BEFORE THE WAITANGI TRIBUNAL

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

Applications for urgent hearings concerning the Trans-Pacific Partnership Agreement by the claimants for the Wai 2522, 2523, 2530, 2531, 2532, and 2533 claims

Affidavit of Professor Elizabeth Jane Kelsey
Dated 21 July 2015

RECEIVED
Waitangi Tribunal
22 Jul 2015
Ministry of Justice
WELLINGTON

Kathy Ertel & Co
Barristers and Solicitors
26 Bidwill Street
Mt Cook
Wellington 6021
Ph: 04-384 1148
Fax: 04-384 1199
Counsel acting: Annette Sykes / Bryce Lyall
Asykes@klelaw.com Bryce@klelaw.com
1, ELIZABETH JANE KELSEY, of Auckland, Professor of Law, swear /
affirm that:

1. This is the second affidavit that I have given in this inquiry. My
credentials and previous publications are set out in my first
affidavit (Wai 2522 A1).

2. This affidavit addresses the following matters arising from the
affidavit of Martin Wilfred Harvey (Wai 2522 A2) on behalf of
the Crown in relation to the Trans-Pacific Partnership Agreement
("TPPA"):

(i) The treaty-making process;

(ii) Confidentiality;

(iii) Exceptions, especially the Treaty of Waitangi exception;

(iv) Investor-State Dispute Settlement;

(v) Projected economic gains to New Zealand;

(vi) Consultation; and

(vii) Timing of the negotiations.

(i) The treaty-making process

3. On 28 August 2014 I made an Official Information Act request to
the Prime Minister to release information or advice he had
received in any form about the legal process the government was
required to follow before New Zealand could ratify the TPPA, and
the role of Parliament in that process, as well as the approach that
a National-led government would take.

4. The Prime Minister declined to provide the advice he received,
and said the government would follow the process in the Cabinet
Manual and Standing Orders. Given the discretions built into

1 Office of the Prime Minister to Jane Kelsey, ‘Official Information Act request for
information on the Trans-Pacific Partnership Agreement’, 24 September 2014. Attached
as Exhibit A.
those processes, neither the Prime Minister’s response nor Mr Harvey’s affidavit provides clarity as to the actual process the government intends to follow with the TPPA.

5. In para. 23 of his affidavit Mr Harvey sets out a series of general steps that would normally be followed, with the implication that Maori can have some effective input to the TPPA through Parliament, as an alternative to seeking to protect their rights and interests through the Waitangi Tribunal.

6. The Crown’s position is that the TPPA cannot be changed once the state parties have agreed on the terms and text, although I note that the US has done so in relation to FTAs that it has signed, including through the ‘certification’ process discussed in para. 44 of my original affidavit.

7. According to Mr Harvey, the Executive intends that Parliament will not see the text until it is tabled in the House (para. 23.1). He also refused to confirm the authenticity of the draft texts that have been leaked (para. 37).

8. The Crown’s position confirms my opinion that the Crown does not intend to provide an opportunity for elected legislators, Maori interests, or indeed any New Zealander to exercise any effective influence over the content of the TPPA once negotiations are concluded, even when it has yet to be signed. That is despite the fact that the agreement would not become formally binding on New Zealand until ratification.

9. Mr Harvey also confirms (paras. 21 and 22) that the Executive has exclusive power over the treaty-making process, except in the limited situation where specific legislation must be amended to bring New Zealand into conformity with the TPPA.

10. Mr Harvey’s statement that Parliament has a ‘critical role’ because the Executive will not ratify the TPPA without parliamentary ‘consideration’ (para. 22) appears to be carefully
worded, as it refers to compliance with the processes for parliamentary consideration, not to any substantive reconsideration by the government of matters raised during the parliamentary process that might lead to reopening of the text.

11. Given this void of information and opportunity, Parliament is rendered impotent to alter the content of the TPPA. The only way Parliament could affect the application of part or all of the TPPA to New Zealand is by the radical step of refusing to pass any legislation that may be required to bring New Zealand into compliance with the treaty.

12. Even if the parliamentary process were robust, Maori MPs are a small minority in the total Parliament. Moreover, Parliament is not a forum for the exercise of tino rangatiranga.

The Select Committee

13. My original affidavit addressed the select committee process briefly in para. 47. Additional evidence is provided here to rebut any inference that it can effectively protect Maori interests.

14. Mr Harvey’s statement in para. 23.1 that the Foreign Affairs Defence and Trade (“FADT”) committee will invite submissions is incorrect. It may invite public submissions, but that is not mandatory. For example, on 19 March 2015 the government majority on the FADT committee determined that it would not call for public submissions on New Zealand’s accession to the Government Procurement Agreement in the World Trade Organization (“WTO”), despite pressure from opposition party members to do so.²

15. Given the controversy surrounding the TPPA, I am nevertheless presuming the committee will call for submissions.

² Dr Shane Reti, Deputy Chair of the FADT Committee to Bill Rosenberg, NZCTU, 19 March 2015. Attached as Exhibit B.
16. The Executive cannot to ratify the TPPA until the FADT committee has reported or 15 sitting days has expired, whichever is sooner.

17. Parliament will see the text for the first time when it is tabled in the House. As my original affidavit explained, the TPPA has an estimated 29 chapters or sections of complex legal rules and schedules. According to the Cabinet Manual, fifteen days is the maximum period the FADT committee has to call for, receive and hear submissions, and prepare its report. In theory, the committee could provide less time.

18. The claimants and other submitters would be placed under extraordinary pressure to respond. In the Singapore New Zealand Closer Economic Partnership Agreement ("SNZCEP"), which was less complex and controversial that the TPPA, the public was given just nine days to make submissions. Many Maori and others may also be discouraged by the knowledge that, however compelling their submission, it would have no influence on the final agreement.

19. The FADT committee can seek an extension of time from the Cabinet, but the government’s intention regarding the time frame is not known. There is nothing to compel the government to allow further time if the FADT committee requests it.

20. As Mr Harvey observes, the Crown is not bound to accept any recommendations from the Select Committee for changes to the TPPA (para. 23.2), and in his view could not do so because no substantive amendments can be made once the negotiations have been concluded. To reopen negotiations in a plurilateral agreement like the TPPA would require the consent of all parties and a rebalancing of the trade-offs that were previously agreed.

---

3 Rod Donald, ‘Select Committee Scrutiny of Singapore FTA a Shocker’, 14 September 2000. Attached as Exhibit C.
21. I have consistently argued that a democratic government should be prepared to seek to reopen negotiations based on parliamentary and select committee input, although that should be a rare occurrence when an open and informed debate, supported by access to the draft text, has occurred during negotiations. Mr Harvey's affidavit confirms that the Crown's current approach precludes that possibility.

22. The Crown's statement that decision points fall over a period of 18 to 24 months reflects other countries' decision points, and does not mean that the New Zealand parliamentary process would be spread over that period. There is no indication of how that timeframe fits with the very short period for consideration under Standing Orders and the Cabinet Manual. It is likely to reflect the much more complex constitutional mechanisms that would take a longer period of time, and the US certification process. It is also unclear how many state parties would need to ratify the agreement for it to come into force.

