

WAITANGI TRIBUNAL

Wai 2522
Wai 2523
Wai 2530
Wai 2531
Wai 2532

CONCERNING

the Treaty of Waitangi Act 1975

AND

applications for urgent hearings concerning the Trans-Pacific Partnership Agreement by the claimants for the Wai 2522, 2523, 2530, 2531 and 2532 claims

DECISION OF THE TRIBUNAL

Introduction

1. This Tribunal currently has before it five applications seeking an urgent hearing of claims relating to the Trans-Pacific Partnership Agreement (TPPA).
2. On 23 July 2015 we heard argument from the parties on the question of urgency. This memorandum records our decision on whether to grant an urgent hearing.

Background

3. The TPPA is an international free trade agreement currently in the final stages of negotiations. There are twelve participating countries – Australia; Brunei; Canada; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; Singapore; United States of America and Vietnam. The TPPA has its origins in the Trans-Pacific Strategic Economic Partnership Agreement (P-4) that came into force in January 2006.
4. Negotiations have been described as nearing a conclusion for the past three years. Negotiations have been conducted in secret and any concluded agreement is taken back to participatory states for domestic consideration and ratification on a take it or leave it basis.
5. The US Congress and President Obama have agreed to Trade Promotion Authority, which means that the US executive can now finalise the negotiation of the TPPA. This means that it is more likely than not that negotiations will conclude by early August 2015.¹
6. Chief Negotiators met in Hawaii from July 24-27 and Trade Ministers will meet from July 28-31 in an attempt to conclude negotiations of the TPPA.² If these negotiations do not result in

¹ Wai 2522, #A2, paras 71-72

an agreement, it is likely that the TPPA will be delayed until after the 2016 American presidential elections.

The claims and applications for urgency

Wai 2522 – The Trans-Pacific Partnership Agreement (Reid and others) claim

7. This claim was filed on 24 June 2015 by Papaarangi Reid, Moana Jackson, Angeline Greensil, Hone Harawira, Rikirangi Gage and Moana Maniapoto.
8. The claimants allege that the Crown has breached the principles of the Treaty of Waitangi and that prejudice will result. They say:³
 - a) The Crown has undermined its Treaty partner by failing to provide information and failing to actively consult with Māori in good faith over the TPPA;
 - b) The Crown has failed to actively engage with Māori in decisions that impact on their rights under te Tiriti and at international law notably the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
 - c) The Crown will empower foreign states and foreign investors to exert influence over and challenge decisions of the New Zealand government for implementing policies aimed at meeting te Tiriti obligations and addressing inequities and improving social outcomes for Māori;
 - d) Māori will lose intellectual property rights;
 - e) Settlement of grievances will be prejudiced (past and future);
 - f) The TPPA, by allowing investor-state dispute settlement (ISDS), will have a chilling effect on Crown policies such as the Smokefree 2025 goal and access to affordable medicine;
 - g) Māori kaitiakitanga will be prejudiced by the TPPA, including the protection of coastal areas from oil exploration;
 - h) The TPPA will have a prejudicial impact on Māori rights regarding forestry including the Tribunal's ability to make binding recommendations. This will prejudice existing and prospective settlements; and
 - i) The TPPA will require the Crown to sign up to the International Union for the Protection of New Varieties of Plants (UPOV) and take other action contrary to the findings of the Wai 262 Tribunal. The Crown has also ignored the Wai 262 Tribunal recommendations on engagement when seeking to sign international agreements.
9. The claimants seek the following relief:
 - a) The grant of an urgent hearing; and
 - b) Recommendations and findings that;
 - i. The Crown has acted contrary to the principles of te Tiriti o Waitangi;
 - ii. There has been insufficient assessment by the Crown of the impact of the TPPA regime on the guarantees of tino rangatiratanga under te Tiriti;
 - iii. There has been inadequate consultation with Māori as to the effect of the TPPA regime on the guarantees of tino rangatiratanga under te Tiriti;
 - iv. Māori have been denied the right of active engagement in governance decisions that affect them as required by tino rangatiratanga;

² Wai 2522, #3.1.20, para 3

³ Wai 2522, #1.1.1

- v. The Crown immediately halt progress towards signing the TPPA until time has been taken to meaningfully engage with Māori in accordance with te Tiriti o Waitangi obligations and ensure their rights and interests are accorded priority over foreign states and investors;
- vi. Prior to entering in to the TPPA the Crown and Māori develop a framework of engagement upon which international agreements must be assessed to ensure they comply with te Tiriti o Waitangi obligations. The Crown must then put in place mechanisms to ensure that it can meet its obligations to Māori under te Tiriti o Waitangi when entering international agreements;
- vii. This may include the establishment of a specialist body of Māori who, with adequate resourcing, are able to determine whether the agreement is compliant with te Tiriti;
- viii. The Crown take immediate steps to implement the recommendations of the Wai 262 report as it relates to international agreements;
- ix. That the current full draft text of the TPPA be released to Māori immediately to enable Māori to engage in an informed debate on the TPPA; and
- x. Any other recommendations the Tribunal see fit to make.

