BEFORE THE WAITANGI TRIBUNAL **WAI TBA**

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF An Urgent Waitangi Tribunal inquiry into the Crown's actions concerning the Trans-Pacific Partnership Agreement

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Affidavit of Professor Elizabeth Jane Kelsey
Dated 19 June 2015

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I, **ELIZABETH JANE KELSEY**, of Auckland, Professor of Law, swear / affirm that:

1. I am a professor of law at the University of Auckland, with law degrees from Victoria University of Wellington, Oxford University and the University of Cambridge, and a PhD from the University of Auckland.

2. I research, teach and publish in the related areas of international economic regulation and law and policy, and am widely published in both fields. My particular expertise is in trade in services, investment, and other regulatory disciplines.

3. As part of my academic work since 1990 I have closely monitored multilateral, regional and bilateral negotiations for 'free trade' agreements and have observed their extension into areas that have little or no relationship to traditional forms of trade. Because these agreements are binding and enforceable by other states and increasingly by foreign investors, they constrain the policy and regulatory options available to the Crown.

4. Since 2009 my research has focused on the Trans-Pacific Partnership Agreement ("**TPPA**" or "**the Agreement**") and I am an internationally recognised academic expert on the negotiations and their policy and regulatory implications. I have written several books and numerous articles on the subject, delivered keynote addresses at international conferences, prepared technical reports and documents, analysed leaked texts, briefed officials and parliamentarians from a number of countries, and advised professional, business and community organisations on issues arising from the negotiations.

5. This work has been supported at different stages by grants from the University of Auckland (which funded a colloquium in 2010 that resulted in an edited book and educational website) and the New Zealand Law Foundation (to support research and education on the end stage of the negotiations, and technical analysis of any final text to assist public engagement).

6. From mid-2010 to August 2013 I attended eleven of the nineteen rounds of negotiations as a registered stakeholder and made presentations on specialist issues in Singapore, Melbourne, Chicago, Auckland (twice), Ho Chi Minh City, and Santiago. Since the parties stopped holding formal rounds, I have been an informal observer at nine informal rounds of meetings of officials ("**intersessionals**") and/or ministerial meetings.

7. A further area of my academic expertise is public policy relating to te Tiriti o Waitangi, especially since 1984. That was the subject of my PhD thesis awarded by the University of Auckland in 1991. I have written specifically on the tensions between the Crown's obligations under the Treaty of Waitangi and the New Zealand state's obligations under free trade and investment agreements.

8. I have presented briefs of evidence to three previous Waitangi Tribunal claims: *He Maungo Rongo: Report on Central North Island Claims,* Stage One, (WAI 1200);[1] that brief was also submitted in support of the claimants in Te Waka Kai Ora, (WAI 262); and *National Fresh Water and Geothermal Resources Inquiry* (WAI 2358) which specifically addressed the potential chilling effect of investor-state dispute settlement on the ability of the Crown to comply with its obligations under te Tiriti.[2]

9. Publications and activities that attest to this expertise are set out in Exhibit C.

Outline of Evidence

10. My evidence canvasses the following matters:

    (i) The background to the TPPA and the prospects for an imminent conclusion to the negotiations;

    (ii) The expected scope of the Agreement and its implications for domestic policy and regulatory autonomy;

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1 *He Maungo Rongo: Report on Central North Island Claims,* Stage One, (WAI 1200) 2007, pp.39-40 and p.43. Attached as Exhibit A

2 *National Fresh Water and Geothermal Resources Inquiry* (WAI 2358) Interim report, August 2012, esp pp.177-84. Attached as Exhibit B

(iii) The general nature of constraints on the Crown's policy and regulatory autonomy under the Agreement;

(iv) The nature and process of enforcement of New Zealand's obligations under TPPA;

(v) The Crown's conduct of negotiations as an executive act and its implications for te Tino Rangatiratanga;

(vi) The secrecy surrounding the negotiations and its implications for the Crown's duty to engage in informed decision making through an active consultation with Maori;

(vii) Widespread expressions of concern about the TPPA;

(viii) Potential conflict between the TPPA and Maori rights in relation to indigenous knowledge and resources and their responsibilities as kaitiaki;

(ix) Potential conflict between the TPPA and Tino Rangatiratanga and kaitiakitanga over whenua, takutai moana, and other taonga in relation to mining;

(x) Potential conflict between the TPPA and Maori rights to health, affirmed in te Tiriti and the United Nations Declaration on the Rights of Indigenous Peoples, specifically:

a. The implementation of the Smokefree 2025 policy adopted following the inquiry of the Maori Affairs Select Committee into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Maori; and

b. Access to affordable medicines;

(xi) The inadequacy of the proposed exception for measures adopted by the Crown to comply with its obligations under te Tiriti;

(xii) The overall constraints that the TPPA would impose on the claimants' ability to secure redress for past, present and future breaches of te Tiriti.

(i) Background to the TPPA

11. Negotiations for the Trans-Pacific Partnership Agreement have their origins in the Trans-Pacific Strategic Economic Partnership Agreement (known as the "P-4") between New Zealand, Chile, Singapore and Brunei Darussalam that came into force in January 2006. Chapters on financial services and investment were deferred for three years. In February 2008 President Bush announced the United States of America ("**US**") would enter those negotiations, and subsequently that it would join the P-4, which effectively meant its renegotiation in accordance with a US template. Several other countries also joined what became known as the Trans-Pacific Partnership negotiations. President Obama reviewed the US position and in November 2009 confirmed US participation in the negotiations.

12. There are currently twelve participating countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America, and Vietnam.

13. Because of the Agreement's origins in the P-4 and the absence of any institutional secretariat New Zealand's Ministry of Foreign Affairs and Trade (MFAT) is the formal depository for the documents.

14. Nineteen rounds of formal negotiations were held between March 2010 and August 2013, and two meetings of ministers.[3] Since August 2013 there have been at least nine rounds of intersessionals and four meetings of ministers.

15. For three years the negotiations have been described as nearing their conclusion. Despite many missed deadlines, I believe that claim is now true. The negotiating timeline is subject to a political constraint. It is widely understood that a final agreement must be tabled in the US Congress before

[3] Knowledge Ecology International has a helpful timeline to the end of 2011: http://keionline.org/node/1095. Attached as Exhibit D

its recess in August 2015 if it is to be adopted during the term of President Obama.[4]

16. The technical negotiations and drafting are largely concluded, awaiting the decision of trade ministers on the unresolved politically sensitive questions. The current hold-up has been due to two factors: the incomplete market access negotiations on agriculture and automobiles between the US and Japan, and the passage of Fast Track or Trade Promotion Authority that is currently before the US Congress, which would circumscribe the ability of the Congress to alter a final agreement.[5]

17. Ministers from the twelve participating countries were due to meet in Guam from 26 to 28 May 2015, with a view to concluding the Agreement, but that was postponed until both houses of the US Congress has passed the Bill granting Fast Track authority. Public statements from US officials and other delegations suggest they expect this to occur sometime in June and New Zealand Trade Minister Tim Groser has said the 'endgame' will start immediately after Congress passes the Fast Track bill.[6]

18. The 'Fast Track' or Trade Promotion Authority Bill passed the US Senate on 21 May 2015. A vote in the House of Representatives on 12 June 2015 saw the Trade Promotion Authority part of the Bill pass, but a second necessary part of the Bill was voted down. A new vote is scheduled for the week of 15 June 2015.[7]

19. There is a serious prospect that these negotiations will be concluded within the next month. Time is therefore of the essence.

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[4] Shawn Donnan, 'Obama Battles Time on Trade Deal', *Financial Times,* 13 May 2015, http://www.ft.com/intl/cms/s/0/c231f440-f988-11e4-ae65-00144feab7de.html#axzz3ZviRN9Ls. Attached as Exhibit E.

[5] 'Groser Says TPP 'Endgame' Will Start Immediately if Congress Passes TPA', *Inside US Trade,* 24 April 2015, Attached as Exhibit F; 'Despite Progress, Obama-Abe Summit Wasn't Right Moment for Deal', *Inside US Trade,* 30 April 2015, Attached as Exhibit G; Shawn Donnan, supra.

[6] 'Groser Says TPP Endgame Will Start 'Immediately', supra Ibid.

[7] 'House Votes in Favor of TPA, But Passage of Bill Delayed Over TAA', *Inside US Trade,* 12 June 2015. Attached as Exhibit H.

(ii) The scope of the TPPA and its implications for domestic policy and regulatory autonomy

20. No formal list of the chapters of the TPPA has ever been released by the parties; however, it is widely believed that there are twenty-nine chapters or substantive sections. [8]

21. On 12 November 2011 the Office of the US Trade Representative listed the following issues as being under negotiation: market access for goods, textiles and apparel, rules of origin, customs, trade remedies, technical barriers to trade, sanitary and phytosanitary standards, intellectual property, government procurement, investment, cross-border services, financial services, e-commerce, telecommunications, competition, state-owned enterprises, labour, environment, temporary entry of business personnel, cooperation and capacity building, legal issues. Four crosscutting issues were regulatory coherence, small and medium enterprises, development, and competitiveness and business facilitation. [9]

22. In addition, leaked documents reveal annexes on special topics, such as one setting rules for the decision-making process for agencies that decide which medicines to subsidise.[10]

23. The issues covered by TPPA can be categorised as:

(i) Traditional areas of commodity trade, such as market access for agriculture and goods, customs, and rules of origin, sanitary and phytosanitary (e.g. quarantine) rules, and technical barriers to trade;

(ii) Subjects whose credentials as 'trade' issues are disputed, such as cross-border services, financial services and investment, intellectual

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[8] Ministry of International Trade and Industry, Government of Malaysia, 'Trans-Pacific Partnership Agreement (TPPA)', 20 February 2014, http://www.miti.gov.my/storage/documents/795/com.tms.cms.document.Document_4e672404-c0a81573-5576a406-e196d64b/1/Slides%20-TPP%20Media%20Meeting%2020022014.pdf . Attached as Exhibit I.

