

BEFORE THE WAITANGI TRIBUNAL

WAI

IN THE MATTER OF

**The Treaty of Waitangi Act
1975**

AND

IN THE MATTER OF

**An inquiry into the Crown's
actions concerning the Trans-
Pacific Partnership Agreement**

STATEMENT OF CLAIM

Dated 23 June 2015

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MAY IT PLEASE THE TRIBUNAL

The Claimants

1. This statement of claim is filed on behalf of an esteemed group of Maori academics and advocates, all of whom have come forward to lead the claim, but who are representative of a wider body of unrest. The claimants are:
 - a) Associate Professor Dr Papaarangi M J Reid, Tumuaki and Head of Department of Maori Health at the Faculty of Medical and Health Sciences, University of Auckland;
 - b) Moana Jackson, Director of Nga Kaiwhakamarama I Nga Ture, lecturer Maori Law and Philosophy degree programme at Te Wananga o Raukawa;
 - c) Angeline Greensill, Environmental and Land Rights Advocate, former Waikato University Lecturer;
 - d) Hone Pani Tamati Waka Nene Harawira, Leader of the Mana Movement and former Member of Parliament for Te Tai Tokerau;
 - e) Rikirangi Gage, Chief Executive of Te Rūnanga o te Whānau tribal authority, current director of the Māori fisheries commission, Te Ohu Kaimoana.
2. For the purposes of this statement of claim all of the parties above will be referred to as the “**claimants**”.
3. The claimants are Māori, and meet the requirements for bringing a claim as set out under s6 of the Treaty of Waitangi Act 1975.
4. The claimants have been prejudicially affected by the policies, practices, acts or omissions of the Crown regarding the Trans-Pacific Partnership Agreement (“**TPPA**”) as particularised in this Statement of Claim.
5. It is anticipated that the Crown will sign off on the TPPA by the end of August 2015 if not sooner. This Statement of Claim is therefore accompanied by an application for the claim to be heard urgently.

Background to the TPPA

6. The TPPA is an international free trade and investment agreement currently under negotiation. It seeks to establish a treaty between signatories, which will include provisions for enforcement of the obligations of the parties.
7. Negotiations for the TPPA have their origins in the Trans-Pacific Strategic Economic Partnership Agreement (known as the “P-4”) that came into force in January 2006.
8. In February 2008 President Bush announced the United States of America (“US”) would enter those negotiations, and subsequently that it would join the P-4, which effectively meant its renegotiation in accordance with a US template. Several other countries also joined what became known as the Trans-Pacific Partnership negotiations. President Obama reviewed the US position and in November 2009 confirmed US participation in the negotiations. The first formal negotiating round was held in March 2010.
9. There are currently twelve participating countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America, and Vietnam.
10. The New Zealand’s Ministry of Foreign Affairs and Trade (“MFAT”) is the formal repository of the documents.
11. Nineteen rounds of formal negotiations were held between March 2010 and August 2013, and two meetings of ministers. Since August 2013 there have been at least nine rounds of informal meetings and four meetings of ministers.
12. The technical negotiations and drafting of the agreement are largely complete.
13. To date all TPPA negotiations have been conducted in conditions of strict secrecy, with no ability for the claimants, nor the New Zealand public, to know what is being agreed to beyond the occasional leak of draft chapters.
14. To ensure secrecy parties to the TPPA signed a memorandum of

understanding dated 4 March 2010 preventing the release of any documents until four years from the date the TPPA goes into force or the final negotiations if an agreement is not concluded. If negotiations are never officially concluded or abandoned the documents might never be released.

15. By virtue of this time period the Crown is protected from political accountability for any positions it takes or concessions it makes during the negotiations, and Maori are unable to ensure that the Crown is acting in their best interests—or in their interests at all.
16. For the last three years negotiations have been described as nearing completion. The Crown anticipates that the TPPA will be finalised during 2015—it is commonly assumed that the TPPA must be tabled in the United States Congress before its August recess if it is to be adopted during the term of President Obama.