Wai 2523 – The Trans-Pacific Partnership Agreement (Baker and others) claim

- 10. The Wai 2523 claim was filed on 23 June 2015 by Natalie Kay Baker, Hone Tiatoa, Maia Pitman, Ani Taniwha, Pouri Harris, Owen Kingi, Justyne Te Tana and Lorraine Norris. The claims are made on behalf of the named claimants and on behalf of the various hapū of Ngā Puhi.
- 11. The claimants allege that the Crown has breached the principles of the Treaty of Waitangi and that prejudice will result. They say:⁴
 - a) The allegations in the claim arise following the decision of the Waitangi Tribunal in He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry;
 - b) Without consultation and consent of the hapū of Ngā Puhi the Crown is ceding elements of New Zealand's sovereignty before considering what effect this will have on hapū in light of the Wai 1040 stage one report. Since the release of the stage 1 report the Crown has trivialised the Tribunal's conclusions and avoided any meaningful dialogue with claimants on the impact of the stage one report on the relationship between Māori and the Crown today. The Crown has made no meaningful response to the stage 1 report;
 - c) Te Tiriti and its principles have not played any role in shaping the Crown's approach to TPPA negotiations;
 - d) A number of features of the TPPA will result in a waiver or limitation on New Zealand's sovereignty. These include ISDS, and reducing the Crown's ability to make law and policy regarding;
 - i. Water quality regulation and agricultural water use;
 - ii. Energy regulation;
 - iii. Regulation of environmental concerns, such as deep sea drilling for oil or 'fracking';
 - iv. Smoking control laws;
 - v. Access to affordable medicines;

⁴ Wai 2523, #1.1.1

- vi. A cap on electricity prices;
 - vii. Treaty settlements; and
 - viii. Policies aimed at alleviating poverty.
- e) The Crown has conducted negotiations in secret without any meaningful consultation or disclosure to the claimants. Claimants are unable to make an informed decision or response on whether the TPPA is desirable or not; and
 - f) The hapū of Ngā Puhī are being heard before the Tribunal in the Te Paparahi o Te Raki (Northland) Inquiry. Following that process the claimants are likely to seek settlement of their grievances and resumption of their lands. Where Māori seek resumption over Crown forest lands by way of resumption hearing and binding recommendations foreign companies may bring actions for compensation. The potential for such action will have a chilling and prejudicial effect which will undermine redress available to claimants.

12. The claimants seek the following relief:

- a) The claimants ask that the Tribunal grant an urgent hearing of this claim.
- b) The claimants ask that this claim be heard within the Northland rohe.
- c) The claimants seek the following recommendations or findings;
 - i. The Crown has acted contrary to the principles of te Tiriti o Waitangi;
 - ii. There has been insufficient assessment by the Crown of the impact of the TPPA regime on the guarantees of tino rangatiratanga under te Tiriti and on Māori sovereignty;
 - iii. That the claimants have been denied the right of active engagement in governance decisions that affect them as required by tino rangatiratanga;
 - iv. The Crown urgently begin meaningful engagement with the claimants on how the Tribunal's findings on sovereignty in the stage 1 report will impact upon the relationship between the Crown and the hapū of Ngā Puhī in the future;
 - v. The Crown immediately halt the progress towards signing the TPPA until time has been taken to meaningfully engage with the hapū of Ngā Puhī in accordance with te Tiriti o Waitangi obligations and ensure their rights and interests are accorded priority over foreign states and investors;
 - vi. Prior to entering in to the TPPA the Crown and Māori develop a framework of engagement upon which international agreements must be assessed to ensure they comply with te Tiriti o Waitangi obligations. The Crown must then put in place mechanisms to ensure that it can meet its obligations to Māori under te Tiriti o Waitangi when entering international agreements;
 - vii. This may include the establishment of a specialist body of Māori who, with adequate resourcing, are able to determine whether agreement is compliant with te Tiriti;
 - viii. The Crown take immediate steps to implement the recommendations of the Wai 262 report as it relates to international agreements;
 - ix. That the current full draft text of the TPPA be released to the hapū of Ngā Puhī immediately to enable them to engage in an informed debate on the TPPA; and
 - x. Any other recommendations the Tribunal sees fit to make.

Wai 2530 – The Tai Tokerau District Māori Council Trans-Pacific Partnership Agreement claim

13. On 3 July 2015 Rihari Dargaville filed a claim on behalf of the Tai Tokerau District Māori Council (TTDMC).
14. The TTDMC allege that the Crown has breached the principles of the Treaty of Waitangi and that prejudice will result. They say:⁵
 - a) The TPPA is inconsistent with the Waitangi Tribunal Northland stage 1 report. Ngā Puhi hapū did not cede sovereignty to the Crown. UNDRIP has not been considered by Crown negotiators in the TPPA.
 - b) The social, economic, cultural and political implications for TTDMC I will not have been considered by Crown negotiators in the TPPA.
 - c) By ratifying the TPPA the Crown binds itself to enforcement provisions which also bind the Council without knowledge or consent.
 - d) By ratifying the TPPA the Crown constrains the ability of the Tribunal to make recommendations as they would potentially preclude offshore investor access to investment in matters relating to land resource rights and other indigenous rights and property.
 - e) The Crown has a duty to consult with the TTDMC and actively protect te Tiriti rights and the TTDMC have the right to be expressly notified that te Tiriti and other legal instruments protecting indigenous Māori rights may be effected.
 - f) The TPPA may affect the ability of Māori to preferentially use, manage, conserve and access their traditional knowledge and intellectual property resources.
 - g) The Crown has not considered the Māori Community Development Act 1962 being the only statute that explicitly recognises Māori rights to self-government and the Crown has failed to have regard to the recommendations of the Tribunal reporting on the Māori Community Development Act 1962.
15. The claimants seek the following relief:
 - a) That the Tribunal recommend that the Crown is obliged to consult with rangatira with respect to the forming of agreements under the TPPA.
 - b) That the Crown should seek a clear protection of indigenous rights and an exclusion of claims arising from rulings and recommendations of this Tribunal or Acts of Parliament associated with such settlements.
 - c) That the Crown be informed of its needs pursuant to the Treaty, and to engage with its Treaty partner as a minimum in terms of Treaty making pursuant to the retained rights under tino rangatiratanga.
 - d) That the Crown acts as guarantor to the claimants for its own Treaty making arrangements with third parties in the TPPA.
 - e) That the claimant reserves the right to amend the claim at a later date to include full submissions on UNDRIP and other relevant legal instruments.

Wai 2531 – The Trans-Pacific Partnership Agreement (Bruce-Kingi and Others) claim

16. This claim has been filed by Waimarie Bruce-Kingi, Kingi Taurua, Paora Whaanga, Huia Brown, Jack Te Reti, Richard Tiki o Te Rangi Thompson, John Wi, Tracey Waitokia, Karina Williams and Michael Leulua'i on behalf of their whānau and hapū.

