### 5.2.2 Consultation standards

We have looked at the Crown's engagement with Māori over the TPPA with a view to considering what input is required from Māori during the ratification of the TPPA. We acknowledge that Crown process up to entry into the TPPA was not the primary focus of our inquiry, but we made it clear that process was relevant to whether the Crown had met its obligations to Māori. The Crown provided significant evidence of the process it undertook. Perhaps it had more comprehensive information available to it, but it chose to adduce evidence only through the MFAT witnesses. We nonetheless have enough information from which to draw a number of tentative conclusions and inferences. Our main concerns are the status of Māori as Treaty partners as opposed to general stakeholders; the transparency of the Crown in its decision-making; and the process by which the Crown informs itself of Māori interests. It is appropriate to begin with a word about consultation.

The *Wellington International Airport Limited v Air New Zealand* case affirmed principles of consultation that have relevance here.<sup>44</sup> In that case the Court of Appeal reiterated the High Court's opinion that

Consultation must be allowed sufficient time, and genuine effort must be made . . . To 'consult' is not merely to tell or present. Nor, at the other extreme is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion . . . Consultation involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done. Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses.<sup>45</sup>

We further note that 'consultation' has a strained meaning when the party with the most relevant information has resolved (perhaps for good reason) not to share it. Even at our initial judicial conference, there was a marked reluctance on the part of the Crown to tell us whether there was a Treaty exception in the draft text that was being negotiated.

The Crown contends:

The substantive outcomes of the TPP demonstrate that the Crown was informed as to matters addressed in the Wai 262 report, and . . . has both preserved the necessary domestic policy space for the ongoing domestic constitutional and policy dialogue . . . and achieved policy-specific outcomes in relation to issues that intersect with Wai 262 including [UPOV and intellectual property measures].<sup>46</sup>

We acknowledge that outcomes such as these are to the credit of the Government and its negotiators, as they demonstrate awareness of and sensitivity to Māori concerns. We do not mean to downplay or diminish these achievements by raising concerns about aspects of process. We do

so in the hope it may assist in the development of processes and relationships going forward, and in recovering from shortcomings that we have identified as having occurred during the prior consultation process.

We do have a concern that the Crown has misjudged or mischaracterised the nature, extent, and relative strength of Māori interests put in issue under the TPPA. It is not sufficient to point to the fact that there are significant parts of the TPPA where Māori interests are not directly engaged, or that there are interests that Māori share in common with all New Zealanders. We accept that this is true. The key point is that claimants can and do point to a number of matters that go to the heart of the Crown–Māori relationship, and Māori Treaty interests. They include specific matters such as access to affordable medicines and possible changes to Pharmac, intellectual property rights, and traditional knowledge. They also include wide-ranging concerns about future capacity to provide fair redress, including by way of Treaty settlements, and concerns about whether existing domestic protections and future policy will properly protect and respect Māori *kaitiakitanga* and *rangatiratanga*. These are matters of high importance to Māori, and any potential adverse impact under TPPA would be likely to cause significant prejudice.

It seems to us that, contrary to the findings of the Wai 262 Tribunal, the Crown did not seek or provide a realistic opportunity for Māori to identify their interests in the TPPA as a Treaty partner. The secrecy or confidentiality of the development of Crown policy in relation to the TPPA and its negotiating positions compounded this difficulty, and is likely to have been a factor in low levels of engagement between the Crown and Māori (whether initiated by either party) prior to the lodging of these claims.

We acknowledge that there is likely to be a range of Māori opinion on a matter such as the TPPA. The Crown has pointed to evidence of support for the TPPA from organisations such as the Federation of Māori Authorities. While it is true that we have before us only a section of Māori opinion, the claimants and interested parties together provide a significant and important voice, representative of significant hapū, iwi, and the New Zealand Māori Council.

The Crown developed a strategy for engaging with Māori over international instruments in 2000. It has been approved by Cabinet and was the subject of detailed consideration by the Wai 262 Tribunal, which recommended changes to the strategy and adoption of some additional steps. We are concerned that the Crown has not adequately taken these recommendations into account. MFAT trade negotiations manager Martin Harvey stated that the report has been helpful in MFAT's trade negotiation practice, but was unable to point to any specific changes which had been made as a result of the report.<sup>47</sup>

The text of the 'Strategy for Engagement with Māori on International Treaties' before us in this inquiry is the same as the version submitted during the Wai 262 inquiry.<sup>48</sup> The strategy has not been updated to include or respond to the Wai 262 report recommendations. Because the strategy has Cabinet approval we assume it remains an authoritative statement of Crown policy. We heard nothing in this inquiry to suggest otherwise.

Some findings from the Wai 262 report can be repeated almost verbatim from the complaints about engagement we have heard in relation to the TPPA:

we have concerns about how the strategy is carried out in practice, in terms of providing consistent and full information to the right people at the right time, so as to consult effectively with Māori when their interests are (sometimes vitally) affected . . . We heard examples of engagement that was too general in nature, and of meetings that were targeted at limited numbers or ranges of participants, or were not adequately advertised. We also heard of engagement processes that occurred over too short a timeframe for Māori to consider and respond to the Crown's proposition . . . [we] even heard examples of a basic dearth of consultation . . .<sup>49</sup>

We are concerned that institutional capacity and lines of advice to Government on Māori interests impacted by the TPPA appear to be relatively limited. It is not clear what role TPK played in Crown engagement or policy during the negotiation of the TPPA. We only heard from MFAT witnesses. As we saw in chapter 3, we did not see any contemporary evidence of consultation between

MFAT and TPK on the nature of the Māori interest in the TPPA or engagement with Māori on the TPPA.

We have seen that the Crown considered Māori interest in intellectual property and UPOV 91 to be significant, yet we know this only from their assessment of post-negotiation interests. When Ngāti Kahungunu responded to the first invitation for open submissions in 2008, they raised, as one of the six iwi claimants in Wai 262, a substantive concern about intellectual property matters, amongst other things.<sup>50</sup> Yet other than a general stakeholder meeting in 2010 to discuss intellectual property in international trade agreements, Ngāti Kahungunu were consulted no further on the matter. This is not simply an issue of poor process. It harms the relationship and increases the probability of a low-trust and adversarial relationship in the future. We understand that MFAT officials have an outward focus and relatively limited capacity for extensive domestic engagement with Māori. While our role is to assess Crown conduct, not that of any one Ministry or agency alone, in this instance we only have evidence of Crown conduct by and through one Ministry, and so that is all that we can assess.