Claimants' concerns

17. A theme throughout the claim is that the Crown has refused or failed to recognise, and has actively attempted to displace the tino rangatiratanga of Nga Rangatira o Nga Hapu katoa o Aotearoa. This was guaranteed to Maori by virtue of the Preamble and Article II of Te Tiriti o Waitangi.
18. The Crown's actions assume Maori sovereignty is subordinate to its own; however the claimants assert that neither they nor their hapu have ever ceded their tino rangatiratanga nor their Maori Mana Motuhake to the Crown .
19. The TPPA will constrain the Crown's ability to regulate its policies, both social and economic, to deal with its Te Tiriti obligations, and to actively protect the interests of Maori hapu and iwi and their esteemed institutions.
20. The Crown has ignored widespread protest by Maori about the TPPA negotiations. This is contrary to the Crown's duty to engage in informed decision making through active consultation with Maori. The Crown has not meaningfully consulted with Maori nor sought their views on the effects of the TPPA in a Treaty compliant manner.

21. The TPPA will undermine Maori rights and the exercise of tino rangatiratanga with respect to significant taonga. The TPPA will give privileges and rights to other nations or transnational companies that can affect, among other things, land and resources, Maori culture, and customary knowledge, for commercial gain. The TPPA would guarantee foreign companies a greater say in government decision making than are currently guaranteed to Maori.
22. There is a conflict between the TPPA and Maori rights in relation to the preservation and protection of indigenous knowledge and resources and the responsibilities of kaitiaki with respect to these taonga. Likewise there is an irreconcilable conflict between the TPPA and the Crown obligations to protect the exercise of tino rangatiratanga and kaitiakitanga by Maori over whenua, including the takutai moana, and other taonga that exist in the territories of hapu and iwi. The examples of mining and plants highlighted in supporting evidence are apposite.
23. Maori rights to health, affirmed in te Tiriti and the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) will be undermined by the TPPA.
24. The TPPA will affect the claimants’ ability to secure redress for past, present and future breaches of Te Tiriti.

Claimants’ Rules of Recognition

25. The claimants’ rights are framed by three sources of legal obligations on the Crown: common law; Tikanga Maori as stated in article 2 of the Treaty of Waitangi "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa"; and international law, in particular the obligations of the Crown under the UNDRIP.
26. The rule of Tikanga Maori adopted by the Crown when signing the Treaty, recognises te tino rangatiratanga (authority over their domain) and taonga katoa (treasures).
27. As a Party to the UNDRIP the Crown has must take effective measures to

recognise and protect Maori rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. Maori also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions, and the right of self-determination.

28. In combination they impose obligations on the Crown when engaging in any action that has impacts on Maori hapu and iwi.

Principles of the Treaty of Waitangi

29. The guarantees encapsulated within the Treaty have been reaffirmed and interpreted as imposing upon the Crown the obligation and duty to ensure Hapu and Iwi maintain:

- a) Their autonomy, in that matters affecting Maori should be determined by Maori who should be permitted to maintain their own way of reaching agreements. [Taranaki Report pp 281 – 282];
- b) Their property and taonga [New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513, PC, 517]; and
- c) Their rights to control such property in accordance with their own customs and having regard to their own cultural preferences [Motunui-Waitara Report 2 ed.. 1989 p 51] and to have protected their tino rangatiratanga being the full authority, status and prestige with regard to Maori possessions and interests: [Manakau Report, p 67].

30. The Crown is obliged to deal with Maori honestly, openly and in an honourable and good faith way, including by ensuring active Maori participation and wellbeing in processes that result in informed decision making about the implications of Crown actions for the rights of Maori (the means), ensuring the protection of Maori as a people including their economic, physical, spiritual and cultural well being (the ends).

31. The Crown has an obligation to remedy past breaches in all but very special circumstances [New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, CA, 664-665] and cannot put itself into a position where it is unable to fulfill those obligations.