[9] Office of the US Trade Representative, 'Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development: Outlines of the Trans-Pacific Partnership Agreement', 12 November 2011, Honolulu, https://ustr.gov/tpp/outlines-of-TPP. Attached as Exhibit J.

[10] Transparency chapter - Annex on Transparency and Procedural Fairness for Healthcare Technologies, dated 22 June 2011, posted October 2011 http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificTransparency.pdf. Attached as Exhibit K.

property, and government procurement, but which have become common in 'free trade' agreements; and

(iii) Topics that have not previously been included in New Zealand's agreements, or are taking a dramatically expanded form, such as state-owned enterprises, regulatory coherence, and the proposed annex on transparency in healthcare technologies and medical devices.

24. Even where the subject matter has been included in the participating countries' previous agreements, the scope of the TPPA and the depth of its rules are intended to go beyond such agreements. Recognising the far-reaching nature of topics under discussion, a US official described the TPPA in a briefing on 12 November 2011 as "*a high-standard agreement that is dealing with new trade issues as well, so it goes beyond trade agreements that have existed in the past*".[11]

25. The expansion of New Zealand's obligations through the TPPA would impose major new constraints on options for domestic policy and regulation. Chief Executive of Business New Zealand Phil O'Reilly said during the fifteenth round of negotiations in Auckland on 7 December 2012:

"It is true that TPP is more than just a trade negotiation. That's because TPP has the capacity to reach further into domestic economies and domestic policy settings than a conventional trade agreement ...".[12]

(iii) The General Nature of Constraints under the TPPA

26. Free trade and investment agreements create binding obligations on New Zealand under international law.

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[11] Office of the White House, Press briefing by Press Secretary Jay Carney, Deputy National Security Advisor and other officials, Moana Surfrider Hotel, Honolulu, 12 November 2012, Attached as Exhibit L.

[12] Business NZ Phil O'Reilly Remarks to TPP Stakeholder Forum, Auckland, NZ, 7 December 2012, *http://www.businessnz.org.nz/resources/speeches-and-presentations/2012/tpp-business-perspective.* Attached as Exhibit M.

27. Some chapters, such as intellectual property, will specify the substantive content of New Zealand's domestic law, such as the term for copyright or patent protection, and the exclusivity of data.

28. The government may also be required to take action internationally, such as the ratification of other international treaties like the International Convention for the Protection of New Varieties of Plants 1991 ("**UPOV**").

29. Some chapters will specify the processes and criteria that the Government and its delegated agencies must be use when making decisions. The Annex on Healthcare Technologies is understood to require a body such as New Zealand's Pharmaceutical Management Agency ("**Pharmac**") to adopt certain procedures and forms of engagement with pharmaceutical companies seeking subsidisation of their medicines.[13] The Transparency and Regulatory Coherence chapters are also expected to provide special opportunities for commercial interests to be engaged in the policy and regulatory processes, embedding or exceeding current New Zealand processes.[14]

30. The chapters on cross-border services, financial services and investment, among others, would restrict the 'measures' a government can adopt. A 'measure' is very broadly defined as a law, regulation, rule, procedure, decision, administrative action, or any other form of action, whether it is taken by the central government or by a local government or non-government body exercising delegated authority. The latter would include Maori entities authorised to make decisions and allocate public funds. The usual forms of redress sought by claimants before the Waitangi Tribunal, aside from monetary payments, would be considered 'measures'.

31. The principal rules in the TPPA that would restrict what measures the Crown is permitted to adopt or maintain for investment and cross-border services are:

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[13] Deborah Gleeson, Ruth Lopert and Papaarangi Reid, 'How the Trans Pacific Partnership Agreement could undermine PHARMAC and threaten access to affordable medicines and health equity in New Zealand', *Health Policy*, 112 (2013) 227-23. Attached as Exhibit N.

[14] Jane Kelsey, 'The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Tobacco Industry', *American Journal of Law and Medicine*, 39 (2013) 237-264 at 246-50. Attached as Exhibit O.

(i) *'National treatment'*: New Zealand must not treat goods, services and service suppliers, or investors and investments, from the other party or parties to the TPPA less favourably than their New Zealand counterparts. Put another way, that means not treating New Zealanders preferentially by limiting the total permissible foreign ownership of an enterprise.

(ii) *'Market access'*: New Zealand must not restrict access to its domestic market for goods, services and services suppliers, or investors and investments, of a TPPA party in specified ways. Prohibited measures in relation to services and investment include requiring foreign investors to invest in services activities through particular legal forms, such as joint ventures or co-ownership arrangements, or restricting the number of services or suppliers in activities such as mining operations or tourism ventures, whether nationwide or in certain locations.

(iii) *'Direct expropriation'*: New Zealand must not confiscate, nationalise or terminate an investment without compensation, such as resuming a geothermal site, cancelling a plant patent, or revoking a mining or logging license.

(iv) *'Indirect expropriation':* Where New Zealand adopts measures, such as regulations, or makes a decision, such as a Treaty settlement, that the foreign investor claims has the effect of taking away the value of its investment it can seek compensation, including for lost future profits. There are restrictions on how this is to be interpreted.

(v) *'Minimum standard of treatment', including 'fair and equitable treatment:* this is routinely interpreted by foreign investors as a guarantee of a stable regulatory environment from the time it invested, and allows it to seek compensation, including lost future profits, if any new measure substantially reduces its value or profitability.

(vi) *Most-favoured-nation (MFN)* treatment entitles foreign services and suppliers or investors to the best treatment that New Zealand gives their counterparts from another country in like circumstances. This would allow states and investors under existing agreements, such as China or Taiwan, to enjoy the benefit of any more favourable provisions given to the parties to the TPPA, and require services and investors/ments from all TPPA countries to be treated no less well than those from any other country.

32. Obligations under the rules in (i), (ii) and (vi) can be subject to reservations that limit their application. However, the 'negative list' approach to these reservations requires the government to specify now every service or policy objective that the rules will not apply to in the future. These schedules are subject to negotiation.

33. The agreement will also contain exceptions that could be raised as defences against allegations that New Zealand has breached its obligations, as discussed below.

(iv) The nature and processes for enforcement

34. As noted, all parties to the TPPA have obligations under international law to comply with the treaty. There will be five main mechanisms for enforcement. The details are not known, except where they are referred to in leaked texts, but they are likely to follow or expand on common practice in other agreements.

35. First, the TPPA is expected to have committees responsible for specific subject areas, as well as a proposed Commission, which would oversee New Zealand's compliance.

36. Second, there would be guaranteed opportunities for foreign firms affected by various proposed measures to have input into New Zealand's domestic regulatory and policy decisions.

37. Third, States that are parties to the Agreement would be able to enforce New Zealand's compliance through a state-state dispute process that involves

offshore arbitration by trade experts. If a breach were proved (for example, imposing restrictions on sale of genetically engineered foods or non-compliance with a commitment to ratify UPOV 1991), the Government would have to comply with the obligations and withdraw any offending measure, or face retaliatory trade sanctions for failure to do so.

38. Fourth, investors could initiate disputes directly against New Zealand for alleged breaches of the investment chapter. The operation of investor-state dispute settlement ("**ISDS**") through international arbitral forums has become highly controversial. The United National Conference for Trade and Development ("**UNCTAD**") lists the 'well-documented shortcomings of the system' in its 2012 *World Investment Report* as: [15]

(i) An expansive use of [International Investment Agreements] that reaches beyond what was originally intended;

(ii) Contradictory interpretations of key IIA provisions by ad hoc tribunals, leading to uncertainty about their meaning;

(iii) The inadequacy of ICSID's annulment or national judicial review mechanisms to correct substantive mistakes of first-level tribunals;

(iv) The emergence of a "club" of individuals who serve as counsel in some cases and arbitrators in others, often obtaining repeated appointments, thereby raising concerns about potential conflicts of interest;

(v) The practice of nominating arbitrators who are likely to support the position of the party appointing him/her;

(vi) The secrecy of many proceedings;

(vii) The high costs and considerable length of arbitration proceedings; and

(viii) Overall concerns about the legitimacy and equity of the system. That, alongside the incursions into domestic regulatory domains,

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15 UNCTAD, *World Investment Report 2012*, UNCTAD, Geneva, p.88. Attached as Exhibit P.

concerns about the bias of arbitrators, has generated what is commonly described as a crisis of legitimacy in the international arbitral regime.