We note these matters of process because, whilst the TPPA is presented for ratification on a take it or leave it basis, there are some matters in the TPPA in relation to which New Zealand retains some flexibility. MFAT chief negotiator Dr David Walker said that, where obligations provide significant flexibility for implementation, policy development can be shaped by engagement and discussion including Māori engagement.<sup>51</sup>

### 5.2.3 The future

It was submitted on behalf of the Crown that

the Crown has benefitted significantly from hearing the concerns of the claimants about consultation. . . . MFAT and the Crown are considering how they might improve performance with respect to engagement with Māori about current and upcoming negotiations involving international treaties.<sup>52</sup>

We think that is a constructive indication, and hope that it progresses. We have not made a finding of Treaty breach,

therefore we are not in a position to make formal recommendations. However, we make the suggestions that follow to assist the Crown and claimants going forward.

We suggest that the Crown include dialogue about the Treaty exception in its review of engagement with Māori. The dialogue between the three expert witnesses has, we believe, highlighted a number of matters that are worthy of attention. To be fair to all parties, some of those occurred to the experts only after fairly intensive discussions during the hearing. We also note that in light of recent public statements by France and Germany in the context of European Union–United States negotiations, it is possible that a modified dispute resolution procedure may emerge in the forthcoming European Union–New Zealand negotiations. Adjustment of the Treaty exception may be necessary and we suggest that this could include space for dialogue between the Crown and Māori on this important provision. There may be practical and logistical questions, but these ought not to be insurmountable, given lines of communication established during this inquiry and proposals made by the Wai 262 Tribunal such as the use of an expert panel.

Claimants must recognise that additional dialogue does not imply or guarantee particular outcomes. A judgement call will have to be made as to whether some changes to improve the exception might put the entire exception at too great a risk of rejection by other states, or cause too much uncertainty as to the application of the Treaty exceptions in existing FTAs. However, this is not a sufficient reason to deny domestic dialogue.

We also suggest to the Crown the adoption of a protocol that would govern New Zealand procedure in the event it becomes a party to an ISDS proceeding under the TPPA (or any other FTA) in which the Treaty exception clause is, or is likely to be relied upon. Any such protocol should be developed in dialogue with Māori. All experts who appeared before us agreed that such a protocol could include the following:

- ▶ a commitment to invoke the Treaty exception if there is an ISDS case concerning Māori;
- ▶ a policy to lead expert Māori evidence where the Treaty exception may be invoked;

- ▶ amicus curiae briefs for Māori to be encouraged;<sup>53</sup>
- ▶ a policy commitment to regular dialogue and consultation over the course of an ISDS case if it raises issues of concern to Māori;
- ▶ in a case where the Treaty exception clause may be raised, Māori representation could be included as part of the New Zealand team;
- ▶ a commitment to select an arbitrator with knowledge of Treaty principles and tikanga (and investment arbitration); and
- ▶ if necessary, cooperate with the state of the investor to make a joint submission on interpretation of the Treaty exception (in the event it was considered that the arbitration tribunal was at risk of coming to an erroneous view).<sup>54</sup>

These are ideas to be developed and not all will necessarily be applicable in the context of a specific dispute. However, given the increased exposure to ISDS under the TPPA, we believe it would be both prudent and Treaty-consistent for the Crown to engage in a dialogue with Māori, with a view to reaching agreement over measures such as these.

Finally, we note that the Government is still developing its process with respect to those aspects of ratification over which it retains a degree of policy flexibility. This includes the response to the TPPA obligations regarding New Zealand's plant variety rights regime. We are informed that MBIE intends to undertake targeted engagement on issues relating to changes to the plant variety rights regime including discussion on how Māori wish to engage with the Crown on those issues and whether or not New Zealand should accede to UPOV 91, or establish alternative compliance.<sup>55</sup> We are not closing off consideration of Māori interests in relation to UPOV 91. Any such consideration, however, would require more evidence on the topic than has been submitted thus far.

As this issue is ongoing and the process of engagement is still under development, we will adjourn our inquiry in respect of this issue only. The purpose of the adjournment is to allow time for the MBIE process to be finalised and communicated to claimants and others. At that point we may convene a judicial conference to hear from the

parties on what, if any, issues remain that may need to be the subject of further inquiry.

The Crown is directed to file an update and timeline as to its plan of engagement with Māori over the plant variety rights regime, and whether or not New Zealand should accede to UPOV 91. This is to be filed no later than 4 pm on Friday 17 June 2016.

## Notes

1. Document A35, p 64
2. A notable exception is the series of expert papers commissioned with support from the Law Foundation. We have found these reports helpful.
3. Barry Coates, Rod Oram, Geoff Bertram, and Tim Hazledine, 'Expert Paper #5: The Economics of the TPPA', January 2016, p 21, <https://tpplegal.files.wordpress.com/2015/12/tpp-economics.pdf>, accessed 2 May 2016
4. Document A50
5. The most significant innovation is the increased openness of proceedings. Article 9.24 of the TPPA provides that hearings will be open to the public and that most documents will be made publicly available.
6. Transcript 4.1.2, pp 96–97
7. Submission 3.3.27, p 63
8. Document A15, pp 11–12; doc A16, pp 10–13; doc A35, pp 17–18
9. Transcript 4.1.2, pp 738–739
10. Document A16, p 13
11. Document A35, p 64
12. Transcript 4.1.2, p 570
13. Document A35(c)
14. Document A47, p 2
15. Transcript 4.1.2, p 414
16. Ibid, pp 414–415
17. Submission 3.3.27, p 66
18. Transcript 4.1.2, p 771
19. Ibid
20. Document A35(c); doc A47, p 2
21. Transcript 4.1.2, p 760
22. Ibid, pp 773–775
23. Document A35(c). The clause reads: '1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to fulfil its obligations to Maori, including under the Treaty of Waitangi. 2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement.'
24. Transcript 4.1.2, pp 645–646
25. Ibid, p 771
26. Document A17, p 20; transcript 4.1.2, p 177
27. Transcript 4.1.2, pp 400, 740; doc A18, p 15
28. Transcript 4.1.2, pp 645–646
29. Ibid, p 772
30. Submission 3.3.27, pp 66–67
31. Ibid, p 66
32. Ibid, pp 66–67
33. For example, Kāwharu's draft exception says 'nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to fulfil its obligations to Maori, including under the Treaty of Waitangi': doc A35(c), p 2.
34. David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008), pp 37, 69
35. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 70; see also Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 207; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 242–243; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 642
36. Transcript 4.1.2, pp 134, 662
37. Document A35, p 43
38. Document A12, p 6
39. Document A2, p 8
40. Ibid, p 9; doc A12, p 7
41. Document A2, p 9
42. Document A12, p 7
43. Submission 3.1.101(a), p 237
44. Submission 3.3.19, p 59; submission 3.3.20, p 22; submission 3.3.23, p [16]; submission 3.3.26, pp 18–19
45. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 675
46. Submission 3.3.27, pp 79–80
47. Transcript 4.1.2, pp 674–675
48. Wai 262 RO1, doc R34(ff), exhibit 1.1, 'Treaty of Waitangi/ Responsiveness to Māori', pp [5]–[7]; doc A2(a), exhibit D, pp 94–96
49. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, pp 683–684
50. Document A2(a), exhibit M, pp 624–625
51. Document A36, p 51
52. Submission 3.3.27, p 78
53. At the suggestion of Kāwharu, Ridings noted at hearing that amicus curiae briefs are supposed to be independent, and may not be accepted if the Crown is seen to be inappropriately involved. She concluded that perhaps the Crown should instead commit to education on amicus briefs, or not opposing them where they are submitted by Māori: transcript 4.1.2, pp 756–757.
54. Ibid, pp 753–754
55. Document A36, p 52