Te Kereme

32. The claimants assert the TPPA procedurally and substantively prejudices and undermines the guarantees to Māori under the Treaty to the exercise of their tino rangatiratanga in governance decisions that affect them, including their health and wellbeing and their authority and responsibilities as kaitiaki over their lands and resources; esteemed institutions, knowledge systems and customs me o rātou taonga katoa; and the Crown's performance of associated obligations under the UNDRIP.
33. This is because prior to entering into negotiations regarding the TPPA:
- a) there was insufficient, or no assessment by the Crown of the TPPA's impact upon the foresaid rights of Māori under the Treaty;
 - b) there was inadequate, or no consultation with Māori as to the TPPA's effect upon the aforesaid guarantees under the Treaty;
 - c) in entering into the TPPA negotiations the Crown adopted a procedure that is inconsistent with the aforesaid rights of Māori under the Treaty;
 - d) The Crown is knowingly adopting obligations under the TPPA that could prevent it from meet its obligations under te Tiriti, including implementation of recommendations of the Waitangi Tribunal;
 - e) the TPPA will place greater emphasis on the economic values of intellectual property at the expense of other values important to Maori, as recognised in te Tiriti and the UNDRIP, such as communal knowledge systems and the cultural and spiritual relationship that indigenous peoples have with their natural environments, and their responsibilities as kaitiaki;

- f) the TPPA will not provide that, in the case of any inconsistency with the Crown's obligations to Māori under Te Tiriti, the latter must prevail, as the proposed exception provision is inadequate to ensure Maori rights are fully protected and does not empower Maori to intervene to protect their rights;
- g) any international laws, conventions or other legal instruments morally or legally binding on the New Zealand Government which are inconsistent with the Crown's obligations to Māori under the Treaty and which are enacted or otherwise adopted by or on behalf of the Crown, are in breach of the Treaty;
- h) the TPPA replicates on an international level the Crown's omissions in meeting its obligations to Māori under the Treaty domestically; and
- i) the Treaty imposes an obligation upon the Crown to put in place mechanisms to ensure it can meet its obligations to Māori under the Treaty prior to entering into any international agreements and the Crown have failed to do so.

34. As a result of the breaches Rangatira Maori, hapu and Iwi have been or will be:

- a) Denied the right to exercise tino rangatiratanga in the governance decisions that affect them, including their health and wellbeing, and over and in respect of their respective lands and resources, indigenous flora and fauna, esteemed institutions, knowledge systems and customs me o rātou taonga katoa;
- b) Denied the right to exercise kaitiakitanga over and in respect of their lands and resources, indigenous flora and fauna, esteemed institutions; knowledge systems and customs me o rātou taonga katoa; and
- c) Denied the right to exercise development in respect of their lands

and resources, indigenous flora and fauna, esteemed institutions and customs me o rātou taonga katoa.

35. Furthermore the claimants assert they have or will:
- a) Suffer damage to and loss of their mana, and their future ability to safeguard for time immemorial their lands and resources, indigenous flora and fauna, esteemed institutions; knowledge systems and customs me o rātou taonga katoa.

Lack of Disclosure and Consultation

36. The Crown has conducted negotiations towards the TPPA in conditions of secrecy, without any meaningful consultation with or disclosure in accordance with their obligations pursuant to te Tiriti. Maori are therefore unable to exercise their rights under te Tiriti to engage in an informed way in decision-making on the TPPA.

37. Under Te Tiriti o Waitangi, the Crown has a duty of active protection, which includes an obligation to consult with the claimants regarding decisions that may affect their rights under te Tiriti. The Manukau Report noted that:

“(C)onsultation can cure a number of problems. A failure to consult may be seen as an affront to the standing of the indigenous tribes and lead to a confrontational stance”¹.

38. The Tribunal, in the *Ngawha Geothermal Resource Report*² stated that:

“Before any decisions are made by the Crown . . . on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori [if the obligation of active protection by the Crown is to be fulfilled].”³

¹ *Report of the Waitangi Tribunal on the Manukau Claim* Waitangi Tribunal Report 1985 at 9.2.12

² *Ngawha Geothermal Resource Report*, Waitangi Tribunal Report 1993

³ *Ngawha Geothermal Resource Report* at 5.1.6

39. On the principle of consultation the Tauranga Moana Tribunal Stated:

*“Consultation must be open and meaningful, and the Crown should be willing to change its mind on the basis of information received”.*⁴

40. The Tribunal’s *Report on the Crown’s Foreshore and Seabed Policy*⁵ (“**Foreshore and Seabed Report**”) adopted the test for consultation set out in *Wellington International Airport Ltd v Air New Zealand*.⁶ This can be summarised as follows: There must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses. Notification is not the same as consultation.