39. The risks associated with these powers have increased significantly in recent years. The number of known investment disputes being brought under ISDS has risen exponentially in recent years. As of 2014, there had been 608 known treaty-based cases lodged involving 101 governments, most of them lodged since 2007.[16]

40. Damages awarded in ISDS claims are significant, with several recent awards near to or exceeding a billion dollars. The OECD estimated in 2013 the costs of a claim to average US$8 million a claim.[17]

41. Often litigation is not the investor's preferred choice. The threat to bring a lengthy and expensive dispute can have a chilling effect on a government's decision. The dissenting arbitrator in a recent 2015 dispute against Canada involving the refusal to grant a license for a quarry warned of the future 'chilling' effect of the investment tribunal effectively overturning a local panel's decision that had been based on socio-economic considerations.[18] Transposed to Aotearoa, a similar chilling effect could apply where Maori are appointed to a panel to assess an application based on Maori values.

42. The leaked January 2015 investment text confirms that the TPPA parties have agreed to special ISDS through Section B of the chapter.[19] Australia is the only country that has sought to exclude itself from coverage of ISDS.

43. New Zealand has a number of agreements with these powers. However, the TPPA would greatly heighten the risks of New Zealand being subject to an

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16 UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note, no. 1, February 2015, 5. Attached as Exhibit Q.

17 OECD, Investor-State Dispute Settlement: Public Consultation 16 May – 23 July 2012, OECD Publishing, Paris, 2012, 18-19, Attached as Exhibit R.

18 In the Matter of an Arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Rules of 1976, William Ralph Clayton et al v Government of Canada, Award on Jurisdiction and Liability, PCA Case 2009-04, 17 March 2015, Dissenting Opinion of Prof Donald McRae, p.19. [Bilcon decision] Attached as Exhibit S.

19 TPP, Investment chapter, 20 January 2015, Section B, *Wikileaks*, posted 25 March 2015. https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf Attached as Exhibit T.

investment dispute. First, investors would have more extensive rights under the chapter than in New Zealand's existing agreements. Second, investors from the US are responsible for the highest number of known investment disputes of any country, accounting for one fifth of total cases by 2014.[20]

44. Finally, the US has a unilateral process called 'certification' whereby it can refuse to exchange notes to bring an agreement into force with another party unless that party has changed its domestic laws, policies, practices, etc. to conform to what the US says are its obligations. It has used this extensively in recent years. Legislators from a number of countries, including New Zealand, recently wrote to their political leaders urging them to neutralise this process in the TPPA text – to which the US would have to agree - or not to concede to such pressure.[21]

(v) Crown's executive authority over negotiations subordinates te Tino Rangatiratanga

45. The Cabinet Manual and Parliament's Standing Orders explain New Zealand's constitutional and operational rules for making international treaties.[22] The Cabinet Manual states explicitly that: "In New Zealand, the power to take treaty action rests with the Executive".[23] The Executive decides to negotiate a treaty, sets the negotiating mandate, conducts the negotiations, and when it is satisfied initials, signs and ratifies the treaty.

46. Most treaties must be presented to the House and are referred to the Foreign Affairs, Defence and Trade select committee. That committee may elect to hear submissions if it sees fit, or refer the treaty to a more appropriate committee. Parliament is not guaranteed a debate on the treaty, let alone a vote. Even with a vote it cannot legally alter the treaty or otherwise fetter the Executive's treaty making powers.

47. When a treaty is tabled in the House it is accompanied by a National Interest Analysis ("**NIA**"), which is supposed to set out the advantages and

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20 UNCTAD, 'Recent Trends in IIAs and ISDS', supra, 6.

21 Attached as Exhibit U, available at www.tppnocertification.org.

22 *Cabinet Manual 2008*, paras 5.73-5.74 and 7.112-7.222, Attached as Exhibit V; Standing Orders, 2011, paras 394-397. Attached as Exhibit W.

23 *Cabinet Manual 2008*, para 7.112, supra.

disadvantages of entering into the treaty.[24] For trade treaties the NIA is prepared by the Ministry of Foreign Affairs and Trade ("**MFAT**"). In my experience the NIA is always perfunctory and uncritical.

48. A Member's Bill in the name of Keith Locke (The International Treaties Bill 2003) would have required the NIA to address te Tiriti, but the Bill was voted down in the House.[25] There is currently no obligation on the Crown to provide a robust and independent assessment of the implications of such agreements for te Tiriti and for Maori or to consult its Treaty partner in a meaningful way (or at all).

49. There is a Convention that a treaty is not ratified until any amendments that are necessary to bring legislation into conformity with the treaty have been passed, but that would rarely, if ever, be relevant in relation to Tiriti obligations.[26]

(vi) Secrecy surrounding the negotiations

50. In March 2010 the original parties to the TPPA negotiations entered into a confidentiality arrangement. Its existence became known because it was referred to on the cover page of a leaked chapter of the Agreement. The Assistant US Trade Representative said during a stakeholder briefing on 11 September 2010 at the Chicago round that the parties would consider a request for release of the memorandum. Subsequently, New Zealand, as the depository, released a form letter the parties had been invited to sign.[27] The relevant extracts read:

> *"As depository for the Trans-Pacific Partnership Agreement, we have been asked to advise participants of important points regarding the handling of the documents we exchange during these negotiations and seek confirmation that you agree with this approach.*

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[24] *Cabinet Manual 2008*, supra, para 7.116-117; Standing Orders, supra, para 395

[25] International Treaties Bill, Second Reading, *NZPD*, vol.606, p. 3589, 19 February 2003. Attached as Exhibit X.

[26] MFAT, 'The Treaty making process in New Zealand', http://mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php, Attached as Exhibit Y

[27] Letter from Mark Sinclair TPP Lead Negotiator, New Zealand, undated. Attached as Exhibit Z, http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20letter.pdf

First, all participants agree that the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release. This means that the documents may be provided only to (1) government officials or (2) persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorized to see them. All participants plan to hold these documents in confidence for four years after entry into force of the Trans Pacific Partnership Agreement, or if no agreement enters into force, for four years after the last round of negotiations. ...

The policy underlying this approach is to maintain the confidentiality of documents, while at the same time allowing the participants to develop their negotiating positions and communicate internally and with each other. We look forward to your confirmation that you agree with this approach.

51. The scope of this arrangement is extraordinary and prevents the Crown from properly undertaking informed consultation with Maori (or anyone).

52. The duration of non-disclosure - four years after the entry into force of the Agreement or the last round of negotiations - makes it impossible to hold the Crown to account effectively for the position it takes in the negotiations or the active protection of Maori interests. That information may never become public if there is never formally a final round of negotiations.

53. The only official information about the content of the Agreement released by the parties is through statements at the end of officials' meetings and at the

ministerial meetings.[28] These statements provide little, and sometimes no, substantive information. The most detailed was a statement of goals issued by the TPPA leaders in Honolulu in November 2011.[29]

54. Official negotiating texts have only been made public through leaks. These documents are:

i. Intellectual property position paper submitted by New Zealand, undated, posted 4 December 2010;[30]

ii. Intellectual property text submitted by New Zealand, undated, posted 23 February 2011;[31]

iii. Intellectual property position paper submitted by Chile, undated, posted 23 February 2011;[32]

iv. Intellectual property text proposed by the US, dated 10 February 2011 and posted 10 March 2011;[33]

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[28] Trans-Pacific Partnership Leaders Statement, Bali, 8 October 2013, http://mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20Leaders%27%20Statement%208%20October.pdf, Attached as Exhibit AA; Statement of the ministers and heads of delegation for the Trans Pacific Partnership countries, Singapore, 25 February 2014, http://mfat.govt.nz/downloads/trade-agreement/transpacific/STATEMENT%20OF%20THE%20MINISTERS%20AND%20HEADS%20OF%20DELEGATION.pdf, Attached as Exhibit AB; Statement from the Singapore ministerial meeting, Singapore, 21 May 2014, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-21-May-2014.php, Attached as Exhibit AC; Statement of the ministers and heads of delegation for the Trans Pacific Partnership countries, Sydney, 27 October 2014, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-27-Oct-2014.php, Attached as Exhibit AD; Trade Ministers Report to Leaders, Beijing, 10 November 2014, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-10b-Nov-2014.php, Attached as Exhibit AE; Trans-Pacific Partnership Leaders' Statement, Beijing, 10 November 2014, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-10b-Nov-2014.php, Attached as Exhibit AF

[29] Trans-Pacific Partnership Trade Ministers' Report to Leaders, Endorsed by TPP Leaders, November 12, 2011, http://beehive.govt.nz/sites/all/files/TPP_Ministers_Report_to_Leaders.pdf, Attached as Exhibit AG; and USTR, 'Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Investment: Outlines of the Trans-Pacific Partnership Agreement, 12 November 2011', supra.