⁵ Wai 2530, #1.1.1

17. The claimants allege that the Crown has breached the principles of the Treaty of Waitangi and that prejudice will result. They say:⁶

- a) The Crown has negotiated the TPPA in secret with no meaningful consultation with the claimants' hapū, Māori generally or the public at large.
- b) The Crown's acts, omissions and proposed plan of action breaches the duty of partnership and corresponding need to consult with Māori.
- c) The claimants have not been involved in formulating the content of the TPPA, have not consented to the Crown representing them in the TPPA and will have no say on whether the Crown agrees to it.
- d) The claimants have particular concern about potential impacts of the TPPA and the Crown's ability to protect the health of Māori. The Crown's capacity to introduce or proceed with policies and protecting Māori would be curtailed by the TPPA enabling foreign corporate investors to sue the New Zealand government if it were to introduce policies that would restrict anticipated profits.
- e) There is potential for foreign investors under ISDS to challenge domestic regulations, judicial decisions or policies allowing tobacco companies to influence domestic cigarette packaging laws and trans-national pharmaceutical companies to increase the price of medicine.
- f) In contemplating the TPPA the Crown is putting the rights of trans-national corporations ahead of the rights of Māori and in so doing is failing to meet its obligations to Māori under the Treaty.
- g) Even if an exception clause is inserted in to the TPPA and is properly worded Crown policies which purport to benefit Māori will be open to scrutiny as to whether the exception clause should apply.
- h) The granting of a power by the Crown to other countries and corporations to challenge the legitimacy of Crown policy which may affect Māori, without consent or consultation with Māori is entirely inappropriate, not consistent with tikanga nor te Tiriti principles and undermines the ability of the claimants to exercise tino rangatiratanga.

18. The claimants seek the following relief:

- a) The claimants ask that the Tribunal grant an urgent hearing of this claim.
- b) The claimants seek the following recommendations or findings:
 - i. The Crown has acted contrary to the principles of te Tiriti o Waitangi;
 - ii. There has been insufficient assessment by the Crown of the impact of the TPPA regime on the guarantees of Tino Rangatiratanga under te Tiriti and on Māori sovereignty;
 - iii. That the claimants have been denied the right of active engagement in governance decisions that affect them as required by the Tiriti guarantee of their tino rangatiratanga;
 - iv. The Crown urgently begin meaningful engagement with the claimants on how the Waitangi Tribunals' findings on sovereignty in the Northland stage 1 report will impact upon the relationship between the Crown and Ngā Puhi hapū and also with other hapū in the immediate future;
 - v. Forthwith, the Crown immediately defer signing the TPPA until time and resources have been applied to properly engage with the Māori hapū in accordance with te Tiriti o Waitangi obligations so the parties can ensure the

⁶ Wai 2531, #1.1.1

claimants' rights and interests are given priority over foreign states and investors;

- vi. As a matter of priority, the Crown and Māori hapū develop a framework of proper, good faith engagement by which international agreements must be assessed to ensure they comply with te Tiriti o Waitangi obligations. The Crown must then actually implement such mechanisms to comply with its obligations to Māori under te Tiriti o Waitangi when negotiating or entering international agreements;
- vii. This may include the establishment of a specialist body of Māori who, with adequate resourcing, are able to determine whether the agreement is compliant with te Tiriti;
- viii. The Crown take immediate steps to implement the recommendations of the Wai 262 report as it relates to international agreements;
- ix. Forthwith, the Crown release the current full draft text of the TPPA to Māori hapū to enable them to engage in an informed debate on the TPPA and its implications for them; and
- x. Any other recommendations the Tribunal sees fit to make.

Wai 2532 – The New Zealand Māori Council Trans-Pacific Partnership Agreement claim

19. The Wai 2532 claim was filed on 10 July 2015 by Cletus Maanu Paul, Sir Edward Taihakurei Durie.

20. The claim was brought on behalf of the following;

- a) Cletus Maanu Paul and Sir Edward Taihakurei for the New Zealand Māori Council and in the interests of Māori generally;
- b) Kereama Pene of Kia Maia Māori Committee of the Tamaki ki te Tonga District Māori for Ngāti Rangiteaorere Council generally as a group involved in the claim of the New Zealand Māori Council in relation to Māori proprietary interests in hot water and geothermal fields;
- c) Tamati Cairns of the Wellington District Māori Council, and of the Pouakani Claims Trust for Pouakani iwi generally as a group involved in the claim of the New Zealand Māori Council in relation to Māori proprietary interests in fresh water; and
- d) The following District Māori Councils:
 - i. Cletus Maanu Paul for the Mataatua District Māori Council;
 - ii. Edward Taihakurei for the Raukawa District Māori Council;
 - iii. Tamati Cairns for the Wellington District Māori Council;
 - iv. Titewhai Harawira for the Auckland District Māori Council;
 - v. Desma Kemp Ratima for the Tākitimu District Māori Council;
 - vi. Rihari Dargaville for the Te Tai Tokerau District Māori Council;
 - vii. Anthony Toro Bidois for the Te Arawa District Māori Council; and
 - viii. Such further District Māori Councils as shall notify their position in relation to this claim in due course.