41. The Court in *Wellington International Airport* relied on *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 as the leading case on the requirement . Lord Morris of Borth-y-Gest, delivering the judgment of the Privy Council, said at p 1124:

“The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.”

42. Finding that the Crown’s conduct did not meet the *Wellington International Airport* test, the Foreshore and Seabed Tribunal concluded that . . . “nor would the Crown be likely to succeed in an argument that its conduct fulfilled the requirements of the duty to consult inherent in the Treaty

⁴ *Tauranga Moana 1886-2006*, p283 The Tribunal was speaking of Public Works takings, but its findings are applicable by analogy here.

⁵ *Report on the Crown’s Foreshore and Seabed Policy* Waitangi Tribunal Report 2004

⁶ *Wellington International Airport Ltd v Air New Zealand*. (ca) [1993] p 676, per Cooke P

principles”.⁷

43. In the report *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (“**Wai 262**”) the Tribunal found that the Crown’s present policies and practices with regard to consultation on international agreements are not compliant with the Treaty.⁸
44. The Tribunal found that in situations where “Māori interests are so central to the entire instrument, such as UNDRIP... then the Māori interest – when given its due weight – may require more than consultation. It may require the Crown to negotiate with Māori and to proceed only with their agreement. At the far end of the spectrum, it may even be appropriate for the Crown to step aside – by agreement – and allow the Māori Treaty partner to speak for New Zealand”.⁹
45. The TPPA will be entered into by executive act rather than by an act of Parliament, and the Crown has not considered the implications of this for tino rangatiratanga, nor consulted with Maori. This further undermines the claimants’ ability to become informed on, and to participate in, a decision which is fundamental to their interests.
46. As outlined above, any documents aside from the final text will not be released until four years after the deal is signed. This includes all background documents, drafts of the text, explanatory notes, and any other material. Therefore not only have the claimants not been consulted, they will also not be able to know the details of the deal for four years after the date it is signed.
47. The scope of this agreement appears unprecedented, and it prevents the Crown from undertaking informed consultation with Maori. Signing this

⁷ Foreshore and Seabed Report p120

⁸ Wai 262 Report p689

⁹ Wai 262 Report p689

confidentiality agreement in and of itself prejudices Maori.

48. The necessarily speculative nature of the claimants' concerns and the need to rely on publicly available information, supported by leaked texts, is a consequence of the secrecy of the negotiations and they cannot be denied a remedy on the basis of conditions the Crown has created to avoid its accountability.

Failure to Protect and Recognise Tino Rangatiratanga

49. Article II of te Tiriti o Waitangi guaranteed Maori their tino rangatiratanga. The Crown has a duty to recognise tino rangatiratanga: Maori rights of independence, autonomy and self-determination. This includes the capacity of whanau, hapū, and iwi to exercise authority over their own affairs.
50. This principle was first confirmed in the *Lands Case*.¹⁰ Following that the Manukau Report found rangatiratanga to mean “full authority status and prestige with regard to [Maori] possessions and interests”.¹¹
51. More recently the Tribunal found that: “te tino rangatiratanga includes but is not confined to possession, ownership, authority, self-regulation, and autonomy.”¹²
52. The Te Paparahi o te Raki Tribunal found that Te Tiriti was an arrangement that explicitly guaranteed Rangatira their ‘tino rangatiratanga’, their independence and full chiefly authority”.¹³
53. The Te Tiriti principles of reciprocity and partnership require the Crown to develop policy in respect of trade agreements in a way that gives meaningful effect to te Tino Rangatiratanga, and balances the interests of both peoples

¹⁰ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

¹¹ *Report of the Waitangi Tribunal on the Manukau Claim* Waitangi Tribunal Report 1985 at 8.3

¹² *Report on the Crown's Foreshore and Seabed Policy* Waitangi Tribunal Report 2004 at 2.1.2

¹³ *He Whakaputanga me te Tiriti: The Report on Stage One of the Te Paparahi o te Raki Inquiry* Waitangi Tribunal 2014 p528

in a fair and reasonable manner.¹⁴

Failure to uphold the protections for indigenous peoples afforded by the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)

54. Rangatiratanga has also been confirmed by UNDRIP, which was described by the Wai 262 Tribunal as “(p)erhaps the most important international instrument ever for Māori people”.¹⁵

55. Art 1 of UNDRIP reads that:

‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.’