Dated at Wellington this 17th day of June 2016



Judge Michael Doogan, presiding officer



David Cochrane, member



The Honourable Sir Douglas Lorimer Kidd KNZM, member



Emeritus Professor Sir Tamati Muturangi Reedy, KNZM, PhD, member



Tania Te Rangingangana Simpson, member





## APPENDIX I

## THE CLAIMS

**1.1 DR PAPAARANGI REID AND OTHERS (WAI 2522)**

The first statement of claim for Wai 2522 was submitted to the Waitangi Tribunal on 23 June 2015. The claimants were:

- ▶ Associate Professor Dr Mary Jane Papaarangi Reid, tumuaki and head of the Department of Māori Health at the Faculty of Medical and Health Sciences, University of Auckland;
- ▶ Moana Jackson, director of Ngā Kaiwhakamārama i Ngā Ture and lecturer in the Māori law and philosophy degree programme at Te Wānanga o Raukawa;
- ▶ Angeline Greensill, environmental and land rights advocate and former lecturer at Waikato University;
- ▶ Hone Pani Tāmāti Waka Nene Harawira, leader of the Mana Movement and former member of Parliament for Te Tai Tokerau; and
- ▶ Rikirangi Gage, chief executive of Te Rūnanga o te Whānau tribal authority and director of Te Ohu Kaimoana (the Māori Fisheries Commission).<sup>1</sup>

The following day, Moana Maniapoto was added as the sixth named claimant.<sup>2</sup>

The claimants' central point was that the Crown was failing to recognise, and indeed attempting to displace, the tino rangatiratanga of rangatira and hapū. They said that neither they nor their hapū had ever ceded their tino rangatiratanga to the Crown. Despite this, the claimants said, the Crown had failed to meaningfully consult with Māori or seek their views on the TPPA, and had ignored widespread Māori protest about the TPPA.<sup>3</sup> They also said the Crown had failed to properly assess the TPPA's impact on Māori rights.<sup>4</sup> The fact that negotiations were carried out in secret, with the draft text of the agreement not made officially public, meant that Māori were unable to engage with the TPPA in an informed manner.<sup>5</sup>

The claimants objected to the Crown's involvement in the TPPA negotiations, stating that the TPPA would:

- ▶ constrain the Crown's ability to act in a Treaty-compliant manner; in particular its duty to protect the interests of hapū and iwi and provide redress for breaches of the Treaty of Waitangi;
- ▶ undermine Māori rights and the exercise of tino rangatiratanga over significant taonga, by giving privileges and rights to foreign and trans-national corporations in relation to matters such as land, resources, and Māori customary knowledge;

- guarantee foreign companies a greater say in Government decision-making beyond that which is currently guaranteed to Māori; and
- undermine Māori rights to health.<sup>6</sup>

In addition, the claimants said that the Crown had failed to take account of the findings of the Wai 262 Tribunal in relation to intellectual property rights over indigenous plants.<sup>7</sup> They were also concerned about the investor–state dispute settlement (ISDS) process, which they said might deter the Crown from providing redress for Treaty breaches.<sup>8</sup> More generally, the claimants submitted that the Treaty of Waitangi exception clause was ‘inadequate to ensure Māori rights are fully protected and does not empower Māori to intervene to protect their rights’.<sup>9</sup>

The claimants asked that we recommend that the Crown immediately halt progress towards signing the TPPA until it had meaningfully engaged with Māori and ensured that their rights were accorded priority over those of foreign states and investors. They also sought a recommendation that the Crown immediately release the full draft text of the TPPA, and take steps to implement those recommendations of the Wai 262 Tribunal which relate to international agreements.<sup>10</sup>

### **1.2 NATALIE BAKER AND OTHERS ON BEHALF OF HAPŪ O NGĀPUHI (WAI 2523)**

The Wai 2523 claimants made their claim on 23 June 2015, on behalf of themselves, their whānau, and various hapū of Ngāpuhi. They were: Natalie Kay Baker, Hone Tiatoa, Māia (Connie) Pitman, Ani Taniwha, Pōuri Harris, Owen Kīngi, Justyne Te Tāna, and Lorraine Norris.<sup>11</sup>

The claimants alleged that the Crown’s accession to the TPPA would cede elements of New Zealand’s sovereignty, despite the finding of the Te Paparahi o te Raki Tribunal that Ngāpuhi rangatira had never ceded their sovereignty to the Crown.<sup>12</sup> They said that the TPPA would restrict New Zealand’s sovereignty, including the Crown’s ability to make law and policy over matters including water use and other environmental concerns, smoking control,

poverty alleviation, and Treaty settlements.<sup>13</sup> Because Ngāpuhi hapū had not ceded sovereignty, they said, the Crown could not have the authority to cede that sovereignty to foreign interests.<sup>14</sup>

Adding to the Treaty breach, the claimants said, was the fact that the Crown was negotiating the TPPA without meaningful consultation with Ngāpuhi hapū or even telling them what was in the agreement. As a result, they were unable to meaningfully participate in the decision-making process. This was in breach of the principle of partnership.<sup>15</sup> They were also concerned that ISDS would make the Crown vulnerable to legal action over Ngāpuhi’s Treaty settlements, and this threat would have an adverse effect on the content of those settlements, particularly where they involved forestry.<sup>16</sup> The claimants did not believe that the Treaty of Waitangi exception would protect their interests.<sup>17</sup>

The recommendations sought by the Wai 2523 claimants were the same as those sought by the Wai 2522 claimants.<sup>18</sup>

### **1.3 RĪHARI DARGAVILLE ON BEHALF OF TE TAI TOKERAU DISTRICT MĀORI COUNCIL (WAI 2530)**

The Wai 2530 claim was made on 3 July 2015 by Rihari Dargaville, chairman of the Te Tai Tokerau District Māori Council, on behalf of the council, which represents Māori in the Te Tai Tokerau (Northland) region.<sup>19</sup>

Dargaville submitted that the TPPA was inconsistent with the findings of the Te Raki Tribunal that Ngāpuhi did not cede sovereignty to the Crown, in that it failed to recognise the right of Māori to self-government.<sup>20</sup> The Crown’s involvement in the TPPA negotiations was also in breach of its duty to consult with Te Tai Tokerau Māori, or at least produce a cost-benefit analysis showing how they would be affected.<sup>21</sup>

