



Expert Paper #3

MĀORI RIGHTS, TE TIRITI O WAITANGI AND THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

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Key points: Tino rangatiratanga and active protection; Traditional Knowledge, Biodiversity, Environment Chapter; UN Declaration on Rights of Indigenous Peoples; Waitangi Tribunal claim; Treaty of Waitangi exception; Economic gains and costs to Māori; Post-agreement process.



Funding support from the
New Zealand Law Foundation

Negotiations for the Trans-Pacific Partnership Agreement (TPPA) among twelve negotiating countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam - were concluded in Atlanta, USA on 5 October 2015. The text was released on 5 November 2015. The agreement has 30 chapters and many annexes, with parties also adopting bilateral side-letters. They are expected to sign the TPPA on 4 February 2016 in New Zealand, which is the formal depositary. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPPA will come into force within two years if all original signatories notify that they have completed their domestic processes, or after 2 years and 3 months if at least six of them, including the US and Japan and several other large countries, have done so. This research paper is part of a series of expert peer-reviewed analyses of different aspects of the text.

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KEY POINTS

- ‘With each instrument that it signs up to, the Crown has less freedom in how it can provide for and protect Māori, their tino rangatiratanga, and their interests in such diverse areas as culture, economic development and the environment.’ (Waitangi Tribunal, WAI-262, 2012)
- The TPPA fetters the sovereignty of New Zealand governments and has the potential to chill their future decisions, including those relating to Māori under te Tiriti o Waitangi, He Wakaputanga o te Rangatiratanga (Declaration of Independence), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and as a matter of public policy and social justice.
- The TPPA conflicts with Māori rights and Crown obligations under te Tiriti and the UNDRIP. The Crown’s prior commitment to indigenous peoples’ right to self-government and political autonomy and their right to the recognition, observance and enforcement of treaties should have informed the negotiation of the TPPA.
- Because the TPPA has the potential to impact on hapu and iwi and their resources, it requires informed consent, or at the least a robust bona fide engagement so Māori views are fully incorporated into decision making.
- Despite the Wai 262 report saying the Crown’s then policies and practices did not comply with the Treaty, and too often came after decisions were made, there was no credible attempt to engage with Māori as the Crown’s Treaty Partner before or during the TPPA negotiations.
- Several chapters guarantee foreign states and their commercial interests the right to participate in New Zealand’s domestic decisions, while Māori as tangata whenua have no similar guarantees.
- Rights of Māori relating to Intellectual Property (IP), biodiversity, and environmental law and policy, guaranteed through te Tiriti o Waitangi and the UNDRIP, could be significantly affected by the TPPA.
- The IP chapter strengthens the rights of holders of state-recognized intellectual property rights, a form of intellectual property that has generally not protected mātauranga Māori and the rights of kaitiaki and has, in many cases, undermined those rights.
- Despite the Treaty of Waitangi exception, the provisions in the IP chapter will make it more difficult for Māori to achieve changes to New Zealand IP law that are necessary to protect rights and obligations of kaitiaki in relation to mātauranga Māori.
- Commercialisation of the mātauranga associated with genetic and biological resources, and of the resources themselves, can compromise the kaitiaki relationship and put the Crown in breach of Treaty principles. Yet the importance of conservation and biological diversity in the TPPA is framed by an objective of facilitating use of biological and genetic resources.
- The Environment chapter provides general commitments to environmental protection, specific detail on a small number of environmental issues, and some procedural mechanisms for cooperation between parties. But there is nothing that reflects Waitangi Tribunal recommendations to strengthen Māori participation in environmental decision-making, planning and management, including under the Resource Management Act.
- The UN special rapporteur on the rights of indigenous peoples singled out investment chapters of agreements like the TPPA and investor-state dispute settlement as a risk to indigenous rights and a constraint on their ability to gain remedies.

- The TPPA leaves the rights and interests of Māori vulnerable to foreign states and corporations who have no obligations under te Tiriti or the UNDRIP, and who will have a legal right to pursue their interests through private international mechanisms. This may further undermine the willingness of governments to implement Tribunal recommendations for fear of legal action.
- The Treaty exception is limited in scope and relies on the good will of the government to protect Māori rights, which repeated Waitangi Tribunal reports show it has failed to do.
- The government has made far-fetched claims regarding the economic gains to New Zealand, and to Māori because of their significant presence in natural resource sectors of the economy. Those figures are not supported by evidence and ignore the tangible and intangible costs of the TPPA to Māori.
- The TPPA's economic model is based on trade liberalisation, monopoly rights to own exploit intellectual property, and privileged rights for foreign investors, and will not serve a future Māori economic development agenda that is built around core Māori values, commitment to environmental sustainability, and tino rangatiratanga.
- The Waitangi Tribunal will hold an urgent hearing in March 2016 on a claim that the TPPA is inconsistent with te Tiriti, focusing on the Crown's processes and whether the Treaty of Waitangi exception fully protects Māori using 3 studies: fracking, affordable medicines, and water. The Crown has refused to defer further action on the TPPA until the claim is resolved.

Tino Rangatiranga and active protection

In 2011 the Waitangi Tribunal report *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262) observed that: 'With each instrument that it signs up to, the Crown has less freedom in how it can provide for and protect Māori, their tino rangatiranga, and their interests in such diverse areas as culture, economic development and the environment.'¹

(i) TPPA: a fetter on sovereignty

The Trans-Pacific Partnership Agreement (TPPA), with 30 chapters, many annexes, and numerous bilateral side-letters, goes further than any previous agreement. Its goal is to advance the commercial and strategic interests of the 12 participating countries. Very few of its rules and obligations deal with traditional trade in goods. Most target the 'behind the border' decisions of governments by restricting the kinds of policies, laws and actions they can adopt, setting the criteria and objectives that must be privileged, and giving foreign states and commercial interests the right to participate in many of those decisions.

The strongest 'behind the border' rules impose binding and enforceable obligations on national governments. In particular, they promote and protect foreign investment, extend monopoly rights over intellectual property, restrict the regulation of financial and other services, including telecommunications, control international flows of data and capital, and prevent local preferences in government procurement. The chapters that address social concerns like labour

¹ Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Second report [Wai 262], para 8.7, p.689

and environment, or small and medium enterprises and developing countries, are much weaker. There is no generic protection for indigenous peoples. Some countries have specific exceptions in particular chapters. The exception allowing New Zealand governments to give preferential treatment of Māori, subject to certain conditions, is unique but inadequate.

The Agreement establishes a TPP Commission and a raft of specialist committees through which other governments will monitor New Zealand's compliance with the TPPA's rules. If party believes New Zealand has breached its obligations, it can bring a dispute before an offshore tribunal; if the case succeeds New Zealand can face economic sanctions until it changes the problematic law or policy. In addition, foreign investors from TPPA countries can directly enforce special rights granted under the investment chapter through ad hoc tribunals and seek compensation for losses to their investment.

As the Waitangi Tribunal foreshadowed, the TPPA fetters the sovereignty of New Zealand governments and has the potential to chill their future decisions, including on policies relating to Māori under te Tiriti o Waitangi, the He Wakaputanga o te Rangatiranga (Declaration of Independence), the UN Declaration on the Rights of Indigenous Peoples, and as a matter of public policy or social justice. It is telling that the Crown has never accepted any equivalent binding obligations to comply with te Tiriti or other sources of Māori rights, and iwi and hapu have no equivalent legal forum to enforce compliance or impose sanctions until the Crown does so.