23. Whatever the time line, the Crown is clear that any decisions taken during this period would be on a 'yes' or 'no' basis, accepting or rejecting the agreement as a whole.

**National Interest Analysis**

24. The only formal cost-benefit analysis the government is required to provide is the *ex post* National Interest Analysis ("NIA") prepared by MFAT and tabled in the House with the final signed text, at a stage where the Crown says no substantive changes can be made.

25. NIAs have long been criticised as perfunctory and lacking independence. Their assessment of benefits routinely relies on similar simplistic assumptions and flawed modelling to those criticised below in Section (v). They routinely fail to engage seriously with the costs and potential risks of the agreement, and
they are not required to address the implications for Maori and the Treaty of Waitangi.

26. The omission of a Treaty of Waitangi assessment has been raised on many occasions. As noted in my original affidavit, a Member’s Bill in the name of Keith Locke (The International Treaties Bill 2003) would have required the NIA to address te Tiriti, but the Bill was voted down in the House.4

27. In my submission to a review of the Standing Orders in 2000 I remarked that:

The National Interest Analysis does not include any requirement to assess the Treaty of Waitangi implications of the treaty. This must be a constitutional pre-requisite, conducted in an independent, informed and culturally appropriate manner. The role of the Waitangi Tribunal in assessing whether legislation is contrary to the principles of the Treaty (Section 8 of the Treaty of Waitangi Act 1975) could easily be extended to cover international treaties. This would, of course, require the commitment of appropriate resources to enable the Tribunal to fulfil this task.5

I recommended that SO 385(h) should explicitly require reports on consultations with Maori.

28. In May 2009 I reiterated to the FADT committee my concerns about the democratic deficit in the treaty-making process, the inadequacy of NIAs and their lack of independence, and the absence of a Treaty of Waitangi analysis.6

---

5 Jane Kelsey, Submission to the Standing Orders Select Committee on the Review of Standing Orders*, 30 November 2000. Attached as Exhibit D.
6 Jane Kelsey to John Hayes, Chair, FADT Committee, 4 May 2009. Attached as Exhibit E.
Critique of Australia’s similar NIAs

29. Australian governments have taken a similar approach to New Zealand on NIAs. The absence of an independent cost-benefit analysis was strongly criticised in the Australian Productivity Commission’s report on bilateral and regional free trade agreements (FTAs) in 2010. It recommended that: ‘Pre-negotiation modelling should include realistic scenarios and be overseen by an independent body.’

30. In September 2014 the dissenting report of two Labour Party members on the Joint Standing Committee on Treaties examination of the Australia Korea FTA observed:

the task of the Committee and the Parliament is to assess whether the agreement is in the overall national interest, not only in the interest of particular industries. The National Interest Analysis does not provide convincing evidence about the benefit of KAFTA to the overall national interest.

31. Concerns about the inadequacy of NIAs are shared by Australian business. The Australian Chamber of Commerce and Industry in the Senate hearing on the Korea-Australia FTA in October 2014 called for future NIAs on trade treaties to be:

independent from negotiations, well-researched and relevant to tangible business activities on the ground, and contain empirical information in the national

---

8 Ibid, xx.
interest, rather than being developed behind closed doors resulting in inaccuracies and omissions.¹⁰

32. If the NIA on the TPPA follows the standard pattern it clearly will not provide a credible cost-benefit analysis. Its timing means even a robust NIA could not make any effective contribution to the treaty making process.

Proposals to address the Treaty of Waitangi in the treaty-making process

33. Independent legal advice to the government has long called for reforms to New Zealand’s treaty making process (for all treaties, not just free trade and investment treaties). Successive governments’ responses have been incremental and inadequate.

34. In 1997 the Clerk of the House David McGee called for a more rigorous process with a stronger role for Parliament. He observed that the Uruguay round GATT agreement was ‘one of the most important international agreements that New Zealand has ever entered into’; yet Parliament was not allowed to vote on the country’s accession.¹¹

35. The same year the New Zealand Law Commission published a report on reform of the treaty making process,¹² based on a 1993 draft report by Sir Kenneth Keith.¹³ The Commission’s report gave specific consideration to the concerns expressed by Maori. It paid particular attention to intellectual property rights, the need to protect taonga, intellectual and cultural property rights, and cultural values, including indigenous flora and fauna, and use of te

¹⁰ Australian Senate, Foreign Affairs, Defence and Trade References Committee, Korea-Australia Free Trade Agreement, October 2014, p.24. Attached as Exhibit H.
¹³ Ibid, p.3
It referred to both the Mataatua Declaration on Cultural and Intellectual Property Rights 1993 and the UN (then draft) Declaration on the Rights of Indigenous Peoples. The report also recognised concerns about the risks to Maori under the proposed Multilateral Agreement on Investment, which was being negotiated at that time and raised similar issues to those in the investment chapter of the TPPA.  

36. The Commission observed the fundamental desire for Maori to uphold the protections enshrined in the Treaty of Waitangi. Given the current treaty making process (which rarely involves Parliament) the recently increased numbers of Maori members of Parliament can have limited effect in this regard.  

37. The report explicitly addressed concerns expressed by Maori over the ‘democratic deficit’ and the lack of consultation with iwi in the treaty-making process.  

38. The Law Commission recommended the preparation of Treaty Impact Statements whose statement of consultations that have been undertaken should expressly cover those with Maori, and ‘assess any effect on iwi Treaty of Waitangi partners’.  

39. The Commission also proposed a specialist Treaty Committee similar to the Australian Joint Standing Committee on Treaties that could, inter alia, conduct hearings during the negotiations.  

40. The FADT Committee conducted a review in 1997 that led initially to changes through Sessional Orders in 1998 and after a review, by amendments to Standing Orders and the Cabinet Manual in 1999. Both adopted a far weaker set of reforms than

---

14 Ibid, pp.25-29  
15 Ibid, pp. 32-33  
16 Ibid, p.26  
17 Ibid, p.28 and 32-33  
18 Ibid, pp.71-73  
19 Ibid p.75  
20 Ibid, pp.60-64.
proposed by the Law Commission, and established the basis for the current treaty-making process. 21

41. Subsequent moves to make the process more democratic and robust have been blocked by successive governments. Private members’ bills seeking to reform the treaty-making process and increase the role for Parliament were drawn up by the ACT Party and Green Party. 22 The latter’s International Treaties Bill 2000 was drawn from the ballot, but voted down in 2003. 23

42. The Australian Senate has just concluded an inquiry into that country’s treaty making process, which has strong similarities to New Zealand’s (although Australia has a more robust Joint Standing Committee on Treaties). The report was highly critical of the process and observed that the Australian Department of Foreign Affairs and Trade (“DFAT”) was the ‘lone voice supporting the status quo’. However, its recommendations adopted a middle course that was considered more likely to garner political support. 24

Parliament’s legislative role

43. Parliament may be given the opportunity by the government to vote on the TPPA (para. 23.1). That is not guaranteed. The government might well decide not to put it to a vote if it believes it would not secure majority support. That would mean that an international treaty that imposes unprecedented constraints on the New Zealand government’s regulatory autonomy, and is effectively entrenched legislation because it binds future governments and is enforceable by foreign states and private

---

21 For a discussion of the steps in that process see Jane Kelsey, Reclaiming the Future, Bridget Williams Books, Wellington, 1999, pp.48-50. Attached as Exhibit K.
22 Law Commission, p.31. Attached as Exhibit J.
24 Foreign Affairs Defence and Trade References Committee of the Australian Senate, Blind Agreement: Reforming Australia’s Treaty-Making Process, June 2015, p.ix-x. Attached as Exhibit L.
commercial interests through offshore arbitral processes, was not even voted on by the New Zealand Parliament.