He alleged that the TPPA would potentially affect the ability of Māori to preferentially use, manage, conserve, and access their traditional knowledge, and undermine cultural restrictions on genetically modified organisms. It would also affect the ability of the Waitangi Tribunal to make recommendations affecting the access of offshore

investors to lands and resource rights.<sup>22</sup> Dargaville was also concerned about the potential impact on Pharmac, particularly if its decisions could result in legal action against the Crown.<sup>23</sup> The potential for policies concerning tobacco control, indigenous trademarks, and genetic engineering to be legally challenged was also a matter of concern, with Dargaville submitting that Māori would be disproportionately affected.<sup>24</sup>

Dargaville asked for a recommendation that the Crown consult with rangatira over the TPPA; and seek clear protection of Māori rights and an exclusion of claims relating to protection of such rights.<sup>25</sup>

#### **1.4 WAIMARIE BRUCE-KĪNGI AND OTHERS (WAI 2531)**

The Wai 2531 claim was made on 3 July 2015 by the following named claimants:

- ▶ Waimarie Bruce-Kīngi on behalf of the whānau and hapū of Ngāti Kahu o Torongare me Te Parawhau;
- ▶ Kingi Taurua on behalf of the whānau and hapū of Ngāti Rahiri and Ngāti Kawa;
- ▶ Pāora Whaanga on behalf of the whānau and hapū of Rakaipaaka;
- ▶ Huia Brown for and on behalf of the whānau and hapū of Rongomaiwahine;
- ▶ Jack Te Reti on behalf of the whānau and hapū of Ngāti Te Ihingārangi;
- ▶ Richard Tiki o Te Rangi Thompson on behalf of the whānau and hapū of Ngāti Tahinga;
- ▶ John Wī on behalf of the whānau and hapū of Ngāti Tūtakamoana and Ngāti Hōpu;
- ▶ Tracey Waitōkia on behalf of the whānau and hapū of Ngāti Hineoneone;
- ▶ Karina Williams on behalf of the whānau and hapū of Ngāti Whākiterangi; and
- ▶ Michael Leulua'i of Ngātiwai on behalf of his whānau.<sup>26</sup>

The claimants submitted that the Crown was breaching its Treaty duty of partnership by negotiating the TPPA in secret and without meaningful consultation with Māori.<sup>27</sup>

They said the TPPA would potentially have a detrimental effect on Māori, as it would allow foreign investors to take legal action against the Crown over policies designed to uphold the Treaty of Waitangi and protect Māori, particularly health policies such as tobacco control.<sup>28</sup>

The relief sought by the claimants was the same as that sought by the Wai 2522 and Wai 2523 claimants.<sup>29</sup>

#### **1.5 TITETWHAI HARAWIRA ON BEHALF OF TEAM PATUONE (WAI 1427)**

The first statement of claim for Wai 1427 was submitted in July 2007 by Titetwhai Harawira, and involved a wide range of political, socio-economic, and cultural issues.<sup>30</sup> In July 2015, a further statement of claim was filed, relating to the TPPA and accompanied by an application for urgency.<sup>31</sup>

The new statement of claim referred to the finding of the Te Raki Tribunal that Ngāpuhi rangatira did not cede their sovereignty when they signed the Treaty of Waitangi, and argued that the Crown therefore had no right to give up New Zealand sovereignty through the TPPA.<sup>32</sup> It also said that the Crown had failed to properly consult with Ngāpuhi hapū and iwi, or consider the potential or likely effects of the TPPA on the claimants and their hapū and iwi. In particular, claimants were concerned about the potential effect of the TPPA on taonga tuku iho including lands, forests, waterways, coastal and oceanic environments, and natural resources, as well as mātauranga and intellectual property rights.<sup>33</sup>

The claimants did not seek any specific relief or recommendations at this stage.

#### **1.6 CLETUS MAANU PAUL AND OTHERS ON BEHALF OF THE NEW ZEALAND MĀORI COUNCIL (WAI 2532)**

The Wai 2532 claim was submitted on 10 July 2015 on behalf of the following claimants:

- ▶ Cletus Maanu Paul (also the Wai 2535 claimant) and Sir Edward Taihākurei Durie on behalf of the New Zealand Māori Council and Māori generally;

- ▶ Tāmami Cairns on behalf of Pouakani iwi and in relation to Māori proprietary interests in fresh water;
- ▶ Kereama Pene in relation to Māori proprietary interests in hot water and geothermal fields; and
- ▶ Cletus Maanu Paul, Sir Edward Durie, Tāmami Cairns, Titewhai Harawira (also a claimant in Wai 1427), Desma Kemp Ratima, Rihari Dargaville (also the Wai 2530 claimant), and Anthony Toro Bidois for the Mataatua, Raukawa, Wellington, Auckland, Tākitimu, Tai Tokerau, and Te Arawa District Māori Councils respectively.<sup>34</sup>

The claim was made in support of the Wai 2522 and Wai 2523 claims.<sup>35</sup> The claimants sought to focus particularly on Māori proprietary claims to fresh water and geothermal resources.<sup>36</sup> They said that the TPPA would expose the Crown to international legal action should it require foreign investors to pay Māori for use of fresh water; this would deter the Crown from requiring such payments.<sup>37</sup> Similarly, the TPPA would deter the Crown from recognising Māori claims to geothermal fields.<sup>38</sup>

The claimants sought a recommendation that the Crown assure Māori that the TPPA would contain provisions protecting Māori claims to natural resources, the nature of that provision to be negotiated with the claimants.<sup>39</sup>

#### **1.7 TIMOTI FLAVELL AND OTHERS ON BEHALF OF NGĀTI KAHU (WAI 2533)**

The Wai 2533 claim was made on 17 July 2015 by Tīmoti Flavell and unnamed others on behalf of Te Rūnanga-ā-Iwi o Ngāti Kahu (a mandated body representing various Ngāti Kahu Treaty claims), and the whānau, hapū, and iwi of Ngāti Kahu.<sup>40</sup>

The claimants objected to the Crown's actions in negotiating the TPPA in secret, without meaningful consultation or engagement with Ngāti Kahu, and said that it was failing to recognise Ngāti Kahu rangatiratanga and kaitiakitanga over their lands, waterways, resources, and other taonga.<sup>41</sup> They said that Ngāti Kahu did not cede their sovereignty or tino rangatiratanga when signing the Treaty, and therefore the Crown could not relinquish that

rangatiratanga without the acceptance of Ngāti Kahu.<sup>42</sup> There were also inherent Treaty breaches in the Crown's failure to seek the agreement of Māori, consider Treaty principles and Tribunal findings, or adequately inform Māori of the content of the TPPA.<sup>43</sup>

They stated that ISDS would reduce the Crown's ability to make law and policy relating to a range of issues including human rights, environmental issues, and Treaty settlements.<sup>44</sup> In particular, they were concerned that current and future Ngāti Kahu Treaty settlements concerning forestry and other issues would be adversely affected.<sup>45</sup> The claimants did not consider that the Treaty of Waitangi exception clause would be sufficient to protect their interests.<sup>46</sup>