(ii) Crown's international treaty-making obligations

As part of the Wai 262 claim the Waitangi Tribunal undertook an in-depth examination of the Crown's actions and obligations when negotiating international instruments. A review of the Crown's approach over several decades shows that successive governments and MFAT were fully aware of how important these agreements are to Māori, and for a short time they actively engaged on the issues.

As a result of pressure from Māori, MFAT established a Kaupapa Māori Division in 1990, followed by a Framework for Responsiveness to Māori in 1995.² Outreach meetings were initiated, but their content was usually very general. There were some more specific meetings around World Trade Organization (WTO) negotiations in 1999 and several other trade and investment instruments. In 2003 a general Māori outreach strategy was designed to respond to a growing interest, with a work programme to be coordinated jointly by MFAT and Te Puni Kokiri (TPK). The Kaupapa Māori Unit was replaced by a Māori Policy Unit in 2006 with the mandate to build relationships with a range of Māori 'stakeholders' and provide advice on consultation. Responsibility for consultation on specific instruments rested with the relevant policy division inside MFAT.

A Strategy for Engagement with Māori on International Treaties was developed jointly by TPK and MFAT in 2000 and endorsed by Cabinet.³ The strategy specifically recognised Māori have interests in intellectual and cultural property, foreign investment, genetic resources, flora and fauna, use of natural physical resources, indigenous rights, human rights, employment and education – all issues that arise under the TPPA. The level of engagement would be decided on a case-by-case basis:

² Wai 262, para 8.3.1, p. 675

³ Wai 262, para 8.3.2 pp 676-77

In general terms, Māori involvement would be expected on any treaty action affecting the control or enjoyment of Māori resources (te tino rangatiratanga) or taonga as protected under the Treaty of Waitangi.

It noted there were opportunities to engage prior to the government deciding to enter negotiations, throughout the treaty-making process, and once a treaty had been tabled in the House.

The Cabinet policy required that iwi and Māori organisations receive six-monthly reports on international treaties under negotiation. The Wai 262 report assumed the policy was still in force as of 2011. If so, case it appears not to have been followed for the TPPA.

The Crown rejected the claim that its approach was a breach of the Treaty principles, saying it had acted reasonably and in good faith where it had obligations to act. Moreover, it had to speak with one voice on behalf of New Zealand in negotiations. New Zealand had limited influence on other states and could not impose its own negotiating timetable. The Tribunal disagreed, noting it was ‘this very control over foreign affairs that affirms the corresponding obligation to protect Māori interests where they cannot, by definition, do so themselves.’⁴ Because Māori interests were profoundly affected by international instruments, there had to be commitment to permanent engagement on such issues.⁵

In sum, the Treaty requires the identification and active protection of Māori interests when they are likely to be affected by international instruments. Māori must have a say in identifying the interest and devising the protection. But the degree of protection to be accorded to the Māori interest in any particular case cannot be prescribed in advance. It will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders, and on the international circumstances which may constrain what the Crown can achieve. The Crown’s duty of active protection becomes ever more urgent in light of the widening reach and rapid evolution of international instruments.⁶

Reflecting on the trigger points for this sliding scale the Tribunal said

the more significant the Māori interest, or the more specific the Treaty interest, the likelier it is that the Crown should be engaged at the more active end of the spectrum, working together with Māori to ensure that Māori interests are accorded sufficient priority. Success will only be achieved if the Crown engages early with Māori in relation to international instruments and talks with the right people about the nature and extent of Māori interests, and how New Zealand’s participation might need to be managed.⁷

The Wai 262 report concluded that the Crown’s then policies and practices were not compliant with the Treaty, and too often came at the end of an international process rather than at the

4 Wai 262, para 8.6, p.685

5 Wai 262, para 8.5, p.680

6 Wai 262, para 8.5, p. 681

7 Wai 262, para 8.5.2, p.682

beginning and during negotiations.⁸ The Tribunal proposed a number of mechanisms to bring the Crown into compliance, including an annual report on activities under the Māori engagement strategy to the Māori Affairs Select Committee.⁹ It also recommended the Crown should identify all existing or proposed Māori bodies that could be used as forums for dialogue. Such forums are especially important for Māori and the Crown to have conversations where there is disagreement about proposed agreements, and through which the Crown is consistently reminded of its responsibilities.¹⁰

In assessing where on the sliding scale a negotiation falls ‘the question would need to be asked: has the Crown not only engaged in good faith to find out Māori views but actually listened, taken those views into account, and understood that the more significant the issue for Māori, the more weight should be accorded to their views?’¹¹

The Crown ignored the Wai 262 recommendations when it embarked on the TPPA negotiations, arguably the largest and most significant international economic treaty ever. The history suggests this failure to engage must have been deliberate. The Crown has not formally responded to the Tribunal’s recommendations. However, its submission to the claim on the Ture Whenua Māori Act reforms in December 2015 states:

The Crown ... acknowledges that the Wai 262 Tribunal, in considering the extent of the Crown’s engagement with Māori over international instruments, found that “the Treaty standard for Crown engagement with Māori operates along a sliding scale” depending on the nature of the Māori interest, with negotiation aimed at achieving consent only required in circumstances where “the Māori Treaty interest is so central.” ... [T]he Crown does not accept Treaty principles require this.¹²

(iii) Crown’s failure to engage on TPPA

In the 1990s and early 2000s Māori were very active in demanding input into negotiations on free trade and investment treaties. Te Puni Kokiri and the Ministry of Foreign Affairs and Trade (MFAT) organised hui and consultations on the intellectual property agreement (TRIPS) in the WTO, the Multilateral Agreement on Investment (MAI), and early bilateral free trade agreements, such as with Singapore. The current Treaty of Waitangi exception (discussed below) arose out of this process.

There has been no credible attempt to engage with Māori as the Crown’s Treaty Partner in the TPPA. Ngati Kahungunu was consulted about intellectual property issues relating to Wai 262 early on, but that stopped in 2010. An Official Information Act request revealed the only Māori on MFAT’s list of ‘stakeholders’ was the Federation of Māori Authorities (FOMA).¹³ A handful of

8 Wai 262, para 8.7, p.689

9 Wai 262, para 8.6.3, p. 688

10 Wai 262, para 8.6, p.685

11 Wai 262, para 8.6.2, p.686

12 Closing Submissions of Counsel for the Crown, Wai 2478, p19, note 64, 15 December 2015

13 MFAT, ‘Trans-Pacific Strategic Economic Partnership Agreement. Consultation/Stakeholder Engagement Overview’, undated, p.8 (released under the Official Information Act)

other individuals and groups were listed as having been consulted, almost all because they attended the stakeholder events when negotiations were held in New Zealand,¹⁴ or because they sought out meetings.