44. Even if there were a vote on the TPPA, the normal parliamentary processes would not apply. The Parliament could not amend the provisions of the Agreement. It would have to vote ‘yes’ or ‘no’ to the entire text.

45. Moreover, the government could still ratify the TPPA even if the Parliament voted ‘no’.

46. Mr Harvey cites the Cabinet Manual, which sets out the convention that Government will not ratify the TPPA without Parliament changing the laws to bring New Zealand into compliance (paras. 22 and 23). This is the only real power the Parliament has throughout the entire treaty making process. However, the significance of that power is often overstated, for several reasons.

47. Some changes can be made by regulation or administrative reforms. An example would be compliance by Pharmac with the requirements of the Annex on Transparency and Procedural Fairness for Healthcare Technologies, unless the government concedes that the obligations in the Annex will undermine the purpose of Pharmac and seeks to amend Section 47(a) of New Zealand Public Health and Disability Act 2000.


49. The TPPA would not require changes to many current legislative settings because it locks in an unsatisfactory status quo. That includes acts or omissions that Maori have successfully challenged as breaches of te Tiriti, such the outstanding recommendations in the WAI-262 claim, or that they might
challenge in the future, such as mining licenses issued without iwi consent and subject to minimal regulation and protections.

50. The only effective way to address these non-legislative issues, which are central to the concerns of the claimants, is to have opportunities effective input during the negotiations.

51. A small number of laws are likely to require amendment to comply with the TPPA, such as on tariffs, copyright and medicine patents and approvals. Those amendments may not follow normal parliamentary procedures in subject specific select committees, but be bundled instead into an omnibus bill that is heard by the FADT committee.

52. Ultimately, Parliament’s freedom to exercise its sovereign powers in the normal manner will be constrained. If either the select committee or the Parliament proposed an amendment to, or rejected, implementing the Bill, knowing that the TPPA could not be changed without a consensus of all the state parties, it would effectively be forced into voting to reject the entire agreement.

**Ratification and Certification**

53. The TPPA is a comprehensive integrated agreement with many chapters. That means New Zealand cannot fix specific problems in one or two chapters, or that arise from a particular situation, without the consent of the other parties and a consequent rebalancing of obligations.

54. Such amendments have been extremely rare in the WTO, even where a specific agreement allows for changes to a country-specific obligation, and one government can block an amendment.\(^{25}\) Changes to the general rules of the TPPA would presumably require consensus among the parties. The alternatives for New Zealand would be to breach its obligations under the

\(^{25}\) Article XXI of the General Agreement on Trade in Services sets out the process for amending a Member’s schedule of commitments.
agreement and bear the associated penalties, or to renounce the TPPA in its entirety.

55. Mr Harvey points out in para. 47 that the Crown will have the right to withdraw from the TPPA once it has come into force if an obligation becomes untenable. Withdrawal is hardly a proportionate or realistic response to a specific conflict between the TPPA and a Tiriti obligation. The reputational consequences alone would be far-reaching, and I am not aware of any government that has taken such action for a comprehensive free trade and investment agreement like the TPPA.26

56. In explaining the treaty-making process Mr Harvey has not addressed the US practice of unilateral certification adopted in recent years and mandated in the ‘Fast Track’ or Trade Promotion Authority Bill 2015. As discussed in para. 44 of my original affidavit, recent use of this certification power by the US27 shows it will be especially pertinent for the TPPA provisions on intellectual property and the Transparency Annex on Healthcare Technologies, both of which impact on affordable medicines, and for the adoption of UPOV 1991.

57. In my opinion, these cumulative deficiencies in the treaty-making process deny Maori any effective input into the TPPA. That failure will have long-term consequences for Maori rights under Tiriti because the TPPA will be enforceable by foreign states and foreign investors through international arbitral tribunals.

(ii) Confidentiality

58. The Crown wants to have it both ways on confidentiality. It says people, including the claimants, can still engage effectively in consultation on the TPPA despite the secrecy of the negotiations, but then dismisses as speculation the claimants’ concerns about

26 A number of government have recently renounced bilateral investment treaties, but these are investment-specific agreements between two parties.
27 See www.tppnocertification.org.
the impact of the Agreement because they rely on leaked texts that are the only hard sources of information.

59. I note that MFAT used similarly unconvincing arguments during the Uruguay Round of the GATT, insisting that secrecy was normal and necessary and did not impede people’s right to participate in discussions on the negotiations. The Minister of Trade refused an Official Information Act request for a copy of the draft text produced in 1992, claiming its release might ‘damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies in relation to ... the entering into of overseas trade agreements’. Yet GATT Publication Services was selling the same document in Geneva.  

60. Mr Harvey says New Zealand’s negotiators consider the leaked texts to be unreliable or out of date (para. 37) and that ‘no one should jump to conclusions’ on the basis of them. It is my informed belief, as someone who has intimately followed the negotiations for more than five years, that the most recently leaked draft texts are authentic and provide a clear view of the likely content of the final text.

61. The investment chapter was dated 20 January 2015 and has very few square brackets that indicate areas yet to be resolved. Likewise, the Annex on Transparency and Procedural Fairness for Healthcare Technologies was dated 19 December 2014 and is largely un-bracketed. The most recent leaked version of the intellectual property chapter was dated 16 May 2014. It has many more unresolved questions, which provide an essential indication of what the New Zealand government has agreed to and the matters on which the government will be required to make decisions. These almost-completed recent texts provide a strong

---

28 Jane Kelsey, Reclaiming the Future, pp.250-52. Attached as Exhibit I.
basis for the claimants to express their concerns, and reinforce the
timeliness of their approach.

62. The Crown asserts that the claimants are simply opposed to the
agreement on an ideological basis (para. 62) and are not genuinely
interested in consultation on these matters, without providing any
evidence to support that assertion. The opportunity for Maori to be
heard on matters of crucial importance and attempt to influence
the negotiations, even if they were implacably opposed to the
Crown’s position, is an integral element of consultation. The
Crown’s position indicates a closed mind to hearing views that are
contrary to the pre-determined position it has taken into the TPPA
negotiations.

Other countries’ practices

63. Paras 66 and 67 of my original affidavit provided precedents
where official documents, draft texts and New Zealand’s proposed
schedules have been released during the negotiations.

64. Other parties to the TPPA have adopted far more extensive
processes for consultation and disclosure than New Zealand. To
my personal knowledge the government of Chile has established a
‘side-room’ process where it briefs stakeholders in detail on the
TPPA without a requirement of confidentiality. In June 2015
Chile’s Foreign Minister also attended the Parliament and spent an
hour responding to detailed questions.²⁹ Clearly, Chile considers
this level of substantive disclosure is possible within the scope of
the confidentiality memorandum between the parties, and that it
does not compromise its ability to negotiate in the national
interest.