The claimants sought a recommendation that the Crown halt progress towards signing the TPPA; immediately release the TPPA text to Ngāti Kahu; engage meaningfully with Ngāti Kahu; and not enter into the TPPA until it has satisfied its obligations to Māori under the Treaty.<sup>47</sup>

#### **1.8 CLETUS MAANU PAUL ON BEHALF OF NGĀ KAIĀWHINA A WAI 262 AND THE MATAATUA DISTRICT MĀORI COUNCIL (WAI 2535)**

The Wai 2535 claim was made on 22 July 2015 by Cletus Maanu Paul on behalf of Ngā Kaiāwhina a Wai 262 and the Mataatua District Māori Council.<sup>48</sup> The claim was concerned with the findings of the Wai 262 (Flora and Fauna) Tribunal, which the claimants said was not taken into account by the Crown when negotiating the TPPA.<sup>49</sup> They submitted that, by negotiating the TPPA without meaningful consultation with Māori, the Crown failed to actively protect and guarantee tino rangatiratanga.<sup>50</sup> As a result, they said, their taonga were 'at serious risk to be used in a way that may be contrary to kaitiaki knowledge and preservation, including the loss of Māori rights to their intellectual property'.<sup>51</sup>

The claimants sought a recommendation that the Crown urgently enter into good faith discussions with Māori over the TPPA, and take immediate steps to implement the recommendations of the Wai 262 Tribunal.<sup>52</sup>

### 1.9 DEIRDRE NEHUA, TE KEREI TIATOA, VIOLET NATHAN, AND OTHERS (WAI 2551)

The Wai 2551 claim was made on 24 December 2015 by Deirdre Nehua, Te Kerei Tiatoa (Gray Theodore), and Violet Nathan. The claimants are involved in the Te Paparahi o te Raki (Northland) district inquiry, as claimants for Wai 1837, Wai 966, and Wai 2217 respectively. They alleged that the Crown had breached the Treaty by failing to protect and guarantee their tino rangatiratanga and kaitiakitanga; by failing to protect Māori interests in international affairs; and by failing to engage in meaningful consultation.<sup>53</sup> As a result of the failure to properly consult, the claimants said they only became aware of the TPPA's significance relatively recently.<sup>54</sup> They were concerned about the potential impact on the environment, iwi and hapū settlements with the Crown, mātauranga Māori and rongōā, and the regulation of water quality and energy, and on their ability to exercise kaitiakitanga over these things.<sup>55</sup>

The claimants sought a recommendation that the Crown enter into good faith negotiations with Māori over the TPPA; take immediate steps to implement the recommendations of the Wai 262 Tribunal; acknowledge and apologise for the Treaty breach relating to the TPPA; compensate the claimants for costs incurred in the claim; and engage with Māori in order to ensure that Māori rights and interests are accorded priority over those of foreign states and investors.<sup>56</sup>

### 1.10 INTERESTED PARTIES

Numerous parties, most of them claimants in other inquiries, were recognised as interested parties in this inquiry. They were:

- ▶ Gray Theodore and Pereme Porter, on behalf of Ngā Puhi (Wai 966).
- ▶ Deirdre Nehua on behalf of the whānau, hapū, and iwi of Te Tai Tokerau (Wai 1837).
- ▶ Maringitearoha Kalva Emily Pia Broughton, Violet Elaine Nathan, and Rhonda Aorangi Kawiti on behalf of the Ngāpuhi nui tonu tamariki of Te Tai Tokerau (Wai 2217).<sup>57</sup>

- ▶ Te Kotahitanga o Ngā Hapū Ngāpuhi.<sup>58</sup>
- ▶ Ngāti Kahungunu Iwi Incorporated.<sup>59</sup>
- ▶ Timoti Flavell on behalf of Te Rūnanga-ā-Iwi o Ngāti Kahu (later a claimant in his own right).<sup>60</sup>
- ▶ Ngāti Kuta (Wai 1140) and Patukeha (Wai 1307).<sup>61</sup>
- ▶ Merehora and Peter Pōkai Taurua (Wai 2244).<sup>62</sup>
- ▶ George Davies on behalf of the descendants of Hairama Pita Kino (Wai 1544).
- ▶ Hūhana Seve on behalf of her whānau (Wai 1677).
- ▶ Sheena Ross and Garry Hooker on behalf of Ngāti Korokoro, Te Pouka, and Ngāti Pou (Wai 1857).
- ▶ Lissa Lyndon on behalf of the descendants of Sylvia Jones (Wai 1959).<sup>63</sup>
- ▶ Paki Pirihi on behalf of Patuharakeke (Wai 745).
- ▶ Ngāwaka Pirihi and others on behalf of the owners of Pukekauri 1B1, 1B2, 1B3, 1B4, and 1B5 and Takahīwai 4C, 4D1, 4E, 7A, 7B2, and 7C (Wai 1308).<sup>64</sup>
- ▶ Pairama Tāhere on behalf of Te Uri o Te Aho (Wai 1259).<sup>65</sup>
- ▶ Evelyn Kereopa on behalf of Te Ihingarangi, a hapū of Ngāti Maniapoto (Wai 762).
- ▶ Marama Waddell on behalf of her whānau and hapū who are members of Te Whiu, Te Uri Taniwha, and Nga Uri o Wiremu raua ko Maunga Tai (Wai 824).
- ▶ Vernon Houppapa on behalf of his whānau and Ngāti Hikairo, Ngāti Mahuta, Ngāti Maniapoto, and Ngāti Ngutu (Wai 1499).
- ▶ Te Enga Harris on behalf of Wiremu Hēmi Harris and Meri Ōtene whānau, and Ngāti Rangi, Ngāti Here, Ngāti Tūpoto, Ngāti Hohaitoko, Ngāti Kōpuru, Te Rarawa, and Ngāti Uenuku (Wai 1531).
- ▶ Wiremu Reihana on behalf of his whānau and Ngāti Tautahi ki Te Iringa (Wai 1957).
- ▶ Piriwhariki Tahapeehi on behalf of Ngāti Māhanga, Ngāti Tamaoho, and Ngāti Apakura hapū (Wai 1992).
- ▶ Charlene Walker-Grace on behalf of Te Hokingamai e te iwi o te Motu o Mahurangi (Wai 2206).
- ▶ Tamarangi Taihuka (Tom) Terekia (Wai 2380).<sup>66</sup>
- ▶ David Potter and Andre Paterson on behalf of Ngāti Rangitihī as represented by the Ngāti Rangitihī Raupatu Trust Incorporated (Wai 996).<sup>67</sup>
- ▶ Louisa Collier, Fred Collier, and Paula Wētere on

behalf of the descendants of Hinewhare; Rihari Dargaville on behalf of the descendants of Ngatau Tangihia; and Amelia Waetford on behalf of the descendants of Wiremu Pou (Wai 1537, Wai 1541, Wai 1685, and Wai 1917).