When the negotiations began in March 2010 the participating governments signed a pact saying no documents relating to the negotiations, aside from the final text, would be released until four years after the TPPA comes into force. The main sources of information have been leaked texts and monitoring on the margins of negotiating meetings.¹⁵ When negotiations were concluded the Crown released its analyses immediately, but the text was not made publicly available for another month. The Crown refused to release any of the draft text to the Waitangi Tribunal prior to conclusion of the negotiations, or even confirm the wording of the proposed Treaty of Waitangi exception. Background documents relating to the drafting of that exception, released under the Official Information Act, had almost everything important blanked out.¹⁶ In November 2015 MFAT held an invitation-only ‘information session’ in Auckland for the Waitangi Tribunal claimants, but that was only after the negotiations were concluded and the final text was public.

Traditional Knowledge, Biodiversity and Environment

(i) Intellectual Property and Traditional Knowledge

Issues relating to intellectual property (IP), biodiversity, and environmental law and policy are matters in which Māori have long demonstrated a significant interest, based on rights guaranteed by the Treaty of Waitangi. Those rights could be significantly impacted upon by the provisions of the TPPA that address those subjects. These provisions would not be so concerning if the Treaty of Waitangi exception contained in the TPPA was more robust. That exception is likely to be limited in practice because the New Zealand government must agree that something is a Treaty obligation and be willing to act on it before it will invoke the Treaty exception. Even then, there are grounds on which the action may be challenged by another party to the TPPA and the mere possibility of a dispute may well deter government from taking action that would require invoking the Treaty exception. Recent history with these issues justifies that scepticism.

The Intellectual Property Chapter significantly strengthens the position of holders of recognised intellectual property rights such as copyrights, trade marks, and patents. However, these forms of property rights often provide little or no recognition of traditional knowledge holders, who then see their own rights and responsibilities undermined. These protections are integral to the

14 The TPPA parties stopped holding stakeholder sessions at their negotiations in August 2013. Only two such events were held in New Zealand, in 2010 and 2012.

para 68, p.18n Rights Councilr on the Rights of Indigenous Peoples Victoria ent de for and protect Maori, their tino rangatira

15 Trade Minister Tim Groser’s refusal to release information under the Official Information Act was challenged successfully in the High Court, with applicants including Ngati Kahungunu. The Minister delayed the reconsideration of that request and release of any information until 5 February 2016, the day after the TPPA is expected to be signed.

16 Minister of Trade to Jane Kelsey, Response to Official Information Act Request, 18 December 2015

exercise of tino rangatiratanga over taonga katoa in te Tiriti, and explicitly recognised in Article 13(1) of the UNDRIP, which acknowledges the right of indigenous peoples to ‘maintain, control, protect and develop their ... sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora’, and that they also ‘have the right to maintain, control, protect and develop their intellectual property’ over such things.

The inability of the system of existing intellectual property rights to prevent the misuse of traditional knowledge or to ensure that traditional knowledge holders are entitled to benefit from the use and application of such knowledge were central issues identified by Māori in the Wai 262 claims. The claimants identified a number of concerns.¹⁷

One example relates to the use of New Zealand’s longest place name, Te Taumata . . . (also claimed to be the longest place name in the world). The name is bound up with the deeds of a tipuna¹⁸ of Ngāti Kere. In an attempt to prevent the ‘unauthorised’ use of the name on merchandise such as tee-shirts, mugs, and tea towels, members of Ngāti Kere sought to register the name as a trade mark. The Intellectual Property Office of New Zealand (IPONZ) rejected the application on the grounds that a geographical name ought to be available to anyone to use as a description of the origin of goods or services. Eventually, the personal name ‘Nopera’ was added to the application and a trade mark granted. However, this did not provide protection in relation to the correct name of Te Taumata, which has been continued to be used by businesses even when asked to stop doing so by those who are kaitiaki of the name. In some cases, this use is culturally offensive, such as on a bottle of wine. In another case, a clothing manufacturer claimed that because it had been using the name before the date the trade mark was granted, it had the prior claim to its use.¹⁹ As the Waitangi Tribunal’s report noted, the trade mark registrations in this case “neither protect the mātauranga Māori nor assist [...] people in the role as kaitiaki of the name.”²⁰

Similar issues arise for Māori in relation to copyright. One of the best known examples is the haka, *Ka Mate*. As noted by the Waitangi Tribunal:

Within the existing IP framework, *Ka Mate* is considered to be in the public domain, and is therefore freely available for anyone to use. Had copyright law existed when it was first created, its lyrics would have qualified for copyright protection. However, such protection would have been for only a limited period of time – that is, the life of the author plus 50 years. The claimants say that the limited duration of copyright runs counter to the perpetual nature of the kaitiaki relationship. Copyright law therefore provides inadequate protection for their interests in taonga works such as *Ka Mate*.²¹

The limited duration was not the only aspect of copyright that Wai 262 claimants identified as unhelpful in protecting mātauranga Māori and its various forms of expression. The originality

17 Wai 262, pp. 54-71.

18 ancestor

19 Wai 262 at p. 66.

20 Waitangi Tribunal Ko Aotearoa Tēnei – Taumata Tuarua, Volume one, (Wai 262), 2011 at 66.

21 Wai 262 at 66.

requirement can disqualify from copyright protection works such as *mōteatea*,²² while at the same time allowing third parties to create rights in collections or arrangements of taonga works that are “in the public domain”.²³ The fixation requirement does not provide effective protection for taonga works that are transmitted orally and do not have a fixed form.²⁴ And although the concept of moral rights has some similarity to the kinds of obligations that kaitiaki have to protect the integrity of mātauranga Māori and its expressions, the TRIPS Agreement does not require the protection of moral rights in its minimum standards.²⁵ Finally, because many types of taonga works are understood to have been collectively created by iwi, hapū or whanau, there is no identifiable individual(s) to whom the right could be attributed.²⁶

The Waitangi Tribunal found that “IP law is not focused on the kaitiaki obligation to safeguard and protect the integrity of mātauranga Māori and taonga works. In addition, the law does not prevent derogatory or offensive use of mātauranga Māori and taonga works. Rather the focus of IP law is on facilitating commercial exploitation.”²⁷

Māori have been trying to get traction on these issues and meaningful changes to law and policy in this area for many years, as the Wai 262 claims demonstrate. These matters will only become more difficult to address under the TPPA, because the IP chapter grafts stronger protections, such as a copyright term of life plus 70 years, onto the same antithetical conceptual foundations. Because IP rights are also defined as investments,²⁸ changes that adversely affect those rights or rights holders could become subject to an investment dispute.

(ii) Biodiversity and Genetic and Biological Resources

Māori have previously expressed concern about the commercialisation of the mātauranga²⁹ associated with genetic and biological resources, as well as the commercialisation of those resources themselves. Under the Environment chapter (chapter 20), TPPA Parties and their investors, who do not have Treaty of Waitangi obligations, will have a stake in New Zealand’s environmental law and policy, making it even less likely that the government will respond to these concerns.

Māori claimants in the Wai 262 claims raised concerns that bioprospecting can conflict with kaitiaki³⁰ interests in a number of ways. They argued that other parties should not be able to use the traditional knowledge associated with Taonga Species³¹ to exploit the genetic or biological

22 An ancient form of waiata or song used to keep oral traditions alive

23 Wai 262 at 54-55.

24 Wai 262 at 55.

25 Wai 262 at 55-56.

26 Wai 262 at 57.

27 Wai 262 at 65.

28 Article 9.1

29 traditional knowledge and understanding

30 carer, guardian, protector and conservator

31 native birds, plants and animals of special cultural significance and importance

resources from those species without the consent of the kaitiaki. Where bioprospecting was inconsistent with tikanga Māori,³² it would be harmful to the relationship between the kaitiaki and the Taonga Species. Some claimants were not opposed to the commercialisation of the knowledge associated with, or genetic or biological resources derived from, Taonga Species, so long as that was done in a way that was consistent with tikanga Māori and any commercial benefit was shared with the kaitiaki community. The Tribunal noted that this would be consistent with moves in the international community to ensure that Prior Informed Consent for the use of these species is gained from appropriate people and there is some form of Access and Benefit Sharing arrangement in place.