²⁹ Heraldo Munoz, ‘If there is not an acceptable agreement, we will not sign’, 23 May
2015. Attached as Exhibit M.
Jeopardising New Zealand’s negotiations

65. The argument that New Zealand should not disclose its mandate or negotiating position so as to safeguard future negotiations with other parties would provide a rationale for never releasing any documents, and hence never being held accountable, on the assumption that negotiations with some country will always be underway or anticipated. Again, that is clearly not the position of other governments who release their mandates and negotiating documents – such as the European Union in its negotiations with the US for the Transatlantic Trade and Investment Partnership (“TTIP”).

66. Even that rationale would not prevent the release of draft texts and collective papers, with the attribution of positions to specific countries removed, as occurs routinely at the WTO. New Zealand agreed to that approach for the Multilateral Agreement on Investment (“MAI”) and the Anti-Counterfeiting Trade Agreement (“ACTA”).

67. Further, the release of documents that other parties to the TPPA have already seen, and have often jointly negotiated, cannot jeopardise the negotiations. Nor can the formal release of authentic texts that have been leaked and are in the public domain.

(iii) Exceptions, especially the Treaty of Waitangi Exception

68. According to Mr Harvey (para. 25) it is incumbent on the Executive to ensure it complies with its obligations under both the TPPA and the Treaty of Waitangi. However, in the case of a conflict between them, the former is likely to prevail because the government is formally bound under an international instrument.

---

31 OECD, ‘Multilateral Agreement on Investment’, undated. Attached as Exhibit O.
that is enforceable extraterritorially, if necessary through the application of sanctions.

69. An agreement such as the TPPA presumes its rules will prevail unless the matters covered by exceptions are, in Mr Harvey’s words, ‘considered of such significance that they outweigh normal trade commitments’ (para. 39). The exception is really a defence, and each regulatory state has responsibility to discharge the burden of proving its requirements are met.

70. The Treaty of Waitangi exception does not leave the Crown free to take whatever actions the Executive, the Waitangi Tribunal, or Maori consider would provide best protection or redress for a right under te Tiriti or advance Maori wellbeing generally. Rather than adopting the measure of choice, Mr Harvey notes the measure would have to be ‘carefully designed’ (para 42.3) to meet the terms of the exception. Even then, he seems unwilling to state unequivocally that the measure would be protected, rather that it would be “unlikely” to be found to be unjustified discrimination.

General exception

71. Mr Harvey’s description of the standard general exception provision in para. 39 fails to acknowledge the limitations it places on the government’s right to regulate for public health and welfare, including that the measures must be adjudged ‘necessary’ to achieve the permitted objective. Nor does he acknowledge that the US has never agreed to allow that provision to apply to the investment or intellectual property chapters in its FTAs. My understanding from monitoring the TPPA negotiations is that the US continues to reject the application of that exception to those chapters.

72. Further, the general exception has many legal steps that make it extremely hard to satisfy. An up-to-date analysis of cases in which
it has been pleaded in the WTO shows it has provided a complete
defence in only one out of 41 disputes.\footnote{The successful case involved a ban on asbestos products. ‘Only One of 41 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Construct Will Not Provide for an Effective TPP General Exception’, Public Citizen, Washington DC, April 2015. Attached as Exhibit P.}

The Treaty of Waitangi Exception

73. Mr Harvey pointed to the inclusion of the Treaty of Waitangi exception in New Zealand’s free trade and investment agreements (para. 39), but did not confirm that it had been accepted by the other parties to the TPPA in relation to all or some of the chapters.

74. I take strong exception to the assertion by the Crown (para. 75) that my interpretation of the chapeau is wrong in law. The Crown also makes no attempt to address the other deficiencies in the exception.

75. I noted in my original affidavit the FTA exception has its genesis in criticism that the scheduled reservation in the WTO’s General Agreement on Trade in Services (‘GATS’) applied only to certain rules, and focused on commercial interests and on discrimination, rather than broad protections for the Treaty of Waitangi and for measures to address the rights and wellbeing of Maori.

76. The current exception was adopted for the first time in the Singapore New Zealand Closer Economic Partnership Agreement (“SNZCEP”) after the Labour government agreed to preserve the right to take broad discriminatory measures, ‘including’ to comply with its Treaty of Waitangi obligations. That meant it could apply to discriminatory (or affirmative action) measures, irrespective of their status under the Treaty of Waitangi, such as the then ‘closing the gaps’ policy. The National Party in opposition condemned that terminology.\footnote{New Zealand National Party, ‘Papers show Treaty Clause was Extended’, 7 November 2000. Attached as Exhibit Q.}
77. That is the current Treaty of Waitangi exception. As explained in my original affidavit, it has a number of deficiencies. It only applies to measures that are discriminatory. It depends on the Crown determining that it needs to take action and the Crown alone decides on the appropriate measure. There is no positive role for Maori in making those decisions or defending the measure. I note that Mr Harvey does not dispute these points. The Crown makes a comment in para. 76 about the ability of Maori to influence interpretation that appears to be non sequitur.

The chapeau: ‘unjustifiable discrimination’

78. The exception contains a chapeau that requires the measure not to be used as a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in goods. New Zealand would bear the burden of proof.

79. Mr Harvey claims the proviso in the chapeau for the Treaty provision is essentially the same as the WTO general exceptions. However, the test is not identical, because there is no reference to ‘like services or service suppliers’, ‘like products’, or for investments ‘like circumstances’ in the Treaty exception. That would affect the applicability of the WTO jurisprudence, because ‘like’ services, products or circumstances provide the reference point for judging discrimination. This difference makes the direct application of WTO jurisprudence problematic.

80. When discussing the term ‘arbitrary or unjustifiable discrimination’ Mr Harvey (para. 42) cites a single paragraph of a 14-page discussion of the part of the chapeau that focuses on discrimination in the recent WTO Appellate Body report on EC-Seal Products.\footnote{EC – Seal Products, para 5.302. Attached as Exhibit E Part 3 of Mr Harvey’s affidavit.} \footnote{Ibid, section 5.3.3 from p. 175 to p. 189}
81. In para 42.2, Mr Harvey cites paragraph 5.306 of *EC-Seal Products* as showing that WTO jurisprudence ‘narrowly construes the nature of unjustifiable discrimination to mean measures where the discrimination cannot be reconciled with, or where there is no rational connection to, the policy objective of the measure’ (in this case compliance with the Crown’s perception of its Treaty obligations and the need to act on them). That misrepresents the Appellate Body’s interpretation. It did consider the cause or rationale for the discrimination was central to deciding whether it is ‘arbitrary’ or ‘unjustifiable’. But it described that consideration as ‘one of the most important factors’, and reiterated its approach in *US-Shrimp* where it ‘considered this factor as one element in a “cumulative assessment” of “unjustifiable discrimination”’.37  

82. I agree that a panel hearing a state-state dispute brought under the TPPA that relates to similar provisions in the WTO would be expected to draw on WTO jurisprudence to interpret the exception, to the extent that it is applicable. As noted, however, there are important differences from the WTO provision even on goods and services, which will mean it is not directly transferrable and create uncertainty about interpretation. Because the wording of the Treaty exception relates only to more favourable treatment to Maori it is also not suited to some other chapters, such as intellectual property.