- ▶ Ruiha Collier and Rihari Dargaville (also the Wai 2530 claimant) (Wai 1673).
- ▶ Popi Tāhere on behalf of Te Waiariki Ngāti Kororā and Ngā Uri o Te Aho and Ngā Hapū o Ngāpuhi (Wai 1681).
- ▶ Mataroria Lyndon and Louisa Collier (Wai 1918).<sup>68</sup>
- ▶ Marino Māhanga (Wai 1712).<sup>69</sup>
- ▶ Te Rūnanganui o Ngāti Porou.<sup>70</sup>
- ▶ Jane Mihingarangi Ruka Te Kōrako and Robert Kenneth McAnergney on behalf of the Grandmother Council of the Waitaha Nation, including the hapū Ngāti Kurawaka, Ngāti Rākaiwaka, and Ngāti Pākauwaka (Wai 1940).
- ▶ Karanga Pourewa, Tarzan Hori, Hinemoa Pourewa, and William Hori on behalf of the descendants of Whakakī and Te Hapū o Ngāti Kawau (Wai 1312).<sup>71</sup>

## Notes

1. Wai 2522 RO1, claim 1.1.1, p 3
2. Ibid, p [25]
3. Ibid, pp 5–6
4. Ibid, p 8
5. Ibid, pp 10–13
6. Wai 2522 RO1, claim 1.1.1, pp 5–6
7. Ibid, pp 15–16
8. Ibid, pp 17–18
9. Ibid, pp 9, 19–20
10. Ibid, pp 22–23
11. Wai 2523 RO1, claim 1.1.1, p 3
12. Ibid, pp 4–5, 9–12
13. Ibid, pp 10–11
14. Ibid, pp 11–12
15. Ibid, pp 12–13
16. Ibid, pp 14–15
17. Ibid, p 11
18. Ibid, pp 16–17
19. Wai 2530 RO1, claim 1.1.1, p [2]
20. Ibid, pp [3]–[4]
21. Ibid, pp [3]–[5]
22. Ibid, p [3]
23. Ibid, pp [5]–[6]
24. Ibid, p [6]
25. Ibid, p [7]
26. Wai 2531 RO1, claim 1.1.1, pp 2–3
27. Ibid, pp 7–8
28. Ibid, pp 8–10
29. Ibid, pp 11–12
30. Wai 1427 RO1, claim 1.1.1
31. Ibid; Wai 1427 RO1, claim 1.1.1(b); Wai 1427 RO1, submission 3.1.1. Dr Benjamin Pittman was also added as a named claimant around this time: Wai 1427 RO1, claim 1.1.1(a).
32. Wai 1427 RO1, claim 1.1.1(b), p 2
33. Ibid, p 3
34. Wai 2532 RO1, claim 1.1.1, p 1
35. Ibid, p 2
36. Ibid, pp 2–3
37. Ibid, p 4
38. Ibid, pp 4–5
39. Ibid, p 5
40. Wai 2533 RO1, claim 1.1.1, p [2]
41. Ibid, pp [3], [6]–[7]
42. Ibid, p [6]
43. Ibid, pp [7]–[9]
44. Ibid, pp [3]–[4]
45. Ibid, p [10]
46. Ibid, pp [4]–[5]
47. Ibid, p [11]
48. Wai 2535 RO1, claim 1.1.1, p 1
49. Ibid, pp 4–6
50. Ibid, p 7
51. Ibid, p 8
52. Ibid, p 9
53. Wai 2551 RO1, claim 1.1.1, p 2
54. Ibid, p 3
55. Ibid, p 3
56. Ibid, pp 5–6
57. Submission 3.1.4, p 2. Porter, Nehua, and Nathan later became claimants in their own right, as part of Wai 2551.
58. Submission 3.1.5, p 2
59. Submission 3.1.6, p 2
60. Submission 3.1.7, p 2
61. Submission 3.1.8, p 2
62. Submission 3.1.14, p [2]
63. Submission 3.1.15, p 1
64. Submission 3.1.16, p 1
65. Submission 3.1.23, p [2]
66. Submission 3.1.24, pp 2–3
67. Submission 3.1.33, p 1
68. Submission 3.1.35, p 1
69. Submission 3.1.36, p 1
70. Submission 3.1.60, p [2]
71. Submission 3.1.97; memo 2.5.21

APPENDIX II

**TRADE AND INVESTMENT TREATIES SINCE 2001**

The table on the following page is taken from document A35(b) and lists the trade and investment treaties that New Zealand has entered into since 2001, showing the country's investment commitments.

No	Agreement	Binding investor–state dispute settlement	National treatment	Most favoured nation
1.	New Zealand Singapore Closer Economic Partnership 2001	No	Yes	Yes
2.	New Zealand Thailand Closer Economic Partnership 2005	No	Qualified	Yes
3.	Trans-Pacific Strategic Economic Partnership: New Zealand, Brunei Darussalam, Chile, and Singapore 2005	No No investment commitments at all	—	—
4.	New Zealand China Free Trade Agreement 2008	Yes	Yes Post-establish subject to most favoured nation	Yes
5.	ASEAN Australia New Zealand Free Trade Agreement 2010	Yes	No National treatment subject to further agreement	No
6.	New Zealand Malaysia Free Trade Agreement 2010	Yes	No National treatment subject to further agreement	No National treatment subject to further agreement
7.	New Zealand–Hong Kong Closer Economic Partnership 2011	No No investment commitments at all	—	—
8.	New Zealand–Australia: investment protocol 2013	No	Yes	Yes
9.	New Zealand–Taiwan Free Trade Agreement 2013	No	Yes	Yes
10.	New Zealand–Korea Free Trade Agreement 2015	Yes	Yes	Yes
11.	Trans-Pacific Partnership Agreement	Yes	Yes	Yes

Expropriation	Fair and equitable treatment/ minimum standard of treatment	Contract claims	General exceptions
No	No	No	Yes
Yes No annex	No 'Appropriate protection'	No	Yes
—	—	—	—
Yes Annex specifies 'rare circumstances' for regulatory taking	Yes Fair and equitable treatment under international law	No	Yes
Yes Annex, no allowance for 'rare circumstances'	Yes Fair and equitable treatment under customary law	No	Limited Article xiv of the General Agreement on Trade in Services applies
Yes Annex, no allowance for 'rare circumstances'	Yes Fair and equitable treatment under customary law	No	Yes
—	—	—	—
Yes No annex; does not specify 'rare circumstances' for regulatory taking	Yes Minimum standard of treatment under customary law	No	Yes
Yes Annex specifies 'rare circumstances' for regulatory taking	Yes Minimum standard of treatment under customary law	No	Yes
Yes Annex, no allowance for 'rare circumstances'	Yes Minimum standard of treatment under customary law	No	Yes
Yes Annex does not specify 'rare circumstances' for regulatory taking	Yes Minimum standard of treatment under customary law	Yes	No



APPENDIX III

**THE STAGES OF AN ISDS CASE**

The table on the following page is taken from document A39 and shows the stages of an ISDS case and the point at which the Treaty exception may come into play.