The Tribunal summarised the claimants' perspectives in relation to bioprospecting as follows:

- Bioprospectors should not use mātauranga Māori about taonga species without the consent of kaitiaki.
- Bioprospectors should not use taonga species if such use is inconsistent with tikanga Māori and therefore damages the kaitiaki relationships with those species. Kaitiaki claim a right of veto over use in order to protect their relationship.
- The kaitiaki relationship with taonga species is so all-encompassing that it amounts to ownership of the genetic resources of that species. The result, claimants said, is that no exploitation of those resources should be allowed without kaitiaki consent.
- In exceptional cases, the kaitiaki relationship is so special that it extends to both the genetic and biological resources of the taonga species. They therefore claim ownership of each living example of that species within the traditional territory of the kaitiaki.³³

Article 20:13 (Trade and Biosecurity) recognises the importance of conservation and biological diversity and states that each Party will promote and encourage conservation and “the sustainable use of biological diversity, in accordance with its law or policy”. However, biological diversity is not seen as being of inherent value in the context of the TPPA. Parties are required to promote the sustainable use of biological diversity, as opposed to biological diversity itself. The focus on the use and exploitation of genetic resources is captured by Article 20.13(4):

The Parties recognise the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with each Party's international obligations. The Parties further recognise that some Parties require, through national measures, prior informed consent to access such genetic resources in accordance with national measures and, where such access is granted, the establishment of mutually agreed terms, including with respect to sharing of benefits from the use of such genetic resources, between users and providers.

This provision acknowledges that some international obligations (such as the UNDRIP) may condition access to genetic resources. Likewise, the parties recognise that some national governments require prior informed consent. They also recognise ‘the importance of respecting, preserving and

³² customary system of values, laws and practices that have developed over time and are deeply embedded in the social context

³³ Wai 262 at p.157.

maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.’ But there is no specific protection for such measures from other rules in the TPPA. The leaked environment chapter text showed Peru and Mexico had proposed to include “the approval and involvement of the holders of knowledge, innovation and practices of indigenous and local communities”, and stronger language on fair and equitable sharing of the benefits.³⁴ That did not survive to the final text.

This issue exposes the multiple weaknesses of the Treaty of Waitangi exception in the TPPA. Not only does the government have to accept that it has an obligation to Māori under te Tiriti or otherwise, such as the UNDRIP, it must also be prepared to act on it. To date the New Zealand government has failed to address problematic aspects of national law that Māori have identified, including prior and informed consent. Any belated action by the government that relied on the exception could also be challenged as “arbitrary discrimination”, given the government’s previous decisions that such action was not warranted.

(iii) Environmental Law

Some of the key concerns that the Waitangi Tribunal heard from claimants in the Wai 262 inquiry relate to the fact that Māori interests rarely seemed to be determinative or be given an appropriate weighting in decisions affecting the environment. Although the Resource Management Act contains a number of provisions designed to provide opportunities for Māori to participate in environmental decision-making, many of those provisions are rarely used and the Act has failed to deliver on its potential in this regard.

The Tribunal suggested that a Treaty-consistent system of environmental management should be able to deliver:

- *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard; and
- *effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management when decisions are made by others.

The Tribunal suggested the enhancement of iwi resource-management plans as a key reform that was necessary to implement such a system. The Resource Management Act already makes provision for the development of iwi management plans, but the Tribunal proposed radically changing their status and giving them real teeth. The Tribunal took the view that iwi should be supported to set out their own vision for the way in which they wish to give expression to the values of whanaungatanga³⁵ and kaitiakitanga in the management of the natural environment and in relation to their particular taonga.

³⁴ TPP Environment Working Group, Report from the Chairs and Consolidated Text for the Environment Chapter, 24 November 2013; Chapter SS Environment, Article 13, <https://wikileaks.org/tpp-enviro/>

³⁵ attaining and maintaining relationships

Crucially, the Tribunal recommended that confirmed aspects of an iwi resource management plan be complied with in the same way as district and regional plans and that a transparent process be developed for confirming an iwi resource management plan. Any aspects that the local authority agrees with could automatically be confirmed, but a statutory negotiation process might be undertaken where there is disagreement between the iwi and the local authority. Ultimately the Environment Court may decide the matter. At the least, local authorities would need to genuinely engage with iwi resource management plans, provide reasons for any disagreement with such plans, and be accountable to the Environment Court for its decisions. In most cases it ought to provide much more than that, such as giving kaitiaki the ability to exercise real decision-making authority in relation to their taonga and consolidating important partnership relationships in the management of the natural environment.

The proposed amendments to the Resource Management Act that are currently before Parliament include some measures which are designed to increase Māori participation in local government planning processes, but these remain a long way from the shift in law and policy in this area that was sought by the Wai 262 claimants. Achieving any movement on these issues has been difficult enough for Māori in dealing directly with a Treaty partner. The ability of TPPA Parties to question, influence and legally challenge environmental law and decisions adds a further complication to addressing these Treaty of Waitangi issues.

The Environment chapter includes a number of important procedural mechanisms, including a cooperation framework,³⁶ and the establishment of an Environment Committee³⁷ and a process for Environmental Consultations between the Parties.³⁸ But even if the Treaty of Waitangi exception provided complete protection, it is not at all clear that the New Zealand government is in a position to ensure that its own Treaty of Waitangi obligations are appropriately taken into account through the TPPA's mechanisms.

The Environment chapter does nothing to advance indigenous values or rights in decision making. The broad overall objectives set out in Article 20.2 are focused on commercial interests. In particular, they “promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation”. Environmental laws or other measures should not “constitute a disguised restriction on trade or investment between the Parties.” The chapter contains articles directed at a small number of particular environmental issues (e.g. protection of the ozone layer; protection of the marine environment from ship pollution; marine capture fisheries), but generally the Parties' commitments remain at quite a high level without much specific detail.

36 Article 20.12

37 Article 20.19

38 Article 20.20

The exceptions chapter (chapter 29) has the following provision entitled Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources:³⁹

Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.

This is a cosmetic provision that adds absolutely nothing. It merely recognises that each party can take such measures where its international obligations, including the TPPA, allow it to do so.

In sum, the Waitangi Tribunal found many breaches of the principles of the Treaty in the long running Wai 262 inquiry. Most still remain to be addressed. Perhaps the key concerns that arise from the TPPA provisions in relation to these subjects are less about substantive issues and more about the process that in turn informs the decisions about substantive law and policy. Given the weakness of the Treaty of Waitangi exception in Chapter 29, it is likely that the New Zealand government will become more conservative and entrenched on these issues and it will become increasingly difficult to get any movement towards more Treaty-consistent law and policy in this area.