56. The Wai 262 report made recommendations on the making of international instruments, finding that “when international instruments affect Māori interests in their culture, identity or traditional knowledge, the Crown is obliged to actively protect those interests. This requires the Crown to inform and consult Māori when it is developing New Zealand’s position on those instruments; in rare cases, Māori consent should be sought”. The Tribunal found that the Crown is currently falling short of this standard.

¹⁴ Foreshore and Seabed Report p131

¹⁵ Wai 262 Report p233

57. Despite receiving the Wai 262 report almost four years ago, the Crown is yet to provide a comprehensive response to it.¹⁶ There is no evidence that the Crown has paid any attention to these recommendations in its negotiations towards the TPPA.
58. The TPPA will undermine:
- a) Maori rights to exercise tino rangatiratanga over and in respect of their respective hapu and iwi; and
 - b) The right to exercise kaitiakitanga over and in respect of their respective hapu and iwi cultural knowledge.

Failure to take account of the Wai 262 Report of the Waitangi Tribunal in relation to the International Convention for the Protection of New Varieties of Plants UPOV1991

59. From what is known the TPPA will require New Zealand to become a party to the International Convention for the Protection of New Varieties of Plants (“**UPOV1991**”).
60. By virtue of this regime and contrary to the recommendations of the Wai 262 report:
- a) Plant variety rights could go to anyone who discovers a new variety of indigenous plant; and
 - b) Would allow others to claim property rights over plants that Maori believe they should have full ownership over.¹⁷
61. This concern was raised by Maori and some of the claimants as long ago as

¹⁶ Wai 898 3.5.6

¹⁷ Jenlink, R, *Maori Claims to Traditional Knowledge of New Zealand*
<http://jay.law.ou.edu/faculty/kershen/IPRLM/Maori%20Claims%20to%20Traditional%20Knowledge%20of%200%20NZ%20-%20FINAL%20accepted%20Mar%2030%202008%20proofed.pdf>

the 2002 Review of the Plant Variety Rights Act 1987.¹⁸

62. By signing up to the TPPA without consultation, and without consideration of the recommendations of the Wai 262 report, the Crown undermines the tino rangatiratanga over taonga.

Failure to Actively Protect Maori

63. The relationship between the Crown and Māori is in the nature of a partnership and rests on the premise that each partner will act reasonably and in utmost good faith towards each other.¹⁹
64. The Crown owes Māori a duty of good faith and active protection, especially when those interests are affected by international rules applying to New Zealand.²⁰
65. The duty of active protection requires active steps to be taken to ensure that Maori have and retain the full exclusive and undisturbed possession of their language and culture. Cooke P confirmed previous Tribunal reports on this principle, stating that:

*“Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal’s Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded”.*²¹

66. As part of this duty, the Crown is obliged to inform Māori of international developments that might affect their interests. This requires an engagement

¹⁸ Office Of The Associate Minister Of Commerce, Paper for the Cabinet Economic Development Committee Review of the Plant Variety Rights Act 1987 <https://www.med.govt.nz/business/intellectual-property/pdf-docs-library/plant-variety-rights/review-of-the-pvra-1987-pdf>

¹⁹ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) pp663-664; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1987), p147