[30] 'TPP: Intellectual Property Chapter: Horizontal Issues/Overall Structure, General Provisions and Cooperation' paper submitted by New Zealand, undated, http://www.citizen.org/documents/NZleakedIPpaper-1.pdf

[31] 'TPP text submitted by New Zealand. Chapter 'X'. Intellectual Property', undated. http://www.citizen.org/documents/NewzealandproposedIPChaptertext.pdf

[32] TPP IP Submission, Preliminary Considerations for TPP IP Chapter', http://www.citizen.org/documents/ChilePreliminaryConsiderationsforTPPIPChapter.pdf

v. Intellectual property rights chapter, selected provisions, September 2011, posted October 2011;[34]

vi. Intellectual property composite text dated 16 May 2014, posted 16 November 2014;[35]

vii. Transparency chapter - Annex on Transparency and Procedural Fairness for Healthcare Technologies, dated 22 June 2011, posted October 2011;[36]

viii. US proposal for TBT annexes on medical devices, undated, posted October 2011;[37]

ix. Regulatory coherence chapter, undated, posted October 2011;[38]

x. Investment chapter, undated, posted 12 June 2012;[39]

xi. Environment Working Group Report from chair and consolidated text for the Environment Chapter, 24 November 2013, posted 15 January 2014;[40]

xii. An unspecified country's analysis of the state of play and positions of individual countries per chapter or issue after Salt Lake City November 2013 round, posted 9 December 2013;[41]

xiii. Intellectual Property Consolidated Text, 16 May 2014, posted 16 October 2014;[42]

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[33] Trans Pacific Partnership Intellectual Property Rights Chapter, 10 February 2011, http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf

[34] http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificTBTwMedicalAnnexes.pdf

[35] Intellectual Property Chapter Working text, 16 November 2014, https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf

[36] http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificTransparency.pdf

[37] US Introduction to Proposed TBT Annexes on Medical Devices, Pharmaceutical Products and Cosmetic Products, http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificTBTwMedicalAnnexes.pdf

[38] http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf

[39] http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf

[40] 'Report from Chairs from Environment Chapter for all 12 nations', https://wikileaks.org/tpp2/static/pdf/tpp-chairs-report.pdf

[41] TPP State of Play After Salt Lake City 19-24 November 2013 Round of Negotiations, http://big.assets.huffingtonpost.com/1294_001.pdf

xiv. Investment chapter, dated 20 January 2015, posted 25 March 2015;[43]

xv. Transparency chapter - Annex on Transparency and Procedural Fairness for Healthcare Technologies, dated 19 December 2014, posted 10 June 2015.[44]

55. On 8 December 2013, legislators from nine TPPA countries sent an open letter to the Trade Ministers calling for release of the draft text before it is signed to enable effective legislative scrutiny and public debate.[45] Signatories from New Zealand were Hon Tariana Turia and Te Ururoa Flavell (Co-leaders of the Maori Party), Rt Hon Winston Peters and Tracey Martin (Leader and Deputy Leader of New Zealand First), Russel Norman and Metiria Turei (Green Party co-leaders), and Hone Harawira (Leader of Mana Movement).[46]

56. The Crown, through Prime Minister John Key[47] and Trade Minister Tim Groser,[48] has maintained that all documents will remain secret until the deal is concluded.

57. MFAT has provided very limited information on the substance of the agreement. Officials acknowledged that the unique nature of the agreement, including its potential impacts on intellectual property, pharmaceuticals, genetically modified organisms and investment screening, required them to

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42 https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf

43 https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf

44 https://wikileaks.org/tpp/healthcare/

45 Jane Kelsey, 'Parliamentarians call for the release of Trans-Pacific Partnership text to enable scrutiny and debate', press release, 13 February 2014, http://www.scoop.co.nz/stories/print.html?path=PO1402/S00156/call-for-the-release-of-trans-pacific-partnership-text.htm, links to letter at http://www.tppmpsfortransparency.org/, Attached as Exhibit AH

46 There are numerous similar letters from legislators in various TPPA countries; see www.tppmpsfortransparency.org

47 Michelle Cooke, 'PM Backs TPP Talks Secrecy', *Stuff*, 4 December 2012, http://www.stuff.co.nz/auckland/local-news/8032428/PM-backs-TPP-talks-secrecy, Attached as Exhibit AI

48 'Tim Groser: Secrecy is part of TPPA negotiations', *TV3*, 9 November 2014, http://www.3news.co.nz/nznews/tim-groser-secrecy-is-part-of-tppa-negotiations-20141109#axzz3bzTYDWA2, Attached as Exhibit AJ; Vernon Small, 'Labour TPP Transparency Push Blocked', 11 February 2014, http://www.stuff.co.nz/business/industries/9708400/Labour-TPP-transparency-push-blocked, Attached as Exhibit AK;

attempt to bring as many people as possible inside the process.[49] That has not happened.

58. There have only been two formal public submissions processes:

(i) In September 2008, when it was announced that the US and others planed to join negotiations to expand the P4; and

(ii) In 2012 regarding expressions of interest from Canada, Mexico and Japan to join the Agreement negotiations.

59. Both were one-sided processes with the government providing no information to allow a critical assessment of the implications.

60. The Ministry launched a webpage *TPP Talk* in May 2011,[50] largely in response to criticism over the lack of information. It contains the formal statements from ministers' meetings, press releases about negotiations, and speeches supporting the negotiations, but no substantive information on the negotiations. Official Information Act documents show the website deliberately was not given a comment functionality.[51] The amount of information posted has declined over time and the website is rarely updated. The last two entries were on 5 May 2015 and 11 November 2014. There are links to critical webpages, but these are often out-dated and some no longer exist (including my own that was discontinued several years ago).

61. The entry dated 5 May 2015 announced briefings by the Chief Negotiator on 6 May (one day later) and 11 May and a process to register for them. There was some proactive advertising among the business sector, as I received information from a recipient. I received no information from MFAT regarding the briefings, nor so far as I am aware did any professional or civil society organisation that has expressed concern about the TPPA.

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[49] MFAT, Trans-Pacific Strategic Economic Partnership Agreement, Consultation/Stakeholder Engagement Overview, undated, (p. 60 of the bundle of documents released under the Official Information Act) Attached as Exhibit AL.

[50] http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/1-TPP-talk.php

[51] MFAT, Trans Pacific Partnership 2012, Heading: Strategy, para 1. (p.60 of the bundle of documents released under the Official Information Act), Attached as Exhibit AM

62. There is an entry on *TPP Talk* website dated 3 December 2012 headed 'TPP and the Treaty of Waitangi exception'.[52] The exception itself is discussed below. There is no other reference on the website to the Treaty of Waitangi or Maori.

63. In response to an Official Information Act request I made in July 2014 MFAT provided a number of heavily redacted documents on its consultation and communications strategy. There were a small number of references that refer to Maori. The objectives of the pre-negotiation phase (January – March 2009) included "To address specific Maori interests, both Maori business interests and any broader Iwi based concerns."[53] There was a proposal for: 'Maori stakeholder consultation – senior Maori: Centrally located hui involving senior Iwi leaders to invite participation in the TransPac process and to seek feedback on forward looking consultation', in February/March 2009.[54]

64. The documents released under the Official Information Act included a list of organisations with which the Ministry had held formal consultations, by date. Some meetings were initiated by the Ministry and others by stakeholders. Some 'in confidence' briefings had been given to stakeholders. Only the Federation of Maori Authorities (FOMA) was listed as a 'core stakeholder'.[55] It appears that only three Maori entities were consulted, some of which were probably within larger meetings: FOMA in August 2010, March 2013, and

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52 http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-3-Dec-2012.php, Attached as Exhibit AN

53 'Trans-Pacific Strategic Economic Partnership Agreement. Consultation/Stakeholder Engagement Overview', undated, p.4, (p.70 of the bundle of documents released under the Official Information Act,). Attached as Exhibit AO.

54 'Trans-Pacific Strategic Economic Partnership Agreement. Consultation/Stakeholder Engagement Overview', p.6 (page 72 of the bundle of documents released under the Official Information Act,)., Attached as Exhibit AP

55 'Trans-Pacific Strategic Economic Partnership Agreement. Consultation/Stakeholder Engagement Overview', p.8, (p.74 of the bundle of documents released under the Official Information Act,). Attached as Exhibit AQ

June 2014;[56] Ngati Kahungunu in September 2010;[57] and Te Ora (Maori Medical Practitioners Association) in November 2012.[58]

65. The fact that officials have held these meetings does not mean that useful information was disclosed. During the early stages of the negotiations I met with New Zealand's chief negotiator and negotiators in specific areas of interest to me. I almost always came away with no additional information and was often told less than could be gathered from international media reports. For this reason, I stopped asking for meetings with the chief negotiator.

66. The Minister has stated on a number of occasions that the current level of secrecy is the way negotiations are always conducted.[59] That is incorrect. From my previous research I am aware that documents have been released in negotiations of multilateral and plurilateral negotiations involving New Zealand, notably during the WTO Doha round.[60]

67. Recently, several negotiating texts of the Anti-Counterfeiting Trade Agreement (ACTA) were released following several leaks and a public outcry. Indeed, in April 2010 Minister Groser said:

> *"New Zealand has supported public release of the negotiating text, in response to strong public interest, and I am pleased that we have now reached agreement with the other participants in this negotiation. This will make the ACTA negotiations more accessible*

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56 'Stakeholders consulted on TPP' (undated) (pp. 88, 94 and 100 of the bundle of documents released under the Official Information Act,), Attached as Exhibit AR

57 'Stakeholders consulted on TPP', (undated), (p 88 of the bundle of documents released under the Official Information Act,) supra

58 'Stakeholders consulted on TPP', (undated), (p.96 of the bundle of documents released under the Official Information Act,).Attached as Exhibit AS

59 'Q&A. Susan Woods Interviews Tim Groser', *TVNZ*, 22 September 2013, http://tvnz.co.nz/q-and-a-news/susan-wood-interviews-tim-groser-5588747, Attached As Exhibit AT; Pattrick Smellie, '10 things TPP critics do not want you to grasp', 14 February 2014, (based on an interview with the Minister) http://www.stuff.co.nz/business/opinion-analysis/9719784/Ten-things-TPP-critics-do-not-want-you-to-grasp , Attached as Exhibit AU