(iv) Investment protections and Investor-State Dispute Settlement (ISDS)

The Investment Chapter is more significant for environmental regulation than the Environment Chapter and is perhaps the most controversial part of the TPPA. Section B of the Investment chapter allows foreign investors from TPPA countries to enforce the special rights they are given under the agreement through offshore ad hoc arbitral processes. These tribunals have become highly discredited, with some countries withdrawing from the mechanisms and the European Union proposing a quite radical alternative.⁴⁰ The TPPA makes some minor adjustments in response to these concerns, but does not address the basic problems.

The fundamental objection is that ISDS lacks the characteristics of a credible and independent legal process and effectively supplants national judicial processes as the appropriate legal forum for a privileged class of foreign investors. Investment tribunals are still ad hoc with the 'judges' selected by the parties. The TPPA says there will be a code of conduct for arbitrators, but it is not required until the agreement comes into force, so it is impossible to assess whether it will even attempt to address the conflicts of interest that arise when practicing investment lawyers also act as arbitrators. Senior judges have expressed concern that decisions of domestic courts can be challenged under ISDS, and domestic appeal processes by-passed.⁴¹ There is no system of precedent, which means interpretation of open ended or novel text in the TPPA will be unpredictable, and there is no appeal. Awards can and do run into the hundreds of millions,

³⁹ Article 29.8

⁴⁰ UNCTAD, World Investment Report 2015: Reforming International Investment Governance, UNCTAD, Geneva, 2015 p119-174

⁴¹ Chief Justice of Australia RS French, 'Investor-state dispute settlement: A cut above the court?', Supreme and Federal Courts' Judges Conference, Darwin, 9 July 2014; Chief Justice of New Zealand Sian Elias, 'Barbarians at the Gate: Challenges of Globalisation to the Rule of Law', World Bar Association Conference, Queenstown NZ, 4 September 2014, pp.3-4

and even more than a billion dollars, including compound interest. Costs of defending an action can be very high, again in the tens of millions of dollars. A majority of these disputes has involved government actions in relation to natural resources. While poorer countries have been the main targets until recently, a growing number of disputes are being lodged against affluent countries, as the TPPA provides for.

The UN special rapporteur on the rights of indigenous peoples, Victoria Lucia Tauli-Corpuz, was a signatory to an open letter by ten UN rapporteurs in June 2015 that expressed particular concern over investor-state dispute settlement. They called for *ex ante* and *ex post* human rights impact assessments to be conducted with regard to existing and proposed agreements.⁴² In October 2015 Ms. Tauli-Corpuz singled out the risk to the human rights of indigenous peoples posed by investment chapters and ISDS, which also constrict their ability to gain remedies.⁴³ She specifically referred to the TPPA, and noted a Waitangi Tribunal claim had been brought by Māori whose concerns were not taken into account in those negotiations.⁴⁴

The Rapporteur cited the example of Texaco (Chevron) using the US Ecuador Bilateral Investment Treaty to challenge judgements won by indigenous peoples in Ecuador to secure remediation of toxic damage in the Amazon basin.⁴⁵ Similarly, the government in Peru had responded to protests by indigenous communities against Canadian mining company Bear Creek, during which many were arrested, injured and one person died, by giving them power to deny mining operations in the area. The investor is suing Peru under the Canada Peru FTA for \$1.2 billion claiming expropriation;⁴⁶ if successful the government's recognition of free prior and informed consent would be overridden.

Another recent case illustrates the risks of an investor-state dispute should a local or regional authority, or another statutory board, reject an application from a foreign investor because of concerns raised by local Māori. US company Bilcon was denied an application for a quarrying permit and marine terminal in Nova Scotia after a local environmental panel had accepted concerns from the local community and in effect put the environment first. A majority of the tribunal upheld the investor's claim that the panel had failed to consider possible mitigation, thus depriving the company of its rights. In reaching this decision, the ISDS panel effectively acted as an appeal body to a Canadian statutory process, and substituted its own priorities for that of the

42 UN experts voice concern over adverse impact of free trade and investment agreements on human rights, Geneva, 2 June 2015, <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E>

43 Report of Indigenous Rapporteur, 20 October 2015, Para 77-79 recommendations, and Statement by Victoria Tauli-Corpuz, Special Rapporteur on Rights of Indigenous Peoples, 70th Session of the General Assembly, 20 October 2015, New York, <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/95-statement-ga70>

44 Press conference on Human Rights by Victoria Tauli-Corpuz (Special Rapporteur on the rights of indigenous peoples) and Alfred De Zayas (Independent Expert on the promotion of a democratic and equitable order) - Press Conference, 26 October 2015. <http://webtv.un.org/search/victoria-tauli-corpuz-special-rapporteur-and-alfred-de-zayas-independent-expert-on-human-rights-press-conference/4579247360001?term=indigenous>

45 Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

46 Bear Creek Mining Corporation v Republic of Peru (ICSID Case No. ARB/14/21) <http://investmentpolicyhub.unctad.org/ISDS/Details/589>

domestic law. The dissenting arbitrator in that case warned that the award would have a chilling effect on future decisions by local environmental panels.⁴⁷ It is very easy to see how a similar situation might arise in relation to Māori objections to a planning or resource consent.

TPPA and UN Declaration on Rights of Indigenous Peoples

Just as international economic agreements expanded in number, scale, reach and impacts on indigenous peoples, so international indigenous rights became a significant field in international law, culminating in the adoption by the UN General Assembly of the UN Declaration on the Rights of Indigenous Peoples in 2007 (UNDRIP). Generally, international human rights have not played a central role in Māori claims-making in New Zealand. Māori rights law and policy has primarily been focused on Te Tiriti rights, customary rights and environmental law. But the TPPA conflicts with Māori rights and Crown obligations the UNDRIP as well as te Tiriti.

(i) Adoption of the UNDRIP

The early emphasis of international human rights law was on rights as they applied to individuals and their relationship to the state. This focus failed to address those matters that were of most importance to indigenous peoples – political sovereignty and territory.⁴⁸ Indigenous peoples as distinct communities were often overlooked or ignored when the state adopted legislation and policies to implement these international rights at the national level.

The rise of identity movements in the 1960s and 1970s – buoyed by the decolonisation movements of the 1950s and 1960s – meant greater attention was directed at indigenous peoples and the denial of their basic human rights. In New Zealand, the initial focus was racial discrimination.⁴⁹ Subsequent Māori activism including the Land March of 1975 and the re-occupation of Bastion point in 1977-1978 sharpened the focus. Māori activists continued to demand political rights (sovereignty, or tino rangatiratanga, mana motuhake) and the return of land. Important local reforms, in particular the beginnings of the contemporary treaty settlement process, were rightly lauded internationally as progressive and innovative. However, they did not deliver substantial political rights, rather procedural rights of consultation with local and central government.

Some Māori took their claims to the UN and actively participated in negotiations on the then draft Declaration on the Rights of Indigenous Peoples from 1985 to 2007. Indigenous peoples' advocates, particularly those from the so-called CANZUS states (Canada, Australia, New Zealand and the United States of America) sought extensive rights relating to self-determination, self-government, free, prior and informed consent (FPIC), treaty rights and historical redress.⁵⁰ Under

47 Inside US Trade, Bilcon Case Leads To Broad Alarm Over ISDS Reach Into Domestic Law, 9 April 2015; and Lisa Sachs and Lise Johnson, Eyes wide shut on ISDS, The Hill, 22 April 2015, <http://thehill.com/blogs/congress-blog/foreign-policy/239560-eyes-wide-shut-on-isds>

48 The Universal Declaration of Human Rights (1948)(UDHR), the International Covenant of Civil and Political Rights (1966) (ICCPR) and International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR).