**Interpretation in an investment dispute**

83. To date there have been very few state-state disputes in plurilateral free trade and investment agreements, even those that have existed for several decades, such as the North American Free Trade Agreement ("NAFTA"). Enforcement primarily takes place through ISDS.

37 Ibid, para 5.303  
38 Ibid, para 5.306
84. Assuming the Treaty of Waitangi exception does apply to the investment chapter in the TPPA, there is nothing to require investment tribunals to apply WTO jurisprudence when interpreting the chapeau, including ‘arbitrary or unjustified discrimination’.

85. Mr Harvey expresses confidence that arbitral panels would uphold the Crown’s actions under the Treaty of Waitangi exception (para 44). It is therefore apposite to refer the Tribunal to the case of Piero Foresti, Laura de Carli & Others v. The Republic of South Africa.³⁹

Piero Foresti v South Africa

86. South Africa’s post-apartheid Black Empowerment Law required businesses to apply to the Department of Mining and Energy within a specific period for the right to convert their former holdings into ‘new-order’ rights. Factors to be taken into account in the conversion process included the South African Constitution’s overall goal of redressing historical, social and economic inequalities, and the progress of applicant companies in meeting targeted social, labour and development objectives set out in a broad-based socio-economic empowerment mining charter.

87. Shareholders in a mining company challenged the law through ISDS as violating South Africa’s investment protection treaties with Italy and Luxembourg. They alleged that the law extinguished their ownership of mineral rights in South Africa, without providing ‘prompt, adequate and effective compensation’ as required under South Africa’s investment treaties, and they were denied ‘fair and equitable treatment’ by being forced to divest 26% of their investments to historically disadvantaged South Africans. They were also victims of ‘discrimination’

³⁹Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, Award, 4 August 2010, ICSID Case No ARB(AF)/07/1. Attached as Exhibit R
because they were treated less favourably that historically disadvantaged South Africans.

88. After four years of litigation, with mounting costs and repeated delays as the claimants and foreign governments pressured the South African government, the investors extracted a settlement that gave them a better deal than they were entitled to under domestic law.  

89. The interpretation of ‘discrimination’ was central to the legal case, although the tribunal did not in the end rule on the substantive issues. It is quite conceivable that an investor could use the investment chapter and ISDS to challenge as ‘unjustified discrimination’ a measure the Crown believes is justified under the Treaty of Waitangi exception. There would be nothing to stop an investment tribunal from interpreting ‘discrimination’ in the manner alleged in Piero Foresti, especially as there would be no appeal from such a decision.

90. It is even conceivable that a tribunal could decline to be bound by the Crown’s interpretation of its Treaty obligations, despite the explicit wording of the exception. That would seem outrageous. But given the lack of precedent, and the absence of any appeal under the ICSID and UNCITRAL processes to correct a rogue interpretation, this remains a possibility. In at least one recent case, a tribunal chose not to accept the interpretation of the minimum standard of treatment provision presented by the parties, and chose to rely on a different interpretation. 

---

40 Ibid Para. 94. The tribunal’s final award was limited to Euro400,000 costs in favour of South Africa.

(iv) Other issues with ISDS

91. Mr Harvey seeks to downplay (para. 45) widespread criticism of the ad hoc investor-state arbitral tribunals that would interpret the Treaty of Waitangi exception.

92. In relation to ISDS Mr Harvey’s affidavit focuses on the impartiality of arbitrators (para 45) and the formal rules of two arbitral mechanisms, whereas the concerns regarding ISDS are much broader. In particular, specific concerns about the ability of Maori to protect their interests in investor-state disputes have not been addressed.

93. The ICSID and UNCITRAL rules appended to Mr Harvey’s affidavit have recently been reformed, but are still widely viewed as inadequate. There is currently an active debate over ongoing reform to both.42

94. The Crown (para. 79) dismisses my concerns about the impartiality and inconsistency of investment tribunals as a ‘sweeping characterisation’ not to be accepted. That characterisation reflects the state of the current debate in international institutions and academic forums.

95. Para. 38 of my original affidavit lists what the United Nations Conference on Trade and Development (“UNCTAD”) calls ‘well-documented shortcomings of the system’, including: ‘contradictory interpretations of key IIA provisions by ad hoc tribunals, leading to uncertainty about their meaning’; ‘the inadequacy of ICSID’s annulment or national judicial review mechanisms to correct substantive mistakes of first-level tribunals’; and the emergence of a “club” of individuals who serve as counsel in some cases and arbitrators in others, often obtaining repeated appointments, thereby raising concerns about potential

conflicts of interest. The UNCTAD has developed a roadmap for reform in an attempt to address these and other concerns.

96. Other international organisations to which New Zealand belongs have also recognised serious concerns with ISDS that are affecting its legitimacy. The Organisation for Economic Cooperation and Development ("OECD") has published background papers, conducted a survey of its members, and hosted roundtables in recognition of the controversy that has enveloped investor-state arbitration. In October 2014 the Secretary-General of the OECD proposed ‘an agenda for joint action to reform and strengthen the investment treaty system’.

97. The sole study on ‘independence of arbitrators’ relied on by the Crown (Harvey, para 46, fn 3) does not address these major concerns with ISDS. The study was published in 2010 by a junior academic who herself describes it as a ‘modest step’ to offer insights into decision making by elite arbitrators. The paper examined only the outcomes of awards, not their legal reasoning and interpretations, use of precedents, or practices that impact on costs and duration of hearings. There are other methodological limitations.

98. Many contemporary accounts portray the conduct of investment tribunals in a different light. I add just two to the comments in my original affidavit: a keynote speech in 2014 by senior counsel George Kahale III to a conference of fellow international arbitrators setting out a list of failings of the system as he

---

44 David Gaukrodger, Speech to World Investment Forum 2014, 16 October 2014. Attached as Exhibit U.
47 The article only examined awards that were publicly available and involved ICSID arbitrations, decided between 1994 and 2009. There has been a significant expansion of ISDS since then, and in the parties to and conduct of disputes.
experiences them;\textsuperscript{48} and an analysis of how a small number of arbitrators from boutique firms have come to dominate the international arbitration process.\textsuperscript{49}

(v) Projected economic gains to New Zealand

99. The Crown asserts that the TPPA would bring net economic benefits to New Zealand. The implication is that a finding by the Waitangi Tribunal that is adverse to the Crown would jeopardise New Zealand’s economic wellbeing.

100. Flaws in these standard economic arguments are examined in my e-book Hidden Agendas, including the limited potential for market access gains given the existing array of FTAs among the parties, the factors weighing against any significant market access concessions in the highly sensitive area of dairy, and need for a more sophisticated analysis of economic development factors than simply tariff cuts and future economic integration.\textsuperscript{50} Several specific points raised by the Crown are addressed here.

101. Former chief negotiator Mark Sinclair warned against overstating the likely gains from the TPPA, reportedly telling a senior US official in 2010:

\textit{there is a public perception that getting into the US will be an 'El Dorado' for New Zealand's commercial sector. However, the reality is different, said Sinclair, since the United States is already quite open to New Zealand trade}

\textsuperscript{48}George Kahale, Keynote speech to the Eighth Annual Investment Treaty Arbitration Conference, 28 March 2014. Attached as Exhibit W. Kahale casts doubt on some of core assumptions about the outcome of disputes and size of awards relied on by Kapeliuk, noting that many disputes ruled in favour of the state should never have been brought and many claimants inflate the compensation sought, meaning that partial awards reflect an artificial starting point, pp.15-18.