²⁰ Wai 262 Report p681

²¹ *New Zealand Maori Council v Attorney-General* 1987 Judgement text p37

sufficient to identify, understand and jointly devise a means of protection.²²

67. Any international laws, conventions or other legal instruments morally or legally binding on the New Zealand Government which are inconsistent with the Crown's obligations to Māori under the Treaty and which are enacted or otherwise adopted by or on behalf of the Crown, are in breach of the Treaty.
68. The TPPA permits a process known as Investor State Dispute Settlement (“ISDS”). In essence this process allows foreign investors to have the same ability to sue as nations to enforce certain provisions of the Agreement. The Crown has made no attempt to engage with Maori over how their interests can be protected from the application of ISDS regime.
69. By signing up to the TPPA the Crown will give foreign investors the right to sue the Crown for introducing laws or policies which the companies claim would significantly hurt its investments.
70. These laws and policies might include changes to the law on any of the following issues (among others):
 - a) Water quality regulation and agricultural water use;
 - b) Energy regulation;
 - c) Regulation of deep sea drilling for oil or on ‘fracking’;
 - d) Smoking control laws;
 - e) Access to affordable medicines;
 - f) A cap on electricity prices;
 - g) Requiring a Treaty of Waitangi assessment prior to approval of foreign investments; and
 - h) Policies aimed at alleviating poverty.

²² *ibid*

71. Where a foreign entity sues the Crown the dispute is decided in an offshore tribunal, with no right for Maori or any other interested party to participate. These tribunals do not follow the doctrine of stare decisis, nor is their process open and robust.
72. These tribunals act on causes of action not recognised at common law or statute in New Zealand, conferring rights on foreign corporations that are superior to those of Maori in their own country. In essence they are able to invent law to suit their purpose.
73. The Tribunals have the power to order huge sums as reparations. By entering the TPPA, the Crown exposes New Zealanders and Maori to these processes. The TPPA would significantly expand the obligations of New Zealand under existing treaties because of the parties involved, especially the United States of America, and additional protections conferred on investors. Any award against the Crown will be paid by the New Zealand taxpayer, including Maori.
74. The legal uncertainty involved in ISDS is a cause for concern not only in the outcome of any particular dispute that may arise, but also in the Crown's assessment of legal risks and ability to provide redress as it considers the Waitangi Tribunal's recommendations.²³

Inadequacy of the 'Treaty of Waitangi Exception' as a means of Active Protection

75. Since 2001 a Treaty of Waitangi exception has been included in all free trade agreements that the Crown has signed. The general form of the text of the exception has evolved to read:

“Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services, nothing

²³ Wai 2358 #A97 at 3.10

in this agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this agreement, including in fulfillment of its obligations under the Treaty of Waitangi”.

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 16 (Dispute Settlement) shall otherwise apply to this Article. An Arbitral Tribunal established under Article 16.8 (Request for the Establishment of an Arbitral Tribunal) may be requested by [country signing agreement] to determine only whether any measure referred to in paragraph 1 is inconsistent with their rights under this Agreement.²⁴

76. The Crown has implied that the TPPA will include such an exception in order to try to preserve the Crown’s ability to treat Maori, their Treaty partner, as well as or better than those who receive rights under the Agreement. The exception does not achieve its purpose.

The Treaty of Waitangi exception and the Honour of the Crown

77. The Treaty of Waitangi exception does not afford the protection for Maori that te Tiriti requires, nor the principle of the honour of the Crown requires.
78. The Crown must first determine that actions favouring Maori over trade partners are necessary. This depends on the honour of the Crown. In cases such as the dispute of water rights, and power company privatisation the Crown did not determine that Maori ought to be accorded better treatment, so the exception was not invoked. The claimants have no way to force the Crown to take such actions to protect their interests under the exception.
79. The exception only applies where the action taken by the Crown is more

²⁴ Text taken from Wai 2358 #A33 Art 17.6

favourable to Maori than to other interests that enjoy benefits under the TPPA. It does not apply to generic non-discriminatory policies that form part of the Crown's obligations under the Tiriti that have particular impacts on Maori, for example in relation to conservation or health.

80. Additionally a party to the TPPA or a foreign investor is still able to object to a measure being taken by the Crown under the Treaty of Waitangi exception as being arbitrary or unjustified discrimination against persons of the other parties to the TPPA.
81. The enduring nature of obligations under the TPPA means a decision of the Crown not to invoke this defence to a claim its actions have breached the Agreement would have long term consequences. Maori could be particularly prejudiced if a current government decides that a group of Maori do not require redress under the Treaty, and this decision is overturned by an incoming government. The actions of the incoming government could be challenged under the TPPA by another state party or by a foreign investor by way of ISDS.