49 The Race Relations Act was passed in 1971, a Race Relations Conciliator appointed, and the UN Convention on the Elimination of Racial Discrimination was ratified by New Zealand in 1972.

50 Karen Engle, *The elusive promise of indigenous development: rights, culture, strategy* (Durham, [NC]: Duke University Press, 2010).

the UN-led decolonisation programme, over 70 colonies and dependent territories or “peoples” acquired independence. Consistent with the common article 1 of the International Human Rights Covenants, indigenous peoples of the CANZUS states argued that as prior sovereign “peoples” who had entered into international treaties with Great Britain (excepting Australia), they too were entitled to the right to self-determination. Most indigenous advocates did not seek full independence. But what was important was the option of independence should indigenous peoples and the state fail to negotiate fair terms of co-existence within the modern state.⁵¹

The New Zealand government attended virtually every annual negotiating meeting over the course of the 20 plus years. New Zealand called for a Declaration that adapted the basic international human rights - including right to life, equality, education without discrimination, right to lands and culture and a right to redress - to the indigenous situation, reflecting the regime New Zealand had already instigated. The New Zealand government expressed particular concern about the inclusion of a right to self-determination in the text and was opposed to indigenous peoples’ call for a right to FPIC.

(ii) The right of Indigenous peoples to self-determination

The final version of Article 3 is the linchpin of the declaration:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In addition, the Declaration guarantees indigenous peoples’ right to self-government and political autonomy.⁵² In relation to land rights, Indigenous peoples have the right to redress, including restitution, for the traditional lands, territories and resources taken without their free, prior and informed consent.⁵³ Indigenous peoples also have the right to the recognition, observance and enforcement of treaties.⁵⁴ These measures anticipate that governments will make requisite reforms and the Declaration calls upon states to “take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”.⁵⁵ Indigenous peoples also have the right to “financial and technical assistance from States ... for the enjoyment of the rights contained in this Declaration”.⁵⁶

The Declaration is not a legally binding international instrument. However, it is vested with significant legitimacy given the active role indigenous advocates and states delegates had in its drafting over the course of twenty-four years.⁵⁷ The UNDRIP has been formally endorsed by an

51 World Council of Indigenous Peoples 1983

52 Article 4

53 Article 28(1)

54 Article 37(1)

55 Article 38

56 Article 39

57 Claire Charters, “The legitimacy of the UN Declaration on the Rights of Indigenous peoples” in Claire Charters & Rodolfo Stavenhagen, *Making the Declaration work: the United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009).

overwhelming majority of UN member states. Canada, Australia, New Zealand and the US voted against the UNDRIP in the UN General Assembly, but later reversed their position and endorsed it as a fundamental document on the human rights of indigenous peoples. This prior commitment entered into in good faith should therefore have informed their negotiation of the TPPA.

(iii) The Right to Free, Prior and Informed Consent (FPIC)

The right to Free, Prior and Informed Consent comes into direct conflict with the TPPA, especially the investment chapter, when it privileges rights of foreign investors over indigenous rights. Article 32 of the UNDRIP says:⁵⁸

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

The right to FPIC has been affirmed in several human rights treaty body decisions, including the UN Human Rights Committee,⁵⁹ the UN Committee on the Elimination of Racial Discrimination⁶⁰ and the African Commission on Human and Peoples' Rights.⁶¹ A body of policy, scholarship and jurisprudence on the right has provided greater clarity about the content and application in the context of extractive industries.⁶² The Inter-American Court of Human Rights has given perhaps the most comprehensive authoritative guidance. In the Case of the Saramaka People v. Suriname (2007),⁶³ the Court heard a complaint lodged by the Saramaka tribal peoples relating to logging and mining concessions awarded by the Suriname government on territory possessed by the Saramaka people without proper consultation. This was said to infringe their right to property under Article 21 of the American Convention on Human Rights. Previous decisions of the Inter-American Court had recognised that indigenous forms of property could be given protection under Article 21.⁶⁴ However in Saramaka, the Court not only recognised this human right to

58 Article 32(2).

59 See *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009.

60 General Recommendation No. 23: Indigenous Peoples: 18/08/97.

61 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 276/03, Judgment of November 2009, see http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

62 This includes the decisions and observations of the of the UN Committee on Economic, Social and Cultural Rights, UN Committee on the Convention on the Elimination of all forms of Racial Discrimination, African Commission on Human and Peoples' Rights, the UN Human Rights Committee, and Inter-American Court of Human Rights.

63 *Saramaka People v. Suriname*, Judgment of the Inter-American Court of Human Rights, 28 November 2007. Ser c No. 172, at para. 129-134.

64 This right has been recognised by the Inter-American Court in the breakthrough decision of *Awas Tingni*. In this case, the Inter-American Court recognised the human right to property in Article 21 of the American Convention included indigenous peoples' collective forms of land tenure. The Court ruled that Indigenous tenure was deserving of equal protection as non-indigenous tenures.

property for the Saramaka people, it held that the right could not be justifiably infringed without compliance with several specific “safeguards”. These safeguards were intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

The first safeguard asserts that the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory. Additionally, the Court ruled that the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions, regarding large-scale development or investment projects that would have a major impact within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.

Some States, including New Zealand,⁶⁵ have argued that the right to FPIC is an “unworkable right of veto” over all activities within their traditional lands and territories. But indigenous peoples do not have an absolute or unworkable veto. Rather, they have the right to say “no” to activities that have potential to significantly impact on them and their territories.⁶⁶

The UN Special Rapporteur on the Rights of Indigenous Peoples has played an important role in promoting discussion about the application of FPIC.⁶⁷ In August 2015 UN Special Rapporteur Victoria Tauli-Corpuz found that:

The entry of foreign direct investments in indigenous territories to exploit mineral resources and establish mega-infrastructure projects without the free, informed and prior consent of the citizens impacted by market liberalization and deregulation has led to systematic violations of indigenous land rights and self-determination.⁶⁸

65 Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations, 13 September 2007; <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php> (the Declaration implies that indigenous peoples have a right of veto over a democratic legislature and national resource management, in particular Articles 19 and 32(2).)

66 See, *Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of 12 August 2008. Series C No. 185, at para. 41 (explaining that environmental and social impact assessments need to address the “cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardise the survival or indigenous or tribal people”).

67 See, *Saramaka People v. Suriname*, at para. 41.

68 Report of the Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz to the UN Human Rights Council, 6 August 2015, A/HRC/30/41, para 68, p.18

In a series of reports former Special Rapporteur James Anaya stressed the need to focus not only on consent, but on establishing a process that will result in indigenous peoples' full engagement with a proposed development.⁶⁹

The challenge is to ensure that indigenous peoples have early and meaningful participation in the process including the preparation of regulatory frameworks on relevant areas such as the environment, natural resource allocation and strategic planning for resource extraction. This can foster indigenous peoples' support for projects on appropriate terms. Yet such initiatives face actual or threatened investor-state disputes, which may further undermine the willingness of governments to take those steps for fear of legal action.