21. The claimants allege that the Crown has breached the principles of the Treaty of Waitangi and that prejudice will result. They say:⁷

⁷ Wai 2532, #1.1.1

- a) The Government's ongoing negotiation of the TPPA is an act of the Crown which is contrary to the principle of active protection of Māori interests and rangatiratanga in the Treaty of Waitangi.
 - b) The claimants express support for the claims of the Wai 2522 and Wai 2523 claimants.
 - c) The claimants draw particular attention to and seek to be heard on a more specific claim by which they bear the burden of a more particular prejudice. Māori claims to natural resources are or are likely to be prejudicially affected by the TPPA. These include but are not limited to the claim by the New Zealand Māori Council and supporting parties to Māori proprietary interests in both fresh water and geothermal resources (Wai 2358).
 - d) The signing of the Treaty of Waitangi established a partnership and imposed on both Crown and Māori a duty to act in good faith towards each other. It also required the Crown actively protect Māori interests and rangatiratanga. The Crown should not put itself in a place where its obligations to Māori would be unjustly challenged. This may arise where the Crown has trade obligations to foreign nationals and foreign investors that conflict with promises that have been made to Māori.
 - e) There is a risk that Māori claims to natural resources will be threatened. Māori have proprietary interests in water as is now accepted by the Waitangi Tribunal in the stage one hearing of the Wai 2358 claim. The Tribunal has yet to determine how that interest may now be provided for.
 - f) The New Zealand Māori Council has developed a framework by which Māori interests in water may be provided for. This will be submitted to the Tribunal. The framework envisages payments for commercial use of water. Without an exempting clause the Crown is unlikely to accede to any provision for payments in respect of water use if that exposes the government to damages on the claim of a foreign investor who invested in New Zealand business on the understanding that no such payment would be required under New Zealand law. The current Treaty of Waitangi exemption clause in international trade agreements is inadequate to protect these rights and interests.
 - g) Certain geothermal fields should be reserved for Māori traditional owners. This is an issue in the Wai 2358 claim.
 - h) Foreign investors may be able to acquire an interest in land or geothermal projects by which they gain access to geothermal resources owned by Māori or to which Māori have a claim but with no benefit to the Māori claimants.
 - i) Any new laws or regulations the Crown may impose on geothermal development to protect the Māori interests and claims may be subject to ramifications under the TPPA as constraining free trade.
 - j) There is a risk that the Crown is unlikely to recognise legitimate property claims of Māori in relation to geothermal fields if this could expose the Crown to substantial damages at the suit of foreign investors.
22. In relation to the foregoing specific claim the claimants seek a recommendation that Government assures Māori that the TPPA will contain provisions protecting Māori claims to natural resources and will negotiate with claimant representatives for the claims as a whole an appropriate provision that will provide for that protection.

New Claims

23. The Tribunal has also recently received a further three claims and applications for urgent hearings in relation to the TPPA. They were not filed in time to enable inclusion of these claims in the judicial conference to hear arguments on urgency on 23 July 2015.
24. A separate memorandum-directions will be issued shortly outlining how these claims and applications will be dealt with.

Interested Parties

25. The following have filed and been added as interested parties to these proceedings:

- a) Wai 996 and 2217 claimants;
- b) Te Kōtahitanga o Nga Hapū Ngā Puhī;
- c) Ngāti Kahungunu Iwi Incorporated;
- d) Wai 1140 and 1307 claimants (Patukeha and Ngāti Kuta ki Te Rawhiti);
- e) Wai 1526 and 59 claimants (Te Mahurehure and Hokianga);
- f) Wai 2244, 1544, 1677, 1857 and 1959 claimants;
- g) Wai 745 claimants (Patuharakeke);
- h) Wai 49, 682, 1464 and 1546 claimants (Ngāti Hine and Te Kapotai);
- i) Wai 1259 claimants (Te Uri o Te Aho); and
- j) Wai 762, 824, 1499, 1531 and 1957 claimants.

Procedural Background

26. On 26 June 2015 the Deputy Chairperson directed the Crown and any interested parties to file submissions and evidence in response to the Wai 2522 and Wai 2523 claims by 3 July 2015. On 3 July 2015 the Crown filed a preliminary response to the applications and sought an extension until 7 July 2015 to file the affidavit of Mr Martin Harvey and updated submissions. The extension was granted and the Crown filed the affidavit of Mr Harvey and updated submissions on 7 July 2015.
27. On 7 July 2015 we were appointed to inquire into the Wai 2522, Wai 2523, Wai 2530 and Wai 2531 claims and to determine the applications for urgency. We were delegated the task of determining the Wai 2532 application also on 14 July 2015.
28. On 14 July 2015 the Presiding Officer advised parties that a judicial conference would be convened on 23 July 2015 to hear argument on whether urgency should be granted. Specific questions were set out in the directions for response. The Crown was also given the opportunity to provide a written response to the Wai 2530, Wai 2531 and Wai 2532 applications.
29. The Crown then filed a response to the Wai 2530, Wai 2531 and Wai 2532 applications as directed. The Tribunal also received from the Wai 2522 and Wai 2523 claimants, the affidavit of Moana Maniapoto and a second affidavit from Professor Kelsey.
30. Interested parties were given an opportunity to provide written submissions. The Tribunal received submissions from a number of interested parties, all in support of the applications for an urgent hearing. The Tribunal also received from counsel for Ngāti Kahungunu an affidavit from Dr Adele Whyte.
31. The judicial conference took place in Wellington on 23 July 2015.

Applicants' submissions

32. In broad terms, the claimants allege that the TPPA will limit the Crown's ability to regulate its policies to deal with its Treaty of Waitangi obligations and to actively protect Māori interests.

They say there has been insufficient assessment of the impact of the TPPA on Māori rights and inadequate consultation with Māori.