JURISDICTION PHASE	MERITS PHASE
	NON CONFORMING MEASURES
Overseas Investment Act screening decision not subject to investor state dispute settlement (annex 9-H)	Any or all the following obligations do not apply where New Zealand has scheduled a reservation against a specific obligation for a specific measure (annex I) or a specific sector(s) (annex II): <ul style="list-style-type: none"><li>➤ National Treatment (article 9.4)</li><li>➤ Most-Favoured Nation (article 9.5)</li><li>➤ Performance Requirements (article 9.9)</li><li>➤ Senior Management and Boards of Directors (article 9.10)</li></ul> Exclusions include: <ul style="list-style-type: none"><li>➤ Approval for investment activities under Overseas Investment Act and Fisheries Act</li><li>➤ Various public services</li><li>➤ Water</li><li>➤ Foreshore and seabed</li><li>➤ Fisheries and maritime matters</li><li>➤ Cultural heritage and preserving sacred sites</li></ul>
Denial of benefits for ‘Tobacco Control Measures’	
Denial of benefits to enterprises controlled by persons of non-parties and no substantial business assets in territory of another party	
Is the definition of ‘investor of a party’ met?	
Is definition of ‘investment’ met?	
Is the claim manifestly without legal merit?	If Non Conforming Measures applies there can be no breach of national treatment, Most-Favoured Nation, performance requirements or Senior Management and Boards of Directors
If any of these definitions are not satisfied, or jurisdictional objections made out: END OF CASE	
	END OF CASE

## MERITS PHASE

## CHAPTER 9, SECTION A KEY OBLIGATIONS

## Article 9.4 (National Treatment)

For there to be a breach of 'national treatment', foreign investor has to be in 'like circumstances' to domestic investor

## Article 9.6 Minimum Standard of Treatment

For there to be a breach, there has to be a violation of the customary international standard of treatment  
NB. Minimum Standard of Treatment is also binding on New Zealand as a matter of customary international law

## Article 9.8 Expropriation

For there to be a breach, an investor has to show that there was an expropriation *and* that it didn't comply with the four required conditions for an expropriation (that it is for a public purpose, non-discriminatory, accompanied by compensation, and done in accordance with due process of law)

NB. The obligation not to expropriate a foreign investor's assets except in accordance with these conditions is also binding on New Zealand as a matter of customary international law

Under Annex 9.B: 'Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, *do not constitute indirect expropriation*, except in rare circumstances.'

If no breach,  
**END OF CASE**

## DEFENCES AGAINST A BREACH

## National Security (article 29.2)

## Temporary Safeguard measures (article 29.3)

## Taxation (article 29.4)

## Prudential reasons (article 11.11, Financial Services Chapter)

## Treaty exception for more favourable treatment of Māori (article 29.6)

If any exception applies  
**END OF CASE**



## APPENDIX IV

# SELECT RECORD OF INQUIRY

## RECORD OF PROCEEDINGS

### 1. STATEMENTS

#### 1.1 Statements of claim

See appendix 1 for a more detailed description of the claims and claimants.

#### (1) *Wai 2522*

1.1.1 Dr Papaarangi Reid, Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto, statement of claim for Wai 2522, 23 June 2015

#### (2) *Wai 1427*

1.1.1(b) Dr Benjamin Pittman and Titewhai Harawira on behalf of Team Patuone, amended statement of claim, 16 July 2015

#### (3) *Wai 2523*

1.1.1 Natalie Baker and others on behalf of the Waimate Taiamai Alliance and other hapū of Ngāpuhi, statement of claim, 23 June 2015

#### (4) *Wai 2530*

1.1.1 Rihari Dargaville on behalf of the Te Tai Tokerau District Māori Council, statement of claim, 3 July 2015

#### (5) *Wai 2531*

1.1.1 Waimarie Bruce-Kingi, Kingi Taurua and others, statement of claim, 3 July 2015

#### (6) *Wai 2532*

1.1.1 Cletus Maanu Paul and Edward Taihākurei Durie on behalf of the New Zealand Māori Council and Māori generally, statement of claim, 10 July 2015

#### (7) *Wai 2533*

1.1.1 Timoti Flavell and others on behalf of Te Rūnanga-ā-Iwi o Ngāti Kahu, statement of claim, 17 July 2015

#### (8) *Wai 2535*

1.1.1 Cletus Maanu Paul on behalf of Ngā Kaiāwhina a Wai 262 and the Mataatua District Māori Council, statement of claim, 22 July 2015

**(9) Wai 2551**

**1.1.1** Deirdre Nehua, Gray Theodore, and Violet Nathan on behalf of Ngāpuhi, statement of claim, 24 December 2015

**2. TRIBUNAL MEMORANDA AND DIRECTIONS****2.5 Pre-hearing stage**

**2.5.6** Judge Michael Doogan, memorandum advising parties of next steps in inquiry, 14 July 2015

**2.5.9** Waitangi Tribunal, decision on applications for urgent hearings, 31 July 2015

**2.5.14** Judge Michael Doogan, memorandum confirming date of judicial conference concerning inquiry planning, 15 October 2015

**2.5.19** Judge Michael Doogan, memorandum concerning issues for inquiry, proposed case studies, Tribunal-commissioned expert evidence, disclosure, and inquiry timetable, 11 December 2015

**3. SUBMISSIONS AND MEMORANDA OF PARTIES****3.1 Pre-hearing stage**

**3.1.41** Michael Heron, Damien Ward, and Rachael Ennor, Crown submissions for judicial conference on urgency, 24 July 2015

**3.1.43** Damien Ward and Rachael Ennor, memorandum advising of ministerial rejection of independent advocate proposal, 27 July 2015

**3.1.66** Damien Ward and Gillian Gillies, memorandum advising TPP outcomes at Atlanta, 6 October 2015

**3.1.76** Virginia Hardy, memorandum advising of public release of TPPA text, 6 November 2015

**3.1.101(a)** Trans-Pacific Partnership National Interest Analysis

**3.1.103** Rachael Ennor, Gillian Gillies, and Annette Sykes, joint memorandum seeking extension to file evidence relating to revised scenarios, 2 February 2016

**3.1.132** Michael Heron, Rachael Ennor, and Gillian Gillies, memorandum concerning timetable for introduction of Bill to implement aspects of TPPA, 1 March 2016