The right to self-determination and FPIC show it is essential that hapu and iwi are fully engaged in any project that could potentially impact on their community and resources. The TPPA has that potential and therefore requires informed consent, or at the very least a robust process that ensures Māori are fully informed and engaged with on a bona fide basis and that their views are fully incorporated into decision making. That has not occurred.

The Waitangi Tribunal claim on the TPPA

The Waitangi Tribunal claim to challenge the TPPA was lodged on 23 June 2015, with two sets of claimants: Wai 2522 concerning the Crown's actions and omissions in its negotiations over the TPPA;⁷⁰ and Wai 2523 that alleges that without consultation with or consent from the hapū of Ngāpuhi, the Crown is ceding elements of New Zealand's sovereignty before considering what effect this will have on hapū in light of the conclusions of the Wai 1040 Stage 1 Report He Whakaputanga me te Tiriti – The Declaration and The Treaty.⁷¹ Since then a number of other claimants have joined the proceedings.

The claimants sought an urgent hearing given the proximity of the ministerial meeting that aimed to conclude the negotiations. The claim had two elements:

- (i) the process has violated tino rangatiratanga, with the Crown failing to consult actively and engage in good faith with Māori during the negotiations.
- (ii) the substance of the TPPA will be inconsistent with, or would prevent the Crown addressing, matters arising from te Tiriti and the Declaration and from other international obligations, including UNDRIP. Examples cited were: unresolved matters

69 See, for example, Report to the General Assembly (Summary of activities. Declaration on the Rights of Indigenous Peoples; Duty to consult; Corporate responsibility; Extractive industries), 2011, A/66/288; Report to the Human Rights Council (Summary of activities. Extractive industries operating within or near indigenous territories, 2011, A/HRC/18/35; and Preliminary Note on the application of the principle of consultation with indigenous peoples in Guatemala and the case of the Marlin mine, 8 July 2010, A/HRC/15/37/Add.8, <http://unsr.jamesanaya.org/special-reports/preliminary-note-on-the-application-of-the-principle-of-consultation-with-indigenous-peoples-in-guatemala-and-the-case-of-the-marlin-mine-2010>.

70 Claimants are Papaarangi Reid, Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage and Moana Maniapoto.

71 Claimants are Natalie Kay Baker, Hone Tiatoa, Maia (Connie) Pitman, Ani Taniwha, Pouri Harris, Owen Kingi, Justyne Te Tana and Lorraine Norris

arising from Wai 262; impacts of investor rights and investor-state dispute settlement on natural resources, notably mining and water; and rights to health through access to affordable medicines and the Smokefree 2025 policy.

The Crown argued that the Treaty of Waitangi exception provides full protection for Māori interests. However, it refused to allow the Tribunal to see any of the draft text or to disclose the exact wording of the exception, only saying it would follow previous examples. The Crown also rejected the proposal to allow an independent expert to assess the exception in the week before the ministers were due to meet to conclude the deal. The reasoning had nothing to do with the Treaty; the Crown said it would not be prepared to reopen any agreed text as that would allow other countries to do the same to New Zealand's disadvantage. Yet the government did subsequently insert a new provision in the intellectual property chapter, discussed below.

The Tribunal agreed in principle to an urgent hearing once the text was available. The claimants asked for that to be held in December 2015, because the agreement was expected to be signed on 4 February 2016. The Tribunal declined, but set the hearing down for 14-18 March 2016. The questions it will consider are:

- (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).

The examination of the exception will centre on three case studies: fracking, affordable medicines, and water. The Tribunal has commissioned an expert in both international trade and investment law and the Treaty of Waitangi to advise it regarding the exception.⁷²

The Treaty of Waitangi Exception

The government has included the following exception in every agreement since the Singapore New Zealand FTA 2000, including the TPPA:

Article 29.6: 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, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.
2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall

72 Memorandum–Directions of Judge MJ Doogan, Wai 2522, 11 December 2015, para 2.

otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

The exception applies to the entire agreement, but its serious limitations mean it fails to protect tino rangatiratanga and leaves the rights and interests of Māori vulnerable to objections from foreign states and corporations who have no obligations under te Tiriti or the UNDRIP.

- The government must agree that something is a Māori or Tiriti obligation – responses to Waitangi Tribunal claims relating to the seabed and foreshore⁷³ and water⁷⁴ are examples where it has refused to do so.
- The government must be prepared to act on that obligation and to take an action that may breach the TPPA rules. As a rule, New Zealand governments will be unwilling to do so because they believe it encourages others to do the same in areas of commercial importance to New Zealand.
- The government's interpretation of the Treaty cannot be challenged in a dispute, but the government's decision to adopt a measure for reasons other than te Tiriti, such as the UNDRIP, can still be challenged.
- Even if the government is prepared to act, the exception only applies where the action involves more favourable treatment to Māori. That does not cover, for example, a general measure, such as a ban on fracking, that is motivated by an obligation under te Tiriti, or situations where Māori would be predominantly affected by a generic measure, such as revisions to the ETS, progressing smokefree policies or bypassing IP monopolies on diabetes medicines that makes them unaffordable. After this point was raised before the Waitangi Tribunal the government secured a last minute change in the TPPA to allow it not to sign up to the International Convention for the Protection of New Varieties of Plants (UPOV 1991), and to do something different but equivalent. That fix has its own problems.⁷⁵ It also implicitly conceded the inadequacy of the exception.
- The phrase 'more favourable treatment' in the exception could be given a broad or narrow interpretation in a dispute brought by another party to the TPPA or an investor of a TPPA country (except Australia). It could be argued, for example, that introduction of a requirement for free, prior and informed consent might be considered more favourable treatment. However, most trade and investment agreements use the term to mean discriminatory treatment in a commercial sense, rather than rules that give a special entitlement. How a state-state or investor-state tribunal interprets the phrase is impossible to predict.
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73 Michael Cullen, 'Waitangi Tribunal report disappointing', 8 March 2004, <http://www.beehive.govt.nz/release/waitangi-tribunal-report-disappointing>; Claire Charters and Andrew Erueti, eds. *Māori Property Rights and the Foreshore and Seabed: The Last Frontier*, Victoria University Press, Wellington, 2007, Introduction, pp. 1-7

74 Jacinta Ruru, 'Māori rights in water – the Waitangi Tribunal's interim report', *Māori Law Review*, September 2012

75 Sanya Smith Reid, Legal Advisor, Third World Network & Burcu Kilic, Legal & Policy Director, Public Citizen's Global Access to Medicines Program, 'General provisions: other treaties to join - International Convention for the Protection of New Varieties of Plants (UPOV 1991) <https://wikileaks.org/tpp-ip3/upov/UPOV%20and%20NZ.pdf>

- The measure can still be challenged for being ‘arbitrary’ or ‘unjustified’ discrimination. If one New Zealand government says it has no obligation and refuses to act, and a future government changes its mind and then seeks to rely on the Treaty exception, its action could be challenged as ‘arbitrary’. Likewise, if similar activities or investments receive different treatment in different tribal rohe they might be challenged as either arbitrary or unjustified discrimination.
- The measure can further be challenged for being a disguised way to benefit local providers of goods, services and investment, even if it is also motivated by Tiriti or related objectives.
- The threat of a dispute can have a ‘chilling’ effect of deterring a government from taking proposed action, even if the investor’s legal arguments are not strong.