33. By directions dated 14 July 2015 claimant counsel were directed to address the following issue:
- a) Why were the claims and applications for urgency not filed earlier?
34. Claimant counsel argued that the claims and applications for urgency could not be filed earlier because until President Obama obtained fast track authority in June 2015, there was no prospect that the TPPA negotiations would conclude in the short to medium term. In the event that President Obama did not obtain fast track authority, it was understood that the TPPA negotiations would effectively stall until after the 2016 United States presidential elections. On this basis the claimants say that had they filed claims and an application for urgency earlier, they would have been met with a response from the Crown that they were premature and speculative.
35. Claimant counsel complain that the Crown's position is circular. The Crown says that the claimants cannot meet urgency criteria because they are unable to point to significant and irreversible prejudice while the TPPA remains a draft agreement under negotiation. At the same time, the Crown maintains it is bound by confidentiality and therefore cannot reveal detail of its negotiating position or draft text of the agreement itself until the agreement is finally concluded. The Crown nonetheless maintains that its negotiating conduct is Treaty consistent and that Māori interests will not be prejudiced because the Crown will seek a Treaty exception clause in the TPPA.
36. Claimant counsel relied upon an affidavit dated 20 July 2015 from Moana Maniapoto.⁸ Ms Maniapoto exhibited various documents which highlight the uncertainty over timing of the TPPA negotiations. Taken together, she says that no one really had any clear idea of when conclusion of negotiations might be until near the end of June when President Obama was given fast track authority. Ms Maniapoto also takes issue with Crown assertions that its consultation with Māori was Treaty-consistent. She points to the fact that such evidence as there is of engagement with Māori is with Māori export and business interests or with Te Puni Kōkiri, a government agency.
37. Claimant counsel also relied upon an affidavit of Dr Adele Whyte dated 21 July 2015.⁹ Dr Whyte is the Chief Executive Officer of Ngāti Kahungunu Iwi Incorporated. Dr Whyte responds to the affidavit of Mr Harvey filed on behalf of the Crown which includes reference to consultation with Ngāti Kahungunu.
38. As early as December 2008, Ngāti Kahungunu had made a submission on the Trans-Pacific Strategic Economic Partnership Agreement (the predecessor to what became the TPPA). In a submission dated 8 December 2008 to the Ministry of Foreign Affairs and Trade (MFAT), Ngāti Kahungunu registered its interest and noted its status as one of the six iwi claimants in the Wai 262 Tribunal proceedings. In that submission Ngāti Kahungunu opposed any changes to the Pharmac scheme or the intellectual property regime that would reduce Pharmac's ability to fund cheaper generic drugs and that would increase the cost of medicine to low income earners who are predominantly Māori. Ngāti Kahungunu concluded recording its wish to be involved in all key stages of the negotiations and in particular an opportunity to consider and comment on any proposed amendments to the TPPA before the New Zealand government agreed to it. They said "involvement during the course of the negotiations rather than simply at the end when decisions have been made is necessary for any consultation to be meaningful and to ensure consistency with the Treaty of Waitangi."¹⁰

⁸ Wai 2522, #A3

⁹ Wai 2522, #A4

¹⁰ Wai 2522, #A4(b)

39. Dr Whyte has been a senior manager at Ngāti Kahungunu Iwi Incorporated since April 2010. Since that time the only record of contact from the Crown over the proposed TPPA was an invitation to meet in April 2010 and notes of a meeting that took place on 10 September 2010. Dr Whyte annexes notes from that meeting that make it clear that Ngāti Kahungunu sought to be engaged with both the TPPA negotiations and the WIPO IGC negotiations. The Crown is recorded as having committed to keep Ngāti Kahungunu informed, and to provide further opportunities for engagement. Dr Whyte says that despite that, there is no record of receiving anything further from the Crown since 2010. She therefore rejects the Crown's assertion that this constitutes reasonable efforts to inform itself of the Ngāti Kahungunu interest as a claimant in the Wai 262 inquiry, and as an iwi which has clearly stated its wish to be substantively engaged in the TPPA negotiations.

Crown submissions

40. The Crown opposed the applications for an urgent hearing. The Crown says there is no realistic window within which to conduct an inquiry, that the late submission of the claims does not warrant the diversion of Tribunal resources. The Crown considers that it was properly exercising their kāwanatanga role consistently with Treaty obligations, and that significant and irreversible prejudice is claimed but not demonstrated.
41. The Crown submits that Treaty principles are not unqualified; they are informed by reasonableness and practicality. In carrying out its Treaty obligations the Crown considers it is not required to go beyond taking actions which are reasonable in the prevailing circumstances. In the context of the TPPA, a relevant and practical consideration is the fact that all negotiating states have signed up to a confidentiality agreement.

Timeframe for inquiry

42. It was argued that the claimants have been aware of the intended timing of the TPPA for some time and have been aware of the matters that form the basis of their claims for a number of years. In light of this, the claims could have been prepared and submitted any time this year or in 2014 or earlier, and it is not tenable to claim urgency in these circumstances.
43. The Crown submits that the claimants are effectively seeking to have the TPPA delayed, but any delay to New Zealand's consideration would have the likely effect of New Zealand not being a party to the agreement. The Crown also suggests that the claimant's true motivation is to exclude New Zealand from the TPPA, not to participate in developing New Zealand's role within it.¹¹
44. Should New Zealand stop participating in negotiations, New Zealand would not have the opportunity to shape final terms and would not be able to negotiate better terms in any later accession process to the TPPA. If the TPPA was to go ahead without New Zealand, the country would be placed at a significant competitive disadvantage in the Pacific region.
45. It is submitted that the remaining decision points for New Zealand involve a yes/no decision about whether to sign up to the TPPA on the agreed terms, and this decision and a parliamentary process will occur over the next 18-24 months. In these circumstances the Crown argues that urgency is not warranted.

Proper exercise of kāwanatanga role

46. It was also argued by the Crown that making foreign policy and following its chosen policy agenda is consistent with its kāwanatanga right under Article 1 of the Treaty, so long as the Crown has taken reasonable steps to become informed of Māori interests, and has acted

¹¹ Wai 2522, #3.1.11, para 61

reasonably and in good faith. What is required is a balancing of article 1 and article 2 rights, consistent with the Court of Appeal's findings in the *Lands* case that "the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy".¹²

47. The Crown says the Wai 262 Report provides guidance on how to implement the Crown's kāwanatanga role in the context of international treaty making. The Tribunal in that report accepted that New Zealand must speak with one voice internationally and that voice must be the Crown. In exchange for the right to govern, Māori were guaranteed the protection of their interests, including those affected by international rules that New Zealand negotiates or signs up to, if and when they are found to exist. These interests must be protected to the extent that is reasonable and practicable. The steps required to protect Māori interests depend on the scale of its importance to Māori and the nature and extent of likely impacts on it.
48. The Crown submitted that while Māori stakeholders stand to benefit from the TPPA, some Māori interests may be impacted but these interests and impacts must be seen within the context of the agreement. The TPPA covers a broad range of issues which will impact on all New Zealanders. It is submitted that the core claims and views of the claimants in relation to key issues for Māori have been extensively canvassed through litigation, Tribunal processes, law reform and other processes. These the Crown are aware of and they have informed its position in negotiations.
49. It has been recognised by the Crown that they are required to make informed decisions on matters that affect Māori interests. When assessed within the broad context within which MFAT operate, the Crown submits that the amount and type of engagement has been adequate to enable them to be sufficiently well informed to be able to act in good faith.