The Prejudice

82. The proposed TPPA will cause the claimants prejudice including:
- a) The Crown has undermined its Treaty partner by failing to provide information and actively consult with Maori in good faith regarding the TPPA;
 - b) The Crown has failed in its duty to actively engage with Maori in decisions that impact on their rights under te Tiriti and in international law, notably the UNDRIP;
 - c) The Crown will empower foreign states and foreign investors to exert influence over and challenge decisions the New Zealand Government for implementing policies aimed at meeting its Tiriti obligations, and at addressing inequities and improving social outcomes for Maori;
 - d) Loss of Maori intellectual property rights;
 - e) Settlement of grievances will be prejudiced, whether they be concluded settlements or settlements that may be reached in the future;
 - f) The TPPA, by allowing ISDS, will have a chilling effect on Crown policies involving Maori, and Crown policy indirectly affecting Maori, such as the Smokefree 2025 goal and access to affordable medicines;
 - g) Maori kaitiakitanga will be prejudiced by the TPPA, including protection of their coastal areas from oil exploration;
 - h) The TPPA will have a prejudicial impact on Maori rights in forestry, and including the impacts it may have on the Tribunal's ability to make binding recommendations on Crown forestry. This will prejudice Maori settlement aspirations as well as settlements already reached; and

- i) The TPPA will require the Crown to sign up to UPOV, and take other action contrary to the findings of the Wai 262. The Crown has also ignored the Wai 262 Tribunal on engagement when seeking to sign international agreements.

Relief sought

83. The claimants ask that the Tribunal grant an urgent hearing of this claim.

84. The claimants seek the following recommendations or findings that:

- a) The Crown has acted contrary to the principles of te Tiriti o Waitangi;
- b) There has been insufficient assessment by the Crown of the impact of the TPPA regime on the guarantees of tino rangatiratanga under te Tiriti;
- c) There has been inadequate consultation with Maori as to the effect of the TPPA regime on the guarantees of tino rangatiratanga under te Tiriti;
- d) Maori have been denied the right of active engagement in governance decisions that affect them as required by tino rangatiratanga;
- e) The Crown immediately halt progress towards signing the TPPA until time has been taken to meaningfully engage with Maori in accordance with te Tiriti o Waitangi obligations and ensure their rights and interests are accorded priority over foreign states and investors;
- f) Prior to entering in to the TPPA the Crown and Maori develop a framework of engagement upon which international agreements must be assessed to ensure they comply with te Tiriti o Waitangi obligations. The Crown must then put in place mechanisms to ensure that it can meet its obligations to Maori under te Tiriti o Waitangi when entering international agreements;

- g) This may include the establishment of a specialist body of Maori who, with adequate resourcing, are able to determine whether the agreement is compliant with te Tiriti;
- h) The Crown take immediate steps to implement the recommendations of the Wai 262 report as it relates to international agreements;
- i) That the current full draft text of the TPPA be released to Maori immediately to enable Maori to engage in an informed debate on the TPPA; and
- j) Any other recommendations the Tribunal sees fit to make.

Dated this 23rd day of June 2015 at Rotorua and Wellington.

Kathy Ertel
Claimant Counsel

Annette Sykes

Robyn Zwaan

TO: The Registrar, Waitangi Tribunal, Wellington

AND TO: The Crown Law Office

This STATEMENT OF CLAIM is filed by KATHY ERTEL, ANNETTE TE IMAIMA SYKES and ROBYN ZWAAN, representatives for the Claimants, of the firm Kathy Ertel & Co.

The address for service on the abovenamed Claimants is at the offices of Kathy Ertel & Co, Barristers and Solicitors, 26 Bidwill Street, Mt Cook, Wellington.

Documents for service on the abovenamed Claimants may be left at the address for service or may be:-

- a) Posted to the solicitor at Kathy Ertel, PO Box 734, Rotorua 3010; or
- b) Transmitted to the solicitor by fax on (07) 460 0434.