\textsuperscript{49}Pia Eberhardt and Cecilia Olivet, Profiting from Injustice. How Law Firms, Arbitrators and Financiers are Fuelling an Arbitration Investment Boom, Corporate European Observatory and the Transnational Institute, Amsterdam, November 2012. Attached as Exhibit X. Kapeliuk did not dispute that there was an 'elite club', and she did not consider their concentrated power within these firms.

\textsuperscript{50}Hidden Agendas. What we need to know about the TPPA, Bridget Williams Books, August 2013, pp. 45-55. Attached as Exhibit Y
and investment. He underscored that New Zealand needs to manage expectations in this regard. In addition, Sinclair said that although New Zealand has already negotiated many free trade agreements, it is the first time New Zealand will negotiate an agreement that will open so many political sensitivities with a partner government. Sinclair noted that Minister for Trade Tim Groser is well aware of this and quoted the Minister as saying, 'getting the United States to agree to engage on the TPP is the easy part; the negotiating process itself will be gut wrenching, especially achieving the gold standard.' Achieving that standard will "put the squeeze" on Japan, Korea and others, which is when the "real payoff" will come in the long term.  

Agricultural Market Access

102. The main projected economic gains to New Zealand are from agriculture, in particular dairy. Yet a report from the US Department of Agriculture ("USDA") in November 2014 that assessed potential economic growth under the TPP in the 'best case' scenario where tariffs were cut to zero would deliver no meaningful gains in GDP to the individual parties. The figure for New Zealand was $1 billion by 2025 or 0.01% of GDP.  

103. Minister Groser has conceded that tariffs on dairy will not be reduced to zero, and now talks of dairy not being excluded from the final outcome. Prime Minister Key said on 22 June that the current offers on dairy for New Zealand fall far below the

---

51 'WikiLeaks Cable: DAS Reed engages on TPP, U.N. reform, environmental cooperation ...', NZ Herald, 30 December 2010. Attached as Exhibit Z
52 Mary E Burfisher, et al, 'Agriculture in the Trans-Pacific Partnership', US Department of Agriculture, Economic Research report 176, October 2014, p.17, Table 5, and p.21
Table 8. Attached as Exhibit AA
53 'TPP comes of life support, as US "fast track" vote looms', BusinessDesk, 19 June 2015. Attached as Exhibit AB
government's objectives,\textsuperscript{54} which have been downgraded from comprehensive tariff liberalisation.\textsuperscript{55} The Trade Minister says New Zealand will not settle for the offer the Prime Minister referred to, and insisted on 26 June 2015 that the serious negotiations have just started.\textsuperscript{56} It cannot be assumed that market access offers from the key countries of US, Japan and Canada will significantly improve.

**Assumptions underpinning the Crown's claim**

104. Mr Harvey's speculation about net economic gains rests on simplistic theoretical assumptions about trade liberalisation, supported by one modelling study. There is no indication that the Crown has conducted any cost-benefit analysis of the TPPA, for example in government procurement, services, investment, agriculture, state-owned enterprises or intellectual property and if it has, what was included and excluded in that analysis, and what conclusions it reached.

\textsuperscript{54} 'TPP dairy deal "not at a level we would currently like": Key', 22 June 2015. Attached as Exhibit AC
\textsuperscript{55} 'Key says TPP not worth signing without inclusion of dairy in comprehensive tariff liberalisation', interest.co.nz, 27 May 2014. Attached as Exhibit AD
\textsuperscript{56} 'Groser says serious TPP negotiations haven't even started', BusinessDay, 26 June 2015. Attached as Exhibit AE
The 2015 *Trade and Assistance Review* from the Australian Productivity Commission illustrates what a balanced economic assessment should address. On one hand, the Commission observes that both the TPPA and the proposed Regional Comprehensive Economic Partnership (RCEP)\(^{57}\) could serve to harmonise the disparate provisions (for example, with respect to rules of origin) contained in existing bilateral agreements among negotiating parties to the respective agreements. At the same time:

> Although the TPP will be open to other Asia-Pacific economies to join, there is the likelihood that a RCEP or a TPP bloc will discriminate against non-parties to the respective agreements. There is also a risk that specific provisions within these agreements including those relating to intellectual property, investor-state dispute settlement and product-specific rules of origin will impose net costs on trading partner economies.

These concerns are heightened by the continuing absence of two critical areas of transparency. First, the lack of contemporaneous transparency of the provisions being negotiated. Second, the absence of any rigorous and transparent assessment of the negotiated text of an agreement before signing (noting that post-negotiation assessments can only result in the Government deciding not to proceed with ratification).\(^{58}\)

**Economic modelling**

Mr Harvey relies on an economic modeling study by Petrie and others\(^{59}\) as empirical support for the claim of significant economic

---

\(^{57}\) The RCEP negotiation involves the ASEAN countries, China, Australia, New Zealand, Korea, India and Japan and is expected not to be as far-reaching as the TPPA.


\(^{59}\) Peter A. Petri, Michael G. Plummer and Fan Zhai, *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment*, Peterson Institute, Policy Analyses in International Economics 98, November 2012. Attached as Exhibit J in Mr Harvey’s
benefits to New Zealand from the TPPA. Such studies are notorious for producing hyperbolic projections based on assumptions that are easily manipulated. The modelling in the Petrie study uses a particularly unorthodox and flawed methodology, and the version referenced includes South Korea as a TPPA party.

108. Trade Minister Groser has himself expressed scepticism about such modelling. In 2011 he said: ‘Let me put down a marker: I “look forward” with a certain weary sense to the inevitable attempts to “model” the gains from the TPP in some econometric model. I am a deep sceptic here.’

109. A report by the Australian Productivity Commission into Australia’s free trade agreements, published in 2010, observed that modelling exercises, which typically yield estimates of benefits in the billions of dollars, had inflated expectations of the likely economic gains from Australia’s bilateral agreements. ‘Outer envelope’ estimates that assume full coverage and liberalisation, optimistic estimates of gains on services and investment, and failure to recognise gaps in coverage and long phase-in periods, meant the economic value of Australia’s preferential agreements ‘has been oversold’.


111. In February 2014 the New Zealand Sustainability Council published a critique by New Zealand economists Geoff Bertram and Simon Terry of the methodology used by Petrie et al. They

affidavit.

61 Australian Productivity Commission, 2010, p.xxviii. Attached as Exhibit F.
62 Australian Productivity Commission, 2015, p.161-62. Attached as Exhibit AF.
concluded that the failure to include key costs created a ‘one-sided focus’ rather than a cost-benefit assessment of the TPP, and ‘the authors appear to have seriously overstated the size of the projected trade benefits as a result of pushing their analysis into highly controversial and untested territory relative to the established economic literature.’

112. The assumption in the Petrie study that the TPPA would reduce the fixed costs of entering overseas markets and trigger a wave of new entrants into exporting vastly boosted the projections without any solid analytical foundations. Traditional modeling methods would have produced a far smaller figure.