Tribunal questions

50. By directions dated 14 July 2015, the Crown was directed to respond to a number of specific issues.¹³ They included the following (with relevant Crown responses summarised following each issue).

Question

51. Under the TPPA negotiation rules, who aside from government officials and ministers, are entitled to information, briefings and updates on the progress on the negotiations? Does the supply of such information include draft text of the agreement itself?

Crown response

52. Crown counsel confirms that the terms of the confidentiality agreement were as set out in Professor Kelsey's affidavit.¹⁴
53. Professor Kelsey deposes that a confidentiality agreement was entered into by the parties in March 2010. It provides as follows:

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

¹² Wai 2522, #3.1.11

¹³ Wai 2522, #2.5.6

¹⁴ Wai 2522, #A1, para 50

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.

54. Crown counsel acknowledge that whilst the terms of the confidentiality agreement allow for provision of documents and information to persons outside government, it was not New Zealand's negotiating practice to do so. New Zealand policy was to protect its negotiating position by not distributing or sharing text or formal documents relating to development of New Zealand's position beyond the negotiating team, other government officials on a "need to know" basis, or the Minister's office. A number of reasons were put forward to explain this position including the following:

a) The more people who have access to information, the less secure the information is and sharing text risks breaching confidence of other negotiating parties.

b) Counsel for the Crown submitted:

27.4 a common element to any international trade process is the need to consider requests that negotiating partners raise. The negotiating process needs to provide space to work through issues, to balance possibly competing stakeholder interests for the overall national interest, for governments to consider their policy positions, and for negotiators to work together to construct solutions that are acceptable to all Parties;

27.5 confidentiality is particularly important to a country such as New Zealand which has a liberal tariff policy and less economic weight and which may come under pressure to compromise in negotiations. These specific attributes of New Zealand mean that it is important for New Zealand to maintain the confidentiality of its negotiating position in order to ensure that New Zealand can advance negotiations in such a way as to give it the best chance of obtaining an outcome that is in the national interest;

27.6 it ensures that one particular stakeholder does not seek to gain advantage at the expense of another particular stakeholder. New Zealand needs to secure the best possible outcome in the negotiations. This cannot be achieved if negotiations are held in the public eye and the Government is forced to balance competing stakeholder interests in public during critical phases of negotiations;

27.7 it also serves to diminish perceived government bias towards particular stakeholders or 'stakeholder capture'.

c) Counsel for the Crown says further that those parties who may have provided text to certain stakeholders under the provisions of the confidentiality agreement, are in a different negotiating position, and in the case of the United States, have different constitutional arrangements than New Zealand. Crown counsel advise that it is MFAT's understanding that only the United States and Australia provide text to certain stakeholders. Crown counsel note provisions in United States legislation that provide congress with access to text (subject to conditions) and in Australia, where parliamentarians have been granted access to text (on condition of confidentiality).

Question

55. The Tribunal also sought a response to the following question:¹⁵

Prior to the conclusion of the negotiation over terms and text, can the Crown make available to the Tribunal and the parties more information as to;

- i. The inclusion or exclusion of the Treaty reservation clause (including text and any actual or anticipated opposition)

Crown response

56. In its written submissions, Crown counsel says¹⁶:

36. The Crown's response to the application stated that the Treaty of Waitangi exception clause is an important element of the Crown's approach to any FTA. New Zealand has successfully sought this exception in all FTAs since 2001.
37. Counsel is instructed that the Treaty of Waitangi exception clause has been a bottom line for New Zealand in all FTAs since 1991.[2001]
38. Ministry officials advise that the Treaty of Waitangi exception clause is considered a constitutional matter and is explained in those terms to other states.
39. New Zealand is the only country that insists upon such an overarching protection regarding indigenous peoples in its FTAs.
40. Counsel is instructed that New Zealand is seeking text in the TPP that is essentially the same as set out in Professor Kelsey's first affidavit (paragraph 114). The basis of the TPP negotiations, like other negotiations, is that nothing is agreed until everything is agreed. While officials are confident that they will secure provision of the Treaty of Waitangi exception clause in the TPP, this cannot be confirmed or guaranteed until the text is finalised.
41. Officials have advised, as indicated at the judicial conference, that when approaching a new FTA negotiation, New Zealand officials always reconsider the kind of text that is appropriate for the new agreement. This is of course the case for the Treaty of Waitangi clause, given the critical constitutional issues at stake if the Crown were unable to fulfil its Treaty of Waitangi obligations. The clause has to be "fit for purpose" and the Crown considers that it is. Officials advise scrutiny is also heightened because of the intensive negotiations that are required for negotiating parties to agree that it is a "must have" provision for New Zealand. Because of the clause's wide scope and the fact that it is only qualified by the reference to measures that are "unjustified discrimination" or a "disguised restriction on trade", negotiators have to be well informed to defend New Zealand's case for its inclusion.
42. Counsel is further instructed that the Crown considers that the drafting of the Treaty of Waitangi exception clause, together with the other exceptions, reservations and specific drafting of terms discussed below, secures the necessary regulatory freedom for the Crown to meet its Treaty obligations.