60 Jane Kelsey, 'Too many precedents to refuse to release TPPA text and papers', 12 April 2011, Attached as Exhibit AV

to the public and I hope that it will help the process of reaching a final agreement".[61]

(viii) Widespread expressions of concern about the TPPA

68. Concerns about the lack of information available and the potential impact of the Agreement on democratic government, national sovereignty and the lives of ordinary people have been expressed from many quarters. These include:

i. The General Secretary of the World Health Organization;[62]

ii. A number of United Nations bodies and rapporteurs;[63]

iii. Twenty seven health leaders from seven participating countries, including leaders of the World Medical Association and World Federation of Public Health Associations, in a letter to *The Lancet* medical journal;[64]

iv. Nobel-prize winning economist Joseph Stiglitz;[65]

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[61] 'Groser Welcomes Release of ACTA Negotiating Text', 18 April 2010, http://www.scoop.co.nz/stories/PA1004/S00184.htm, Attached as Exhibit AW

[62] Dr Margaret Chan, Opening Address to the 67th World Health Assembly, 19 May 2014 , http://multimedia.who.int/mp4/WHO-PROD_WHA67_CHANm_speech_19MAY2014.mp4 (video)

[63] For example, generally on the need for transparency in negotiating such agreements: 'it is essential that national parliaments and civil society are provided opportunities to monitor the positions adopted by Governments in trade negotiations. They should not be presented, at the very final stage of the negotiation process - once agreement has been reached - with a set of commitments made by the Executive from which, at that stage, from which it would be politically very difficult or impossible to retreat.' Olivier de Schutter, 'Report of the Special Rapporteur on the Right to Food', 2009, A/HRC/10/5/Add.2, 22 Attached as Exhibit AX. Specifically on this Agreement, eg. 'Considerable concern is expressed today about an apparent democratic deficit in international policymaking on copyright. Of particular concern is the tendency for trade negotiations to be conducted amid great secrecy, with substantial corporate participation but without an equivalent participation of elected officials and other public interest voices. For example, the recent negotiations around the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership have involved a few countries negotiating substantial commitments on copyright policy, without the benefit of public participation and debate. In contrast, treaty negotiations in WIPO forums are characterized by greater openness, participation, and consensus-building.' Farida Shaheed, 'Report of the Special Rapporteur in the field of cultural rights: Copyright policy and the right to science and culture', A/HRC/28/57, 24 December 2014, 5. Attached as Exhibit AY

[64] 'Call for transparency in new generation tread deals', *The Lancet*, February 2015, www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)60233-1.pdf, Attached as Exhibit AZ

[65] Joseph Stiglitz, 'On the wrong side of globalization', 15 March 2014, http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?_r=0, Attached as Exhibit BA

v. Former Secretary of Labour under US President Clinton, Robert Reich;[66]

vi. Prominent international economists;[67]

vii. More than 100 jurists, including former judges and Attorneys-General;[68]

viii. Legislators from many of the participating countries, including New Zealand (referred to above);[69] and

ix. Prominent members of the US Congress.[70]

69. On 2 June 2015 ten United Nations' special rapporteurs, including Victoria Lucia Tauli-Corpuz the rapporteur on the rights of indigenous peoples, issued a joint statement expressing concern over the adverse human rights impact of trade and investment agreements. They explicitly named the TPPA. They said:

> *"While trade and investment agreements can create new economic opportunities, we draw attention to the potential detrimental impact these treaties and agreements may have on the enjoyment of human rights as enshrined in legally binding instruments, whether civil, cultural, economic, political or social. Our concerns relate to the rights to life, food, water and sanitation, health, housing, education, science and culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.*

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66 Robert Reich, 'The Largest, Most Disastrous Trade Deal You've Never Heard Of', 6 January 2015, AlterNet, v http://www.alternet.org/robert-reich-largest-most-disastrous-trade-deal-youve-never-heard?akid=12656.18412.Jzillu&rd=1&src=newsletter1029834&t=4, Attached as Exhibit BB

67 Open letter to ministers of trade from the participating countries re: Promoting Financial Stability in the Trans-Pacific Partnership Agreement, 28 February 2012 http://www.ase.tufts.edu/gdae/policy_research/TPPAletter.html#statement, Attached as Exhibit BC

68 An open letter from lawyers to the negotiators of the Trans-Pacific Partnership urging rejection of Investor-State Dispute Settlement, 8 May 2012, https://tpplegal.wordpress.com/open-letter/ Attached as Exhibit BD

69 An open letter to the leaders of the negotiating countries seeking publication of the draft text of the agreement before it is signed to enable effective legislative scrutiny and public debate, 11 February 2014, and other parliamentary resolutions, supra.

70 For example, Senator Elizabeth Warren to Ambassador Michael Froman, 17 December 2014, http://www.warren.senate.gov/files/documents/TPP.pdf, Attached as Exhibit AS; and Senator Bernard Sanders to Ambassador Michael Froman, 5 January 2015, Attached as Exhibit BF

As also underlined in the UN Guiding Principles on Business and Human Rights, States must ensure that trade and investment agreements do not constrain their ability to meet their human rights obligations (Guiding Principle 9)".[71]

(ix) Conflict between TPPA and Indigenous Knowledge

70. There have been a number of leaks of the intellectual property chapter of the TPPA, which reveal proposals for intellectual property rights protection that go beyond New Zealand's current obligations under the Agreement on Trade-related Intellectual Property Rights ("**TRIPS**") at the World Trade Organization and under other free trade agreements.

71. Proposals in the leaked intellectual property chapter of the TPPA to allow patents on plants and require parties to the TPPA to join UPOV 1991 illustrate the potential implications for te Tino Rangatiranga and kaitiaki responsibilities under te Tiriti.[72]

72. Since 1995 all US free trade agreements have required the Parties to comply with UPOV 1991, so that is expected to be a bottom line for the US in the TPPA. Once a breeder or seed manufacturer has obtained plant variety protection on a plant, the 1991 UPOV allows this rights holder to exclude all others from producing or reproducing the protected plant, unless a royalty is paid to the patent holder, with some limited exceptions.[73] New Zealand is a party to UPOV 1978 but not to UPOV 1991.

73. In 2009 the United Nations Rapporteur on the right to food Olivier de Schutter said, with reference to the strengthening of breeders' rights in the 1991 UPOV Convention, that "*No State should be forced to establish a regime for the protection of intellectual property rights which goes beyond*

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71 United Nations Human Rights Commission, 'Media Statement; UN experts voice concern over adverse impact of free trade and investment agreements on human rights', Geneva,2 June 2015, http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/FBC72AB0AAE15570C1257E58004D0C54?OpenDocument, Attached as Exhibit BG

72 Intellectual Property Consolidated Text, 16 May 2014, posted 16 October 2014, Article QQ.A.8 {Existing Rights and Obligations/International Agreements}, https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf, Attached as Exhibit BH

73 International Convention for the Protection of New Varieties of Plants, of 2 December 1961, Revised at Geneva 10 November 1972, on 23 October 1978 and on 19 March 1991, http://www.upov.int/en/publications/conventions/1991/act1991.htm, Attached as Exhibit BI

the minimum requirements of the TRIPS Agreement" and that *"States should not allow patents on plants"*.[74]

74. Other rapporteurs have explicitly recognised that UPOV 1991 breaches indigenous rights. Special rapporteur on the right to food Jean Zigler observed in 2005 how:

> *"Indigenous peoples are concerned that recent developments in international intellectual property rights regimes represent a threat to indigenous access to and control over plant and animal genetic resources, as well as to community knowledge gained over generations. . . They are particularly concerned about developments in biotechnology and intellectual property protection that could deprive indigenous farming communities of their access to and control of seeds and livestock breeds, allowing intellectual property protection to "inventions" that will later require pay for its use".*[75]

75. The UN High Commission for Human Rights said in 2010 that:

> *"Indigenous peoples' access to and control over plant and animal genetic resources, such as seeds traditionally cultivated by indigenous communities, as well as to community knowledge gained over generations are also threatened. There is concern that recent developments in international intellectual property rights regimes, such as the World Trade Organization's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), may protect "inventions" of business enterprises and research institutions based on indigenous communities' traditional resource and knowledge*

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[74] Olivier De Schutter, Special Rapporteur on the right to food, 'Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation' presented at the 64th session of the UN General Assembly (October 2009) A/64/170, http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf, Attached as Exhibit BJ.

[75] Jean Ziegler, Special Rapporteur for the Commission on Human Rights on the Right to food, "The right to food", Interim report, A/60/350, 12 September 2005, para 24, Attached as Exhibit BK

and deprive them of free access and use of such resource and knowledge".[76]

76. A human rights impact assessment of UPOV 1991 conducted in 2014 recommended that governments 'undertake an HRIA before drafting a national plant variety protection (PVP) law or before agreeing to or introducing intellectual property provisions in trade and investment agreements in the area of agriculture.[77] The report lists the human rights affected by intellectual property on seeds, and observes that: '*Seed exchange practices have long constituted a fundamental aspect of farmers' cultural life. By limiting such exchange, thus also hindering rituals around planting and harvests, IP protection directly interferes with the enjoyment of the right to take part in cultural life, as well as with minority and indigenous rights . . . Permitting IPRs on genetic resources encourages biopiracy.*'[78]

77. The Crown is well aware of this conflict. The irreconcilability of TRIPS and similar agreements with te Tiriti and kaitiakitanga has been raised to my knowledge since 1994.