113. The remaining gains, from foreign direct investment, were calculated entirely outside the computer model. Bertram and Terry advised that: ‘We are not aware of any economic theory or modelling practice that supports this claim’, and it should simply be discounted.

114. The Petrie study also ignores any fiscal or other economic downsides to the adoption of the agreement.

Other costs not factored in

115. Mr Harvey only refers to the investment and services chapters of the TPPA in terms of the speculated benefits to New Zealand’s offshore service suppliers and investors, with no supporting evidence (para 16.2 and 53.3). As with NIAs, the domestic implications of new rules and commitments in investment and services for New Zealand’s regulatory autonomy are ignored. In particular, no reference is made to the risks associated with more extensive rights and protections for investors from highly litigious countries, notably, the US, which can be enforced through ISDS.

---

63 Geoff Bertram and Simon Terry, Economic Gains and Costs from the TPP. Review of Modelled Economic Impacts of The Trans Pacific Partnership, Sustainability Council, February 2014, p.i. Attached as Exhibit AH.
64 Ibid, p.ii.
65 Ibid, i-ii
116. By contrast, the Australian Productivity Commission’s report on free trade agreements in 2010 said, with specific reference to ISDS:

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows. Experience in other countries demonstrates there are considerable policy and financial risks arising from ISDS provisions.\(^{66}\)

117. The Commission advised the Australian government to seek to avoid the inclusion of ISDS provisions in agreements that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.\(^{67}\)

118. The Commission’s 2015 report expanded on the costs of ISDS:

The possible inclusion of an ISDS mechanism in the TPP could similarly allow investors to bring claims for private arbitration directly against governments and potentially undermine the role of domestic courts and freedom of governments to regulate in the public interest. The greater the stringency of specific provisions, the greater the risk of ISDS actions against government as firms have more at stake in relation to government decisions that directly or indirectly affect their commercial interests. Similarly, where interpretation of the negotiated text may be subject to dispute, understandings or expectations between TPP members over how these provisions will be interpreted may not necessarily be

---

\(^{66}\) Productivity Commission 2010, Attached as Exhibit F, p.xxxvi

\(^{67}\) Ibid, xxviii
taken into account by an international tribunal hearing a claim brought by a private company.\textsuperscript{68}

119. Intellectual property is dealt with in an especially peremptory fashion by Mr Harvey referred to in passing as an example of ‘Other issues’ (para 15.4). Yet the New Zealand government’s concerns about negative impacts of the TPPA on the innovation economy, given our status as a net intellectual property importer, were revealed in a leaked position paper from New Zealand early in the negotiations.\textsuperscript{69}

120. The Australian Productivity Commission’s 2015 report warned the intellectual property chapter of the TPPA could result in a net cost to the Australian economy:

\begin{quote}
The relevance of trade related IP issues for Australia has gained even greater prominence because of the potential reach of the proposed TPP in this area. Potentially, the IP chapter in the TPP could be extensive and go beyond the provisions contained in the TRIPS Agreement and AUSFTA. For example, based on US media access to the current draft text, it appears likely that the TPP will include obligations on pharmaceutical price determination arrangements in Australia and other TPP members, of an uncertain character and intent. The history of IP arrangements being addressed in preferential trade deals is not good. Indeed, to the extent that the return to IP holders awarded by more stringent IP laws outweighed the benefits to the broader economy, the provision would also impose a net cost on both \end{quote}

\textsuperscript{68} Productivity Commission 2015, p.80. Attached as Exhibit AF.

partners, lowering trading and growth potential across the bloc. 70

121. Mr Harvey also makes no reference to the potential fiscal costs that could arise to New Zealand from provisions revealed in the virtually-finalised leaked texts of the TPPA, such as:

(i) Increased costs of medicines, especially biologics, and negative impacts on Pharmac’s modus operandi, a model that Pharmac estimates has saved New Zealand taxpayers an estimated $5 billion between 2000 and 2014; 71

(ii) Legal and arbitration costs of defending state measures in an investor-state disputes, which the OECD reported in 2012 was an average US$8 million; 72 and

(iii) Fiscal costs of restraints on New Zealand governments’ right to choose how to regulate services and investments, coupled with investor protection rules on indirect expropriation or minimum standard of treatment. This can affect such activities as remediation of environmental damage from mining, re-regulation of the financial sector, or imposition of capital controls at a time of crisis.

122. In projecting net gains for New Zealand, there is no suggestion that the Crown has specifically examined the implications of the TPPA for Treaty rights or Maori generally. Nor is there any evidence to support the Crown’s assertion in para 53 that Maori stakeholders will benefit from the TPP. Intangible costs, such as impacts on mana and tino rangatiranga, physical and spiritual wellbeing, the environment and ecosystems, kaitiakitanga of taonga, and te reo and Maori culture are all ignored.

70 Ibid, p.76
71 Pharmac, ‘Our History’, Attached as Exhibit AJ.
123. In sum, the available evidence is strongly weighted against the
Crown’s claims of net economic gains to New Zealand. Yet,
unless the Waitangi Tribunal is prepared to intervene, the secrecy
of the negotiations will make it impossible to conduct a genuine
cost-benefit analysis before the negotiations are completed.

(vi) Consultation

124. It is clear from Mr Harvey’s affidavit that MFAT’s approach to
the TPPA negotiations is driven by external and foreign and trade
priorities, and obligations under te Tiriti are merely ‘domestic
concerns to be taken into account’ (para 11).

125. That bias is reflected in MFAT’s approach to consultation with
Maori, which focused on Maori export and other business
interests, supplemented by engagement with Te Puni Kokiri
(“TPK”)—a Crown agency.

Past practices

126. The Crown asserts the need for consultation that is ‘proportionate’
to Maori interests in relation to their affected interests and those of
others (para. 58). Yet the TPPA belongs to a new generation of
mega-treaties whose scope and scale will impose constraints on
domestic policy choices and regulatory autonomy that are
unprecedented. Given the Crown’s special obligations to Maori
that therefore requires more extensive consultation than for any
previous agreements.

127. The EU Ombudsman expressed similar views in relation to
parallel negotiations for TTIP negotiations. Her January 2015
report on an own-initiated inquiry into transparency of those
negotiations observed that ‘traditional methods of confidential
negotiations are ill-equipped to generate the legitimacy impacting
on citizens daily lives’. She called for the release of a wide range
128. In this context, the four options for consultation Mr Harvey identified in para 27 are inappropriate and inadequate:

(i) ‘inter-departmental consultation’ is with agencies of the Crown;

(ii) The ‘public consultation process’ described focused on two calls for submissions, dissemination of information that was devoid of any thing substantive as that would breach the memorandum of secrecy, followed by discussions with ‘key’ stakeholders who included very few Maori;

(iii) A ‘Maori consultation process’ with Te Puni Kokiri, a Crown agency, to develop a strategy for engagement, although no evidence is provided that a robust, distinctive strategy was developed or undertaken; and

(iv) A process of public submissions to take place after negotiations are concluded, as part of the parliamentary process, as discussed above.

129. Documents I obtained under the Official Information Act show a stark contrast with the processes developed by TPK in conjunction with MFAT in 1999 and 2000 in relation to the SNZCEP, whose implications were less significant than the TPPA. This process recognised genuine Maori concern about such agreements.