**3.3 Submissions: opening, closing, and in reply**

**3.3.16** Robyn Zwaan, closing submissions for Wai 375, Wai 520, and Wai 523, 29 March 2016

**3.3.17** Gerald Sharrock, closing submissions for Wai 2530, 29 March 2016

**3.3.19** Te Kani Williams and Alana Thomas, closing submissions for Te Rūnanga-ā-Iwi o Ngāti Kahu (Wai 2533), 29 March 2016

**3.3.20** Bryce Lyall and Linda Thornton, closing submissions for Wai 2523, 29 March 2016

**3.3.21** Season-Mary Downs and Heather Jamieson, closing submissions for Ngāti Hine and Te Kapotai (Wai 49, Wai 682, Wai 1464), 29 March 2016

**3.3.22** Peter Andrew, Donna Hall, and Cerridwen Bulow, closing submissions for New Zealand Māori Council (Wai 2532), 29 March 2016

**3.3.23** Tavake Afeaki, Winston McCarthy, and Rebekah Jordan, closing submissions for Wai 2351, 30 March 2016

**3.3.24** Janet Mason, closing submissions for Wai 2535, 30 March 2016

**3.3.25** Annette Sykes and Piri McDougall-Moore, closing submissions for Wai 2523, Wai 2530, Wai 2531, Wai 2532, Wai 2533, 30 March 2016

**3.3.26** Moana Sinclair, amended closing submissions for Wai 2551, 6 April 2016

**3.3.27** Michael Heron, Rachael Ennor, and Gillian Gillies, closing submissions for the Crown, 8 April 2016

**3.3.36** Janet Mason, submissions in reply on behalf of Ngā Kaiāwhina a Wai 262 and the Mataatua District Council (Wai 2535), 15 April 2016

**3.4.10** Michael Heron, Rachael Ennor, and Gillian Gillies, memorandum updating TPPA timing, 8 April 2016

#### **4. TRANSCRIPTS AND TRANSLATIONS**

##### **4.1 Transcripts**

**4.1.1** Transcript of judicial conference, Waitangi Tribunal offices, 23 July 2015

**4.1.2** Transcript of hearing, Waitangi Tribunal offices, 14–18 March 2016

#### **RECORD OF DOCUMENTS**

##### **A SERIES**

**A1** Professor Jane Kelsey, brief of evidence, 23 June 2015  
(a) Exhibit Q: United Nations Conference on Trade and Development, 'Recent Trends in IIAs and ISDS', *IIA Issues Note*, no 1, February 2015  
Exhibit Z: Sinclair, letter on TPPA confidentiality, no date  
Exhibit AM: Ministry of Foreign Affairs and Trade, 'Trans-Pacific Partnership 2012: Strategy'

**A2** Martin Harvey, brief of evidence, 7 July 2015  
(a) Exhibit D: Ministry of Foreign Affairs and Trade, 'Strategy for Engagement with Māori on International Treaties', 2001  
Exhibit J: Petri, Plummer, and Zhai, 'The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment', *East-West Working Papers: Economics Series*, no 119, 24 October 2011  
Exhibit M: Ministry of Foreign Affairs and Trade, 'Ngāti Kahungunu Iwi Incorporated response', 2008  
Exhibit P: Ministry of Foreign Affairs and Trade, 'Invitation to Meetings in Auckland and Wellington', May 2015  
Exhibit Q: Ministry of Foreign Affairs and Trade, 'Invitation to Meetings in Dunedin', April 2014  
Exhibit V: 'Open Letter to Prime Minister John Key in Support of TPP Negotiations', 3 December 2012

**A4** Dr Adele Whyte, brief of evidence, 20 July 2015

**A6** Waimarie Bruce-Kingi, 'Whakatatoranga Kōrero o Waimarie Kingi Hei Tuatoko Te Kerēme Kōhukihuki / Brief of evidence of Waimarie Kingi in Support of Urgency Application', 21 July 2015

**A12** Dr David Walker, brief of evidence, 27 October 2015  
(a) Exhibit B: Ministry of Foreign Affairs and Trade, 'TPA in Brief', no date

**A13** Martin Harvey, brief of evidence, 10 November 2015  
(a) Exhibit A: TPP text as published online by Ministry of Foreign Affairs and Trade

**A14** Dr Papaarangi Reid, brief of evidence, 22 January 2016

**A15** Professor Jane Kelsey, brief of evidence, 20 January 2016  
(a) Exhibit O: 'New Zealand: Schedule of Specific Commitments', *GATS/SC/62*, 15 April 1994  
Exhibit P: Joana Johnston to Jane Kelsey, letter, 18 December 2015

**A16** Dr Penelope Ridings, brief of evidence, 19 January 2016  
(a) Exhibit CC: United Nations Conference on Trade and Development, 'Fair and Equitable Treatment: A Sequel', United Nations Conference on Trade and Development Series on International Investment Agreements 11, 2012

**A17** Professor Jane Kelsey, brief of evidence, 3 February 2016

**A18** Dr Penelope Ridings, brief of evidence, 3 February 2016

**A19** Dr Penelope Ridings, brief of evidence, 9 February 2016

**A20(a)** Exhibit C: chair of Ngāti Kahungunu Iwi Incorporated to Ministers for Māori Development and Foreign Affairs and Trade, letter, 28 January 2016

**A21** Professor Jane Kelsey, brief of evidence, 11 February 2016

**A26** Willow-Jean Prime, brief of evidence as interested party, 12 February 2016

**A27** Pita Tipene, brief of evidence as interested party, 15 February 2016

**A28** Maanu Paul, brief of evidence, 15 February 2016

**A29** Waimarie Bruce-Kingi, brief of evidence, 15 February 2016

**A30** Natalie Baker, brief of evidence, 15 February 2016

**A35** Amokura Kāwharu, brief of evidence, 24 February 2016  
(b) Amokura Kāwharu, 'New Zealand Trade and Investment Treaties since 2001: Investment Commitments by New Zealand', 17 March 2016  
(c) Amokura Kāwharu, 'Draft "Fit for Purpose" Treaty Exception Clause', 21 March 2016

**A36** Dr David Walker, brief of evidence, 1 March 2016  
(a) Exhibit J: Minister of Trade to Iwi Chairs Forum, letter, 4 February 2016

**A39** Crown, cross-examination document used during presentation of Dr Penelope Ridings, 15 March 2016

**A41(a)** Exhibit B: email correspondence released under Official Information Act request, 16–18 November 2015

**A43** Miles, Beale, and Barnett, 'Investor–State Dispute Settlement under the Recently Concluded Trans-Pacific Partnership', *Arbitration Newsletter*, February 2016, pp 25–27

**A44** International treaties list, 18 March 2016

**A47** Professor Jane Kelsey, 'Best "Fit for Purpose" Tiriti Provision', 21 March 2016

**A48** Trans-Pacific Partnership Agreement text  
(a) Trans-Pacific Partnership: index to text

**A50** Prime Minister's Office to Iwi Chairs Forum, letter, no date (confidential)