78. I was present at a hui hosted by the National Maori Congress in February 1994 where Moana Jackson explained this conflict to officials from the MFAT.[79] The hui endorsed the Mataatua Declaration on Cultural and Intellectual Property adopted in Tauranga in 1993, which affirmed the right of indigenous self-determination over cultural and intellectual property and demanded a moratorium on further commercialisation of indigenous medicinal plants and human genetic materials until indigenous communities had developed appropriate protection mechanisms. The Declaration was eventually signed by 80 indigenous nations and tabled at the United Nations.

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[76] UN Commission on Human Rights and FAO, 'The Right to Adequate Food' Fact Sheet No, 34, p.13, http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf, Attached as Exhibit BL

[77] Owning Seeds, Accessing Foods. A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and Philippines, The Berne Declaration, October 2014, p.7 https://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf. Attached as Exhibit BM

[78] 'Seeds of hunger: intellectual property rights on seeds and the human rights response', 3DThree, 2009, http://www.ideaspaz.org/tools/download/47066. Attached as Exhibit BN

[79] See Jane Kelsey, *Reclaiming the Future. New Zealand and the Global Economy*, Wellington, Bridget Williams Books, 1999, pp.265-266, Attached as Exhibit BO

79. The Ministry of Economic Development acknowledged in 2002 during a review of the Patents Act 1953, conducted in part to consider whether New Zealand should ratify UPOV 1991, that previous submissions from Maori in 1994 and 1999 had indicated that: *"Māori are in general opposed to any reform of the Patents Act that might either "extend" patentability in the area of biotechnology, or that might not prevent the granting of patent rights to inventions based upon living organisms".* [80]

80. The 2002 discussion document for the review recognised that

> *"Many Māori are concerned about the application of patent rights to life forms, including indigenous flora and fauna. These concerns are wide ranging. First, there is concern that a patent for an invention derived from indigenous flora and fauna may, through the grant of exclusive rights in relation to the invention, infringe what Māori consider to be their rights under the Treaty of Waitangi to maintain control over their resources, and may also limit the rights of Māori themselves to develop new uses of those resources. Second, there is concern about the cultural and spiritual implications of the alteration of life forms, and the encouragement given through the patents system to continue innovation in this field".*
>
> *"Māori have also raised concerns about the application of the patents system to inventions based on traditional knowledge. There is a concern that traditional remedies, or their active ingredients, may be patented by individuals from outside the Iwi from which the knowledge is obtained, and that Iwi would then be denied access to their traditional remedies during the patent term without either informed consent or arrangements for benefit sharing".* [81]

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[80] Minister of Economic Development, 'Review of the Patents Act 1953: Boundaries of Patentability, A Discussion Paper', March 2002, 21; http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/patents/review-of-patents-act/boundaries-to-patentability/review-of-the-patents-act-1953-boundaries-to-patentability-pdf. Attached as Exhibit BP

[81] Minister of Economic Development, 'Review of the Patents Act 1953: Boundaries of Patentability, A Discussion Paper', supra, 21

81. A Cabinet paper in the name of The Associate Minister of Commerce at the conclusion of this review advised that

> *"if, for example, a person were to go into a national park or conservation land, take an indigenous plant, and use it develop a new variety, then, under UPOV 91, that person would be considered to be the "breeder" of the new variety. It would not be possible, under the provisions of UPOV 91, to refuse to grant a PVR (or revoke a granted PVR) on the grounds that the breeder had not obtained (for example) prior informed consent to use the variety in that way. Ratification of UPOV 91 is likely to be strongly opposed by many Māori, in particular the WAI 262 claimants. They may consider that ratification of UPOV 91 would be in breach of the Crown's obligations under the Treaty of Waitangi".*[82]

82. When the Waitangi Tribunal considered the claim by Te Waka Kai Ora (WAI 262) it found that

> *"Māori interests in international instruments exist on a sliding scale. For some instruments, the interest will be small and the level of engagement correspondingly minor. For others, consultation will be needed so that the Māori interest may be properly understood and fairly balanced. In these situations, engagement through high quality consultation ought to result in the degree of protection to which the Treaty entitles the particular Māori interest at stake. In situations where Māori interests are so central to the entire instrument, such as DRIP, or to a part of it, such as article 8(j) of the CBD,* [or, I would argue UPOV 1991] *then the Māori interest – when given its due weight – may require more than consultation. It may require the Crown to negotiate with Māori and to proceed only with their agreement. At the far end of the spectrum, it may even be appropriate for the Crown to step aside – by agreement – and allow the Māori Treaty partner to speak for New Zealand. The*

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[82] Office of the Associate Minister of Commerce to Cabinet Economic Development Committee, 'Review of the Plant Varieties Act 1987', 7, https://www.med.govt.nz/business/intellectual-property/pdf-docs-library/plant-variety-rights/review-of-the-pvra-1987-pdf. Attached as Exhibit BQ

repatriation of taonga seemed to us an example of when this might be justified. The Crown's present policies and practices are not compliant with the Treaty.[83]

83. The Associate Minister of Commerce recommended 'that UPOV 91 not be ratified at this time, but that ratification be considered after the WAI 262 claim has been resolved and work on a bioprospecting policy is completed, or within three years of this decision, whichever is sooner.'[84]

84. The relevant recommendations of WAI-262 have still not been implemented.

(x) Investment and Mining

85. The investment chapter of the TPPA poses particular threats to the rights of claimants and other Maori. Two versions of the chapter were leaked in 2012 and again in 2015. These texts confirm that the TPPA would confer exceptional rights and protections on foreign investors, which they could enforce directly against the New Zealand government through the process of ISDS described above. Investors can and do seek compensation of hundreds of millions and sometimes billions of dollars in such claims.

86. The June 2015 statement from the UN rapporteurs made special mention of the

"legitimate concern that both bilateral and multilateral investment treaties might aggravate the problem of extreme poverty, jeopardize fair and efficient foreign debt renegotiation, and affect the rights of indigenous peoples, minorities, persons with disabilities, older persons, and other persons leaving (sic) in vulnerable situations. Further, the experience with Investor-state dispute settlement (ISDS) 'demonstrates that the regulatory function of many States and their ability to legislate in the public interest have been put at risk".[85]

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[83] Te Waka Kai Ora (WAI 262), supra,

[84] Office of the Associate Minister, 'Review of the Plant Varieties Act 1987', supra, 1-2.

[85] over adverse impact of free trade and investment agreements on human rights', Geneva,2 June 2015, supra, Attached as Exhibit BG.

87. 'Investment' has been defined in the TPPA to include a business enterprise, whether it operates as a subsidiary, branch or agency, shares, bonds, securities, derivatives and other negotiable instruments, public private partnership and concession contracts, real-estate titles, exploration and mining licences, leases on fisheries quotas, emission quotas, forestry and other resource rights, and even intellectual property rights. These protections extend to foreign investors who *attempt* to make such an investment.

88. Foreign investors and investments from the other TPPA countries would be guaranteed the right to enter, establish, use, operate and dispose of a broad range of investments, subject to some limits that are likely to preserve New Zealand's light-handed overseas investment regime and limited additional room in relation to some land and fisheries.

89. The rules on minimum standards of treatment (notably 'fair and equitable treatment') and direct and indirect expropriation may also give special protection to foreign investors if they allege a host government has significantly eroded the value or profitability of the investment – by, say, adopting a new policy or law, such as a ban on fracking; tightening regulations, such as technical standards for drilling or disposal of toxic substances; making an administrative decision to impose new levies or insurance deposits against spills; or an environment court has upheld a District Council's refusal to issue a land use consent.

90. The investment chapter, especially when it is enforced through ISDS, poses significant risks that measures sought by Maori, and adopted by the Crown in fulfilment of its obligations, might be impugned before a tribunal, or the Crown may be 'chilled' from adopting such measures by the threat of a dispute or use those obligations as a reason for not acting.

91. These risks are illustrated with reference to mining. Two recent cases show this to be a real and present risk under the TPPA.

92. OceanaGold is a mining company co-owned by Australian and Canadian interests, both parties to the TPPA. There may be an agreement between Australia and New Zealand that their investors cannot bring an investment

claim against the other country under the TPPA (consistent with the position in the Investment Protocol to the Australia New Zealand Closer Economic Relations Trade Agreement) that would not apply to Canada. OceanaGold currently has two open pit and one underground mine in the South Island of New Zealand: Macraes, Fraser and Reefton.[86]

93. Pacific Rim, bought by OceanaGold in 2013, launched an investment dispute against El Salvador in 2009 seeking $301 million, mainly for lost profits. The government of El Salvador stopped issuing new mining permits in 2008 after pollution of the water supply in San Sebastian.[87] Pacific Rim had done environmental due diligence at the time the ban was instituted, and is claiming breach of 'fair and equitable treatment'. The litigation had cost El Salvador US$6 million by 2015. A decision from the arbitral tribunal is imminent.

94. The second example is a dispute brought by US company Lone Pine against the Government of Canada, claiming $250 million for breaches of its rights under the North American Free Trade Agreement's (NAFTA) investment chapter after Quebec introduced a moratorium on fracking for oil and gas underneath the St Lawrence river.[88] Lone Pine calls the ban 'arbitrary' and 'capricious'. The company is Calgary based, but incorporated in Delaware USA, which allows it to bring the suit under NAFTA.