Question

57. The Tribunal also asked:¹⁷

Has the government formed a response to the recommendations of the Wai 262 Tribunal on the making of International Instruments? What steps has the Crown taken to adopt or implement these recommendations in the course of the TPP negotiations? Does the Crown have anything further to add in this regard to the information contained in Mr Harvey's affidavit?

¹⁵ Wai 2522, #2.5.6

¹⁶ Wai 2522, #3.1.41

¹⁷ Wai 2522, #2.5.6

Crown response

58. In written submissions, Crown counsel says:¹⁸

127. The New Zealand Government is considering its response to the WAI 262 Report, *Ko Aotearoa Tēnei*, and as such there currently are no domestic policy decisions in response to WAI 262 directly.
128. As New Zealand undertakes policy development in related fields, the Crown is cognisant of international instruments and emerging models of best practice. Mr Harvey sets out how the Wai 262 report has been helpful in the Ministry's trade negotiation practice.

Urgency criteria

59. The *Guide to Practice and Procedure of the Waitangi Tribunal* sets out the criteria it will consider in determining whether or not to grant an application for an urgent hearing. Of particular importance are the following:

- a) the claimants must be able to demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- b) that there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- c) that the claimants can demonstrate that they are ready to proceed to an urgent hearing.

60. The Tribunal may also consider the following factors:

- a) whether the claim or claims challenge an important current or pending Crown action or policy;
- b) whether an injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- c) whether there are any other grounds justifying urgency.

61. The Tribunal has stated on a number of occasions that it will only grant an urgent hearing in exceptional cases and where it is satisfied that adequate grounds for urgency have been made out. The applicant must establish that there is an exceptional case that warrants the diversion of the Tribunal's resources from other inquiries and priorities to conduct an urgent inquiry into their claim.

Decision

62. As we noted in our initial directions these claims have been filed on behalf of a range of prominent Māori individuals and organisations. They raise matters of considerable importance, not only to Māori, but to New Zealand as a whole.¹⁹

63. These applications, and others that have since joined, were made soon after President Obama obtained fast track authority and it became apparent that TPPA negotiations might conclude in July or early August 2015.

64. The applicants seek an urgent hearing and a recommendation that the Crown immediately halt progress towards signing the TPPA until it has meaningfully engaged with Māori. They

¹⁸ Wai 2522, #3.1.41

¹⁹ Wai 2522, #2.5.6

also seek release of the current draft text of the TPPA to enable Māori to engage in informed debate.

65. The Crown opposes. It says these claims could and should have been filed earlier and the window for inquiry has passed.
66. Counsel for the applicants pointed out that if they had lodged their claims and applied for urgency sooner, they would have been met with an argument from the Crown that the application is premature as negotiations were ongoing and may not conclude for a considerable period of time. There may be truth in this, but claimant counsel also seemed to have assumed that the Tribunal would simply have accepted the Crown view. The various process deficiencies said to attach to the Crown's conduct of the TPPA negotiations have been apparent for a number of years. Claims to that effect could have been lodged earlier.
67. There was no realistic prospect of a Tribunal inquiry and report on such complex and far-ranging issues between the filing of the first applications in late June 2015 and the probable conclusion of TPPA negotiations in late July 2015. That is a fact to be faced. The late filing of these applications is also a factor going to the exercise of discretion in relation to interim recommendations proposing a delay to the TPPA negotiations or to require production by the Crown of negotiation text in order to weigh alleged prejudice.
68. Having now had the opportunity to hear argument from the parties, we confirm the preliminary view expressed in our directions of 14 July 2015.²⁰

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

69. We therefore decline urgency on the terms sought by the claimants. We go on to consider, whether there may nonetheless be grounds for an urgent hearing of these claims as and when the text of any final agreement becomes available. What follows are our conclusions on this question based on the assumption that negotiations over the TPPA are concluded late July or early August 2015. If that does not happen and negotiations are pushed out beyond the United States presidential election in 2016, we will revisit this question after hearing further from the parties.
70. Demonstration by claimants that they are suffering or are likely to suffer significant and irreversible prejudice as a result of current or pending Crown action is a fundamental criteria for the granting of urgency. The secrecy of the TPPA negotiations means that it is difficult at this point to assess actual or potential prejudice. Nonetheless, at the conclusion of the judicial conference on 23 July 2015, we gave an oral indication that based on the evidence before us we had concerns as to the potential for significant prejudice to Māori arising from New Zealand's entry into the TPPA.²¹
71. It was on this basis that the panel expressed support for a proposal by claimant counsel that an independent barrister acceptable to both claimants and the Crown be appointed to undertake a review of the Treaty exception clause proposed by the Crown for inclusion in the TPPA. We expressed support for such a review on the basis that it may provide an opportunity to give some assurance to the claimants that Māori interests are being protected despite limited Māori involvement. At the very least it may help narrow matters that currently divide the claimants and the Crown. The analysis would have been of the clause being sought by the Crown, and would not necessarily involve an expectation that the Crown must seek amendments at this late stage. The Solicitor-General sought instructions and by

²⁰ Ibid

²¹ Wai 2522, #2.5.8

memorandum dated 28 July 2015, we were informed that ministers had declined the proposal for an independent review.²²

72. Crown counsel said:²³

3. The current New Zealand position on TPP wording, including in relation to the Treaty of Waitangi exception clause, has required considerable negotiation with the 11 other parties to the TPP talks. Officials have advised that seeking to engage with the other parties on the Treaty of Waitangi clause at this stage could result in parties seeking to revisit other issues of significance to New Zealand, which New Zealand had considered were concluded. Officials further advise there is no guarantee that changes (even minor) would be acceptable to the other parties at present. It might also jeopardise the Treaty of Waitangi clause as a whole – to the serious detriment of Māori and New Zealand.
4. The Crown considers that the Treaty of Waitangi exception clause sought in these negotiations is a valuable and effective protection of Māori interests. The clause has never been subject to question or challenge by international parties post-ratification since its first inclusion in an FTA in 2001.
5. The Crown does not accept that it has acted in breach of Treaty principles in relation to the TPP.