Economic gains and costs to Māori

The gains for traditional trade from the TPPA were always going to be limited because there are already many FTAs among the TPPA countries.⁷⁶ There are few border barriers to be removed, and those which remain are sensitive, especially for agriculture. The nature and level of concessions across the 12 countries also reflect power asymmetries among negotiating parties.

After the negotiations were concluded, but before the text was published, the government acknowledged the TPPA fell well short of the ‘gold standard’ it had set as a bottom line for an acceptable deal. Nevertheless, the government made a number of claims regarding the economic gains to New Zealand. There are two main figures which the government has cited;⁷⁷ the same figures form the basis of claims the TPPA will benefit Māori because of their significant presence in natural resource sectors of the economy:⁷⁸

- (i) ‘tariff savings’ of \$259 million when the agreement is fully implemented (around 2030). This figure is both small and deceptive for various reasons. The description implies that tariff cuts are direct savings to exporters. For benefits to accrue to New Zealand exporters, either demand or the price they receive would have to increase. But importers and retailers may not pass the cuts on to consumers. The importing TPPA country may also invoke safeguard mechanisms and other protections set out in the agreement. Total exports may not increase if products are just diverted from other markets with higher tariffs. Other factors, such as limited production capacity, costs of increased production, and exchange rate may outweigh any new commercial gains.
- (ii) gains of \$2.7 billion to GDP by 2030.⁷⁹ This figure is fictional,⁸⁰ comprised largely of hypothetical gains from reducing unquantifiable ‘non-tariff barriers’, and is so methodologically unsound that the government itself arbitrarily halved the original

76 Jane Kelsey, *Hidden Agendas: What we need to know about the TPPA*, Bridget Williams Books, 2013, pp.45-55

77 <http://tpp.mfat.govt.nz/#benefits>

78 David Walker, TPP presentation to Waitangi Tribunal claimants, 26 November 2015

79 Anna Strutt, Peter Minor and Allan Rae, ‘A Dynamic Computable General Equilibrium (CGE) Model Analysis of the Trans-Pacific Partnership Agreement: Potential Impacts on the New Zealand Economy’, 28 September 2015

80 See the forthcoming paper by Barry Coates, Rod Oram, Geoff Bertram and Tim Hazledine, ‘The Economics of the TPPA’, Expert Paper #4, January 2016, www.tpplegal.wordpress.com

projection.⁸¹ It does not factor in any costs, even where the government has calculated them – such as \$55 million per year for 20 years longer copyright protection.⁸²

Claims that Māori as natural resource exporters will reap major gains through improved supply chains are also simplistic. Supply chains will be dominated by large trans-nationals from TPPA countries. New Zealand exporters will be takers of access to these systems on the terms set by those major players. Some rules, such as intellectual property rights over information technology, could also hinder innovative new ventures.

A critique of the economic arguments by New Zealand economists will be published in January 2016 on www.tpplegal.wordpress.com.⁸³ Similar modelling in Australia has been challenged by their Productivity Commission, which warned in June 2015 there was a risk that provisions in the TPPA ‘relating to intellectual property, investor-state dispute settlement, and product-specific rules of origin will impose net costs on trading partner economies.’⁸⁴ These concerns were heightened by the lack of transparency in the negotiations and the absence of any transparent and rigorous assessment of the text prior to signing. The Commission noted that post-negotiation assessments could only lead to a decision not to proceed with ratification.

Perhaps most importantly, the TPPA’s economic model based on trade liberalisation will not serve a future Māori economic development agenda that is built around indigenous values, relationships, environmental sustainability and self-determination.

The post-agreement process

The steps from agreement to entry into force of the TPPA have been analysed in a separate expert paper,⁸⁵ which explains it is the Executive that decides whether and when to sign and ratify the TPPA. Parliament’s role is largely token.

Assuming the text is signed in February 2016, the government will then table it in Parliament along with a National Interest Analysis prepared by MFAT. The Waitangi Tribunal’s Wai 262 report criticised the failure of the NIA to assess the Treaty of Waitangi implications of such agreements, as is required for domestic legislation.⁸⁶ The Law Commission had recommended such an

81 MFAT, ‘Economic Modelling on Estimated Effect of TPP on New Zealand Economy’, <http://tpp.mfat.govt.nz/assets/docs/TPP%20-%20CGE%20Analysis%20of%20Impact%20on%20New%20Zealand,%20explanatory%20cover%20note.pdf>

82 Henry Ergas, ‘Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy’, Concept Economy, 2015

83 See Coates et al, ‘The Economics of the TPPA’, www.tpplegal.wordpress.com

84 Australian Productivity Commission, Trade and Assistance Review 2013-2014, Australian Productivity Commission, 2015, p.160

85 Jane Kelsey, ‘Treaty Making, Parliamentary Democracy, Regulatory Sovereignty and the Rule of Law’, Expert Paper #1, 2 December 2015, <https://tpplegal.wordpress.com/nzlf-expert-paper-series/>

86 Wai 262, p.688

assessment,⁸⁷ and it was included in The International Treaties Bill unsuccessfully promoted by Green Party MP Keith Locke.⁸⁸

Once tabled, the TPPA will be referred to the Foreign Affairs Defence and Trade Committee to hear submissions. But the government controls that committee, and it is not required to adopt any recommendations for change even if they were made. There is no requirement for Parliament even to debate the agreement, let alone vote on it. Whether a vote occurs may depend on whether the government believes the Labour opposition will support it.

The government must then introduce any legislative changes that are necessary to comply with the agreement. There are likely to only be a handful of amendments (tariffs, trade remedies, copyrights, investment vetting threshold) because most of the rules that require change can be addressed by regulation or administrative means, while others are about locking in the status quo and pre-empting decisions by future governments.

Other countries must also complete their processes before the Agreement can come into force. Some governments, notably Japan, are still anticipating changes and additional commitments from various TPPA countries, including suggestions of side-letters that set out understandings and additional commitments rather than by reopening the text itself.⁸⁹ The New Zealand government could seek more comprehensive protections for Māori in this way, if the political will was there.

Even if New Zealand completed its ratification process, the US may require further changes to New Zealand's legislation and policy to implement what the US says is required for New Zealand to comply.⁹⁰ This process known as certification may allow the US effectively to rewrite parts of the TPPA or force other countries to adopt its interpretation of vague or ambiguous provisions. The US Congress has no interest in te Tiriti, the UNDRIP or tino rangatiratanga.

The ultimate threat of the TPPA is that those who have power conferred on them by the agreement and who wield power over its final content are foreign states and foreign corporations who have no obligations under te Tiriti. The Crown has been complicit in that outcome.

87 Law Commission, *The Treaty-Making Process: Reform and the Role of Parliament*, Law Commission, Wellington, 1997, p.73

88 Foreign Affairs, Defence and Trade Committee Report on The International Treaties Bill no 67-1, 14 December 2001

89 'Japanese Official Holds Door Open to TPP Fizes Without Renegotiation', *Inside US Trade*, 24 November 2015

90 The certification process and the way the US has used it in previous agreements is set out at tpnocertification.org

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