95. The following actions taken in response to Maori concerns over breaches of te Tiriti could in my opinion become subject of an investor-initiated dispute under the TPPA:

(i) Not granting an extraction license to an investor that had been granted an exploration license,

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[86] OceanaGold at a Glance. Fact sheet', January 2015 http://www.oceanagold.com/assets/documents/Technical-Reports/1501-OGC-Fact-Sheet-Jan-2015.pdf. Attached as Exhibit BR

[87] Amy Westervelt, *The Guardian*, 27 May 2015, http://www.theguardian.com/sustainable-business/2015/may/27/pacific-rim-lawsuit-el-salvador-mine-gold-free-trade. Attached as Exhibit BS

[88] Brent Patterson, 'NAFTA challenge against fracking moratorium is "fast-tracked"', http://canadians.org/blog/nafta-challenge-against-fracking-moratorium-fast-tracked. Attached as Exhibit BT

(ii) Imposing new conditions requiring an investor to secure the prior consent of local hapu or Iwi before drilling;

(iii) Enhancing the environmental protection regulations by restricting the use of toxic substances or requiring full remediation;

(iv) A moratorium on fracking,

(v) Refusal of a land use license by a local board after hearing evidence of Iwi concerns, when government officials have created contrary expectations;

(vi) Requiring levies or deposits to cover potential harm;

(vii) Court awards of costs for damage caused to wāhi tapu and remediation; or

(viii) Revoking an exploration or mining license for alleged breaches of conditions.

(ix) Conflict with right to health

96. The right to health is a human right, a right under the Declaration of the Rights of Indigenous Peoples, and an obligation of the Crown under te Tiriti to actively protect Maori health. Dr Papaarangi Reid observed that:

> "*Maori have a right to monitor the Crown and to evaluate Crown action and inaction. This right is derived from different sources. Firstly, from our indigenous rights embodied in the United Nations Declaration on the Rights of Indigenous Peoples ... and reinforced by the Treaty of Waitangi ... . The primary right of indigenous peoples it to self-determination, which includes to name ourselves as tangata whenua and be recognised as such. As tangata whenua, our duty includes ensuring the wellbeing of all people in our territories, Maori and tauiwi...* "[89]

[89] Papaarungi Reid and Bridget Robson, 'Understanding Health Inequities', *Hauora:* Maori Standards of Health. A study of the years 2000-2005, Otago University, 2007, 1 Attached as Exhibit BU

97. The June 2015 statement from the rapporteurs, cited above, said:

> *"Observers are concerned that these treaties and agreements are likely to have a number of retrogressive effects on the protection and promotion of human rights, including by lowering the threshold of health protection, food safety, and labour standards, by catering to the business interests of pharmaceutical monopolies and extending intellectual property protection".*

98. They also expressed concern about

> *"the 'chilling effect that intrusive ISDS awards have had, when States have been penalized for adopting regulations, for example to protect the environment, food security, access to generic and essential medicines, and reduction of smoking, as required under the WHO Framework Convention on Tobacco control ...".*

Smokefree Aotearoa 2025

99. In 2012, as part of a project co-funded by the Health Research Council and the Ministry of Health, wrote a report on the implications of New Zealand's trade and investment treaties for the Smokefree Aotearoa 2025 strategy.[90] I have spoken in many forums about the implications of the TPPA for New Zealand's Smokefree strategy, including briefing the Maori Affairs committee twice on the issue.

100. The 2025 strategy incorporates fully or partly most of the tobacco control policies recommended by the Maori Affairs Select Committee Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Maori (the 'MAC report').

101. The select committee observed that: 'Māori culture was traditionally auahi kore (smoke-free). However, with the introduction of tobacco to New Zealand in the eighteenth century, smoking quickly became an embedded

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[90] Jane Kelsey, International Trade and Investment law Issues Relating to New Zealand's Proposed Tobacco Control Policies to Achieve an Effectively Smokefree Aotearoa New Zealand by 2025, Report to the Tobacco Control Research Turanga, 1 March 2012. Attached as Exhibit BV

part of Māori culture.'[91] Appendix two of its report explains how tobacco was explicitly marketed to Maori. The consequences today are that Maori have disproportionate rates of addiction and a greater chance of dying from use of tobacco.

102. Smoked tobacco is an addictive and hazardous product, which if used as recommended by the manufacturer results in the premature death of half of its long-term users. Today 40 percent of Māori males and almost 50 percent of Māori females smoke, and Māori in all age groups have higher smoking rates than non-Māori. While overall smoking rates in New Zealand fell significantly in the 1980s and 1990s, the rates of smoking in low socioeconomic areas and amongst Māori and Pacific peoples increased. The Māori community therefore bears a disproportionate burden of the negative physical, economic, social, and cultural impacts of tobacco.

103. The Crown has a Tiriti obligation to address this harm induced by colonisation, and has recognised the need to do so under the Smokefree 2025 policy.

104. The potential constraints of the TPPA on tobacco control policies have been the subject of extensive legal analysis and expert opinion.[92] World leaders in the health community, including President of the World Health Organisation Margaret Chan[93] and the UN rapporteurs in June 2015, have expressed grave concern that the TPPA and similar agreements will undermine the ability of states to meet their obligations under the Framework Convention on Tobacco Control.

105. It has been reported publicly that Malaysia has proposed a complete carve-out of tobacco from the TPPA.[94] It is my informed understanding that New Zealand has not supported this move. A US proposal for more limited

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91 Maori Affairs Select Committee, Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Maori, 2010, 58. Attached as Exhibit BW.

92 See generally, eg. *American Journal of Law and Medicine*, 39, (2013) no. 2 and 3, Special edition on trade and tobacco control.

93 Margaret Chan, Opening address to the 67th World Health Assembly, 19 May 2014, supra.

94 Reported, for example, in 'The Hazard of Free-Trade Tobacco' [Editorial], *New York Times*, 31 August 2013, http://www.nytimes.com/2013/09/01/opinion/sunday/the-hazard-of-free-trade-tobacco.html;. Attached as Exhibit BX 'U.S. Official Touts TPP Progress; Identifies IP, Canada, Malaysia As Obstacles' *Inside US Trade*, 10 April 2015, Attached as Exhibit BY

protections for tobacco control measures from the investment chapter has been mooted publicly, but media reports suggest they have not been tabled.[95]

106. The tobacco companies' litigation against Australia's plain packaging laws and threats to take similar action on New Zealand has already had a chilling effect on the government's delay in adopting plain packaging. Whether the TPPA could be used to challenge the subsequent implementation of that Act would depend on the final wording of the chapter given the legislation is already in train, but it could certainly impact on future Smokefree policies, as it would other policies to combat obesity or alcohol abuse.

Access to medicines

107. Dr Papaarangi Reid and Bridget Robson points to the legacy of colonisation and "the (mis)appropriation and transfer of power and resources from indigenous peoples to newcomers" in constructing "who will benefit and be privileged".[96] Noting that one of the three pathways that contributes to ethnic inequalities in health is differential access to healthcare, they conclude, "the evidence suggests that Maori are receiving lower levels of health services and poor quality of service".[97]

108. Health experts Deborah Gleeson, Ruth Lopert and Papaarangi Reid predict that the US agenda for the TPPA would likely increase costs and reduce access to affordable medicine for New Zealanders, exacerbating existing inequities with a disproportionate impact on Maori and Pacific peoples.[98] They based this opinion on the leaked texts of the intellectual property chapter and the annex on transparency in healthcare technologies; it is my informed understanding that these observations are still a valid concern.

109. In particular, the successful purchasing arrangement of Pharmac will be undermined. The authors identify three possible outcomes: [99]

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95 Krista Hughes, 'U.S Floats cutting Tobacco from part of Pacific trade pact – sources', *Reuters*, 21 October 2014. Attached as Exhibit BZ.

96 Reid and Robson, supra, 5. Attached as Exhibit BU

97 Reid and Robson, supra, 7 Attached as Exhibit BU

98 Gleeson, et al, supra, at 227. Attached as Exhibit K

99 Gleeson, et al, supra, at 231-22 Attached as Exhibit K

(i) A rise in co-payments, meaning higher out of pocket costs for prescriptions, which will impact most on those least able to pay, in particular communities in which Maori are disproportionately represented;

(ii) Increasing government health funding (which is unlikely in the current fiscal climate) or increasing the proportion of Vote Health allocated to pharmaceuticals, potentially decreasing funding to essential public health services targeted to high needs population groups; or

(iii) Increased rationing by restricting the range of medicines subsidised or imposing more restrictive criteria for access.