73. We acknowledge that officials and the Minister responsible for the conduct of the negotiations are better placed than the Tribunal to assess risk to the successful conclusion of the TPPA associated with any attempt to revisit the Treaty clause at this late stage. At the same time, it is unfortunate that such a review was not possible as it may have been able to provide Māori with greater assurance that the Treaty clause is fit for purpose.

74. While an independent review of the Treaty clause proved not to be possible, we are satisfied that there is a good case for the Tribunal to grant urgency or priority to the hearing of these claims once the text of the TPPA is available. The issues for urgent inquiry being:

- (a) whether or not the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be; and
- (b) what Māori engagement and input is now required over steps needed to ratify the TPPA (including by way of legislation and/or changes to Government policies that may affect Māori).

75. Such a hearing can take place as soon as possible following the release of the text of the TPPA itself. If negotiations on terms and text of the TPPA are concluded in the next few days in Hawaii, we are informed that the revised and authoritative text of the TPPA is likely to be available towards the end of August or early September 2015. Further directions will issue once timeframes for release of the TPPA become clear.

76. We are satisfied that there is a strong case for an urgent hearing of this kind for the following reasons:

- (a) We understand the TPPA in both substance and reach is substantially different from previous free trade agreements. The efficacy of the Treaty reservation clause in such an agreement is unclear and untested.
- (b) The confidentiality requirements of the TPPA negotiations do not prevent ministers and officials from providing information and documents to persons outside government including Māori. It is New Zealand's negotiating practice not to do so. This can be contrasted with the approach of Australia and the United States. For example, corporate interests appear to be directly involved in developing the United States negotiating position. In any event, international negotiations will take second place to domestic

²² Wai 2522, #3.1.43

²³ Ibid

analysis once negotiations conclude and the formal ratification process of each state begins.

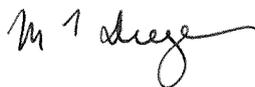
- (c) The Crown argues for the inclusion of the Treaty of Waitangi exception clause on the basis that it is a constitutional requirement, but its domestic engagement appears to be based on a view of selected Māori organisations as stakeholders rather than Māori more generally as Treaty partners.
 - (d) The TPPA apparently includes intellectual and cultural property, foreign investment, state owned enterprises, genetic resources, indigenous rights, New Zealand flora and fauna and use of natural and physical resources. Evidence of the degree of engagement with Māori appears to date, relatively limited and selective.²⁴ Lack of proper engagement and follow up with Ngāti Kahungunu raises particular concern.
 - (e) The Wai 262 Tribunal released its report *Ko Aotearoa Tēnei* in 2011. It contains a number of findings and recommendations of direct relevance to matters put in issue in these claims. The Government is still considering its response and we are told there are no domestic policy decisions in response to Wai 262. Evidence filed on behalf of the Crown referred to the Wai 262 report as being helpful to the Ministry's trade negotiation practice, but it remains unclear whether or not the Crown truly has met its Treaty responsibilities in the negotiation of the TPPA.
 - (f) The secrecy of the TPPA negotiations and their potential impact upon Māori heighten the Crown's duty of active protection. It is appropriate that there be an opportunity for inquiry and report prior to ratification of the TPPA.
77. It is clear that at some point legislation will be needed to implement the TPPA. The Crown anticipates legislation will be introduced in April/May 2016. At that point, our jurisdiction would end. Before that, a hearing might usefully highlight the views of Māori and assist the Crown in the formation of Government policies concerning implementation and ratification of the TPPA. This would include the form of the draft legislation to go before the House. We view this as a necessary focus for inquiry because of the concerns we have as to the adequacy of the Crown's engagement with Māori over the TPPA. Once the Crown identifies those statutes that will need to be amended, and what policies are to be adopted or amended in order to implement the TPPA we will hear further from the parties on issues for inquiry.
78. The timing of any inquiry and related procedural steps will be the subject of further directions once the outcome of the current round of TPPA negotiations is known. Crown counsel have raised a potential issue concerning comity as between Tribunal inquiry and parliamentary process. At this point we see no impediment to inquiry but will consider this issue further once the timeframe for commencement of the parliamentary process is clear. The Crown anticipates comity issues are manageable.
79. We have come to this decision not knowing whether the TPPA negotiations will be concluded over the next few days. In order to avoid any risk of compromise to what may be final stage negotiations we have decided that our decision should not be released until after the negotiation meetings currently underway in Hawaii have concluded. The focus for inquiry recorded in this decision is based on the assumption that the Hawaii meetings will conclude negotiations and that our window for inquiry will be a narrow one. If we are to conduct an inquiry before legislation may be introduced in March or April 2016, it will need to be focused upon what is now required of the Crown in order to implement and ratify the TPPA.
80. If the TPPA is not concluded and is delayed until after the 2016 United States presidential elections, we will consider next steps after hearing further from the parties. An inquiry in this timeframe may enable a wider focus to include more detailed scrutiny of the extent to which

²⁴ Wai 2522, #3.1.41

Crown negotiation practice has in this instance been consistent with the Crown's obligations to Māori under te Tiriti.

The Registrar is to send a copy of this direction to all those on the distribution lists for the claims concerning the Trans Pacific Partnership Agreement, but not before midday, Monday 3 August 2015.

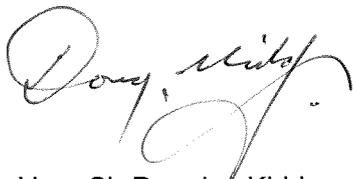
DATED at Wellington this 31st day of July 2015



Judge MJ Doogan
Presiding Officer



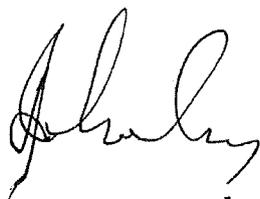
Sir Tamati Reedy
Tribunal Member



Hon. Sir Douglas Kidd
Tribunal Member



Tania Simpson
Tribunal Member



David Cochrane
Tribunal Member