130. Initiatives included conducting research on the Treaty of Waitangi exception, investment, the labour market outcomes of removing tariffs, liberalisation of services, intellectual property rights, and

---

73 European Ombudsman, Decision of the Ombudsman Closing her own-initiative Inquiry OI/10/2014/RA Concerning the European Commission, 6 January 2015. Attached as Exhibit AK.

74 Te Puni Kokiri, ‘Singapore/NZ Free Trade Agreement: Meeting between MFAT and TPK, 2 November 1999, File note ref: ER 3614. Attached as Exhibit AL.
sovereignty. TPK was persistent in securing a tailored consultation document and process of engagement. A series of hui in Christchurch, Rotorua, South Auckland, Auckland, Whangarei, and Wellington finally took place in April 2000, near the end of the negotiations. A memorandum to Cabinet outlined a list of issue raised in the consultations, including the absence of Maori from the negotiating process, impacts on culture and identity, belated consultation, and the Treaty of Waitangi clause.

131. Consultation on the TPPA through occasional meetings and largely passive dissemination of information, with a focus on Maori exporters, certainly fails to meet the standards set in the late 1990s and early 2000s on the MAI and the SNZCEP.

132. I note that the Crown conflates my knowledge and participation in the TPPA debate and ‘stakeholder’ activities with those of the claimants (eg. Crown para.27 and 28.4). I am not Maori, I am not a claimant, and I did not initiate this claim. I was asked shortly before the Wai 2522 and Wai 2523 claims were lodged to prepare an affidavit as the principal expert to support the claims and the request for urgency.

133. My long term knowledge and activities in relation to the negotiation cannot have any bearing on the Crown’s claim (para. 6.2) that this is an ‘eleventh hour’ intervention. Nor can my involvement in educating people about the TPPA negotiations over the past five years be used to excuse the Crown’s lack of effective consultation with Maori (or anyone).

134. My original affidavit (para. 65) made it clear that most of my engagement with MFAT negotiators on the TPPA has been unproductive and I discontinued it, as there has been no effective exchange of information of views. Negotiators from the Ministry for Business, Innovation and Employment dealing with intellectual property have sought to be more open, but still within the parameters of confidentiality.
135. My analysis and educational activities on the TPPA have been an attempt to fill the void created by the Crown. Regrettably, they have been limited in relation to Maori, which has compounded the lack of knowledge of the issues among many Maori communities.

136. I have addressed the Maori Affairs committee twice on the tobacco issue, spoken at several Mana movement conferences, worked with some Maori health researchers, and organised a hui on traditional knowledge at Waipapa marae for the intellectual property negotiators during the December 2012 round of TPPA negotiations in Auckland (which I consider should have been done by the responsible ministries). But my outreach to iwi Maori has been very limited.

(vii) Timing of the negotiations

137. The Crown asserts that the intention to conclude the negotiations in mid-2015 has been widely publicised and cites statements from the Prime Minister and Trade Minister Groser in support. However, as noted earlier, the Trade Minister insisted on 26 June 2015 that the serious negotiations have just started, and put the chances of concluding a deal at ‘7 out of 10’.75

138. The potential ‘end point’ of the negotiations has been anything but certain with many false predictions of the ‘end game’ over several years. In March 2014 Trade Minister Groser said ‘I absolutely believe we can get this done by the end of the year’.76 For much of 2015, market access negotiations between the US and Japan and the US President’s lack of Fast Track authority meant substantive negotiations were largely on hold.

139. Before the US Congress passed the Trade Promotion Authority Bill in late June 2015, Trade Minister Groser expressed concern

---

75 ‘Groser says serious TPP negotiations haven’t even started’, BusinessDay, 26 June 2015. Attached as Exhibit AE.
76 ‘Will the TPP go the Way of the WTO’s Doha Round?’, Wall Street Journal, 23 May 2014. Attached as Exhibit AM.
over the prospect that the negotiations could continue for several more years. When the US Senate and House of Representatives both voted against the Bill, the situation was extremely unclear. A number of governments had refused to negotiate until President Obama had Fast Track Authority.

140. The Ministerial meeting proposed for May 2015 to follow on from the APEC meeting was postponed. It was entirely possible that the negotiations would run past the period during which they could be concluded under the Obama presidency. I wrote several New Zealand Herald opinion pieces expressing my view that the negotiations could go either way and might not conclude.

141. President Obama only signed the Fast Track legislation into law on 30 June 2015. A ministerial meeting has subsequently been called for 28 to 31 July 2015 in Maui, Hawaii. The Crown depicts this as the final meeting. However, recent statements from informed players are more ambivalent.

142. Agreement between the US and Japan on agriculture is crucial to unlock the door to non-agriculture decisions in the negotiations. Acting Deputy USTR Wendy Cutler was reported as saying on 17 July 2015 that:

> the United States and Japan are struggling to overcome differences in talks over access to the Japanese rice market and said trade ministers will likely have to hash this issue out later this month in Hawaii. ...When asked whether she was confident the ministerial will be the last one in the TPP talks, however, Cutler declined to respond directly. "I'm not going to assign a number to my level of confidence, but we will be working very hard

---

77 Eg. ‘Groser Warns TPP Could End Up Like Doha If Congress Does Not Pass TPA’, Inside US Trade, 20 March 2015. Attached as Exhibit AN
78 Jane Kelsey, ‘New Zealand Irresponsible to Follow Obama’s Spin’, New Zealand Herald, 21 April 2015, Attached as Exhibit AO; Jane Kelsey, ‘The Stakes are High so Harden Up’, New Zealand Herald, 5 June 2015.; Attached as Exhibit AP
between now and the ministerial with Japan and our other TPP partners to lay the groundwork for a successful ministerial meeting in Hawaii.” She said many of the outstanding issues between the US and Japan are also linked to bilateral issues with other TPP countries and the overall negotiations.79

143. Former chair of the US House Ways and Means trade committee, Republican Representative Kevin Brady was reported on 17 July 2015 as expressing doubt that the parties would be able to conclude the negotiations at the end of the month, observing there were tough issues to be resolved and that ‘(m)y sense is they still have a ways to go’.80

144. The Crown argues that this claim has been brought ‘belatedly’ in the midst of such ongoing uncertainty and when it has manifestly failed to bring the critical issues to the claimants’ attention over a period of more than five years. Had the claim been lodged earlier, my experience suggests the Crown would have argued that there was no way to assess the implications of an agreement whose terms were still largely inchoate.

79 ‘Cutler: No U.S.-Japan deal on rice yet, ministers will discuss in Hawaii, Inside US Trade, 33 (28), 17 July 2015. Attached as Exhibit AQ.
145. The most recent largely-completed leaked texts on intellectual property, investment and the healthcare annex constitute recently created information of utmost significance, and provide the best evidence on which to substantiate a claim that is based on explicit and reliable information, at a time when the negotiations are still in play and can be affected by a Tribunal finding.

SWORN / AFFIRMED at Auckland

On this 21st day of July 2015

Before me:

CORAL M T LINSTEAD-PAHOHO
SOLICITOR
AUCKLAND

A barrister and solicitor of the High Court of New Zealand