(x) The Maori/Treaty of Waitangi Exception

110. The *TPP Talk* webpage on the MFAT website entitled 'TPP and the Treaty of Waitangi exception' says, *inter alia*:[100]

> *For New Zealand, the Treaty of Waitangi exception in our FTAs is a critical addition to the GATT exceptions. As the founding document of New Zealand, the Treaty provides a framework for the on-going relationship between the Government of New Zealand and Maori. Given its importance, the Treaty exception has been included in all of New Zealand's FTAs, including multi-party processes like the ASEAN-Australia-New Zealand FTA and the WTO General Agreement on Trade in Services. The exception is designed to ensure that successive governments retain flexibility to implement domestic policies that favour Maori without being obliged to offer equivalent treatment to overseas entities.*
>
> *The Treaty of Waitangi exception is qualified by a requirement that any measures that provide more favourable treatment to Maori must not be used by New Zealand as a means of arbitrary or unjustified discrimination against persons from the other Parties, or as a*

100 'TPP and the Treaty of Waitangi exception', *TPP Talk*, supra, Attached as Exhibit AN

disguised restriction on international trade. This is the same qualification that applies to the GATT Article XX exceptions. It provides an important reassurance to our trading partners that New Zealand will only seek to invoke this exception for legitimate purposes related to Māori and the Treaty of Waitangi.

111. It is implied, but not stated, that this exception would be included in the TPPA. Without access to the documents it is impossible to determine whether it has been proposed by the Crown and whether any other party has opposed its inclusion.

112. As I have said in previous evidence to the Waitangi Tribunal,[101] it is my expert opinion that the exception it will not provide adequate protection for te Tino Rangatiratanga of Maori under te Tiriti, even if it included in the TPPA.

113. The exception has its origins in a reservation for Maori commercial and industrial undertakings in New Zealand's schedule of commitments to the General Agreement on Trade in Services, which came into force in 1995.

114. Since the early 2000s a more explicit exception has been included in the text of New Zealand's FTAs with Singapore,[102] China,[103] Thailand,[104] Australia-

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101 'Brief of Evidence of Expert Witness Dr Jane Kelsey in the Matter of the National Freshwater and Geothermal Resources Claim (WAI 2358), 22 June 2012, paragraph 8.

102 Agreement on between New Zealand and Singapore on a Closer Economic Partnership 2001, Article 74, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Singapore/Closer-Economic-Partnership-Agreement-text/index.php

103 New Zealand China Free Trade Agreement 2008, Article 205, http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php

104 New Zealand Thailand Closer Economic Partnership Agreement 2005, Article 15.8, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php

ASEAN,[105] the Trans-Pacific Strategic Economic Partnership,[106] Malaysia,[107] Taiwan,[108] and South Korea.[109] A generic version reads:

> *Article xx: Treaty of Waitangi*
>
> *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 and services, 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 fulfillment 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. Chapter (Dispute Settlement) shall otherwise apply to this Article. An arbitral tribunal established under Article (Establishment of an Arbitral Tribunal) may be requested by [another Party] to determine only whether any measure (referred to in Paragraph 1) is inconsistent with their rights under this Agreement.*

115. The Crown did not initiate this revised exception. It resulted from vigorous debate and challenges over the years about the risks that the services, investment and intellectual property chapters of free trade agreements pose to the interests of Maori and to the Crown's ability to meet its Treaty of Waitangi obligations. In my book *Reclaiming the Future* (1999) I documented the controversy over a proposed Multilateral Agreement on

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[105] ASEAN-Australia-NZ-Free Trade Agreement 2010, Chapter 15, Article 5, http://www.asean.fta.govt.nz/preamble/

[106] Trans-Pacific Strategic Economic Partnership Agreement 2005, Article 19.5, http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php

[107] New Zealand Malaysia Free Trade Agreement 2009, Article 17.6, http://mfat.govt.nz/downloads/trade-agreement/malaysia/mnzfta-text-of-agreement.pdf

[108] Agreement between New Zealand and the Separate Customs territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation 2013, Chapter 24, Article 6, http://www.nzcio.com/webfm_send/59

[109] New Zealand Korea FTA (not yet in force), Article 20.6, https://korea.fta.govt.nz/assets/docs/NZ%20Korea%20FTA%20consolidated%20text.pdf

Investment ("**MAI**") under negotiation at the Organisation for Economic Cooperation and Development. In 1997 Te Puni Kokiri, Maori Members of Parliament, the Maori Affairs Select Committee of Parliament, amongst many others, criticised the inadequacy of the initial Treaty reservation, which addressed only narrow commercial interests, and the failure to consult properly with Maori.[110]

116. Although the resulting revision is some improvement, it still fails to address many of the concerns raised during the MAI and similar debates, for many reasons.

117. First, the exception only applies when 'New Zealand' (effectively the Crown) considers there are rights and obligations arising under the Treaty of Waitangi. There are many instances where Crown refuses to recognise obligations under te Tiriti that clearly exist in the eyes of tangata whenua, and at times in the reports of this Tribunal. Examples include water and geothermal resources in relation to the power-generating SOEs[111] and the foreshore and seabed.[112]

118. Second, the exception can only be invoked when 'New Zealand' (effectively the Crown) deems action is necessary to protect those interests. Even if the Crown acknowledges there is a Tiriti issue, the claimants cannot require the Crown to take action that protects their rights or interests ahead of the rights of other states, investors, or commercial interests under the TPPA.

119. Third, the problem arises in the first place when the Crown has adopted obligations through general or specific provisions of the TPPA that are incompatible with te Tiriti, or may become so because they foreclose its future ability to take remedial measures to meet its Tiriti obligations. Securing the right to argue a defence does not constitute to active protection.

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110 See Kelsey, *Reclaiming the Future*, supra, 339-342. Attached as Exhibit CA

111 'Supreme Court and Option on Water Rights', *Radio New Zealand*, 14 April 2015, http://www.radionz.co.nz/news/political/271095/supreme-court-an-option-on-water-rights. Attached as Exhibit CB

112 'Nobody will own foreshore and seabed – Govt', *New Zealand Herald*, 31 March 2010, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10635579. Attached as Exhibit CC

120. Fourth, the exception only preserves the Crown's right to provide special or discriminatory treatment to Maori. It does not excuse measures the Crown takes to address other Treaty obligations, such as general health or environmental measures whose impacts are most significant for Maori, such as smokefree policies or affordable medicines. Nor would it protect decisions *not* to take certain action required under the TPPA, such as ratification of UPOV 1991.

121. Fifth, the exception operates as a defence to an alleged breach. Even if the government invokes the exception, a state or an investor could still challenge the measure through the dispute process in the FTA. The wording of the exception makes interpretation of the Treaty of Waitangi, and the nature of rights and obligations arising under it, self-judging. However, a measure could be challenged as '*arbitrary or unjustified discrimination*' or a '*disguised barrier to trade in goods or services*'. These are broad terms whose interpretation in trade law is inconsistent and unpredictable, especially when the dispute is heard by an ad hoc arbitral panel that is not governed by a system of precedent. Where an investor-state dispute is brought under the investment chapter that interpretation would be in the hands of private arbitral tribunals whose neutrality and judicial integrity has been questioned.

122. Tino Rangatiratanga and the Declaration on the Rights of Indigenous Peoples require the Government to recognise Maori participation in governance. The process provisions in the TPPA provide guarantees for other states and commercial interests to influence decisions taken by the Crown, with no reference to and potentially at the expense of Maori participation. This is, in itself, a breach of the Crown's obligations under te Tiriti. Where domestic processes to ensure Maori participation and decisions that reflect Maori values, there is a high risk that these could be challenged by investors in the same way as the decision making processes in the Bilcon case, discussed above.

123. These cumulative deficiencies show that the Treaty of Waitangi exception does not provide the protection claimed by the Crown and required by te Tiriti.

124. Even if the exception were considered adequate, it faces one further hurdle. There is no equivalent exception in the New Zealand Hong Kong Investment Promotion and Protection Agreement ("**NZHKIPPA**").[113] The leaked investment chapter makes it clear that the MFN provision entitles the parties to the TPPA and their investors to any better treatment New Zealand gives to any other country's investors. That would allow them to circumvent the Treaty exception by drawing on the NZHKIPPA. It is likely that New Zealand would make a reservation so the MFN rule only applies to future agreements, as it has done in some other agreements, but the secrecy of the negotiation makes that impossible to know.

125. The Crown might point to the 'general exception' as an alternative protection for environmental, conservation or public health measures. That is also gravely inadequate, for three reasons. First, it only covers a specific selection of public policy objectives. Second, the standard general exception had many conditions and it has fully succeeded in only one out of forty disputes in which it has been pleaded as a defence in the WTO. Third, past US FTAs have not allowed the general exception to apply to the investment chapter, and my understanding is that the US has not agreed to it in the TPPA either.

Concluding observations

126. The stakes for Maori are very high because the TPPA is a binding and enforceable international treaty that, if the parties have their way, will be concluded during 2015.

127. As a purely domestic matter, if one government acting as the Crown fails to accept or meet its Tiriti obligations a future government can still do so. In the case of a binding international treaty like the TPPA, which is enforceable in extraterritorial tribunals by foreign states and foreign investors, it may be impossible to turn back the clock.

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[113] There is no such exception in the CER Services Protocol 1989 either, although it is proposed for inclusion in the ANZCERTA Investment Protocol.

128. In its negotiation of the TPPA the Crown has manifestly denied to Tino Rangatiratanga o nga hapu, and failed in its duty to act in good faith, make informed decisions and actively protect the rights and interests of Iwi Maori.

129. There is no indication that the Crown intends to act in any other way in the period leading up to the conclusion of the TPPA.

SWORN / AFFIRMED at: Auckland)

On: 9th of June 2015

Before me:)

CORAL M T LINSTEAD-PANOHC
SOLICITOR
AUCKLAND

A barrister and solicitor of the High Court of New Zealand