TPPA AND TE TIRITI
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What is the TPPA

- Negotiations for a Trans-Pacific Partnership Agreement (TPPA) began formally in March 2010 were concluded in Atlanta, USA on 5 October 2015.
- Notionally it builds on an earlier agreement between NZ, Singapore, Chile and Brunei, but it is really a totally different document.
- The text was released on 5 November 2015, subject to legal verification (scrubbing).
- There are 12 negotiating countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.
- They are expected to sign the agreement on 4 February 2016 in New Zealand, which is the formal depositary for the TPPA.
- Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement.
- The TPPA will come into force within two years if all original signatories notify that they have completed their domestic processes, or after 2 years and 3 months if at least six of them, including the US and Japan, have done so.

What is the goal of the TPPA?

The negotiations are designed to advance the commercial interests of the participating governments. However, there are already many FTAs among the TPPA countries. That means remaining border barriers are few and sensitive, especially for agriculture, and the outcomes will obviously reflect power asymmetries among negotiating countries. The TPPA explicitly aims to reach further 'behind the border' to impose disciplines on governments' laws and policies than any previous agreement, which means it constrains domestic political and democratic processes and governments' abilities to respond to unresolved matters or unforseen future challenges. The combination of rules on content and criteria for policies, state-state and investor-state enforcement, and committees to monitor implementation has the potential to have a chilling effect on future government decisions, including for the settlement of unresolved Maori claims.

What does the agreement cover?

The TPPA has 30 chapters and many annexes, with parties also adopting bilateral side-letters. Very few deal with traditional trade in goods. The most potent set down rules to promote and protect cross-border financial and other services, foreign investment, telecommunications, e-commerce, government procurement, SOEs, monopoly rights over intellectual property. Some, less binding, chapters address concerns like labour and environment, small and medium enterprises, development. Several process chapters, and parts of other chapters, specify criteria for decision making and rights of foreign states and commercial interests to engage in another country's domestic decisions, and there is provision for enforcement by other states, and in relation to the investment chapter, by foreign investors.

Why has there been such secrecy around the negotiations?
These negotiations signal a continued retreat by the government from hard won disclosure of the content of negotiations. The countries involved signed a pact saying no documents relating to the negotiations would be released during the negotiations or until four years after it comes into force (about 2 years after signing), aside from the final text. The main sources of information have been leaked texts and active monitoring on the margins of the negotiations by myself and a few others. The Crown refused to release any of the draft text to the Waitangi Tribunal prior to conclusion of the negotiations. Minister Groser's refusal to release information under the Official Information Act was challenged successfully in the High Court, with applicants including Ngati Kahungunu, but the Minister is still stonewalling.

What role have Maori played in the negotiations?
None, despite the recommendations of the Waitangi Tribunal in WAI262 regarding Crown consultation on international treaties. In the 1990s and early 2000s Maori were very active in demanding input into such negotiations – hui were held over the intellectual property agreement (TRIPS) in the WTO, over the proposed multilateral agreement on investment (MAI) and early free trade agreements, such as with Singapore. TPK organised hui and consultation. The current Treaty of Waitangi exception (discussed below) was the government's response to these concerns. However, there has been no outreach to Maori in the TPPA. Ngati Kahunungu was consulted early on about intellectual property and WAI 262 but that stopped. The only Maori on the MFAT stakeholder list was FOMA. A handful of others are listed as having been consulted, either because they attended the stakeholder sessions when negotiations were held in NZ (those sessions stopped 2 years ago) or sought out meetings. Recently MFAT held an 'information session' in Auckland for the Waitangi Tribunal claimants, where people had to enrol and some were refused entry.

Who had brought the Waitangi Tribunal claim?
The first claim was lodged on 23 June 2015: **Wai 2522:** lodged by Papaarangi Reid, Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage and Moana Maniapoto, concerning the Crown's actions and omissions in its negotiations over the TPPA; and **Wai 2523:** a claim by Natalie Kay Baker, Hone Tiatoa, Maia (Connie) Pitman, Ani Taniwha, Pouri Harris, Owen Kingi, Justyne Te Tana and Lorraine Norris, that alleges that without consultation with or consent from the hapū of Ngāpuhi, the Crown is ceding elements of NZ's sovereignty before considering what effect this will have on hapū in light of the conclusions of the Wai 1040 Stage 1 Report He Whakaputanga me te Tiriti – The Declaration and The Treaty. Since then a number of other claimants have joined the proceedings.

What are the key arguments?

(i) the process has violated tino rangatiratanga, with the Crown failing to consult actively and engage in good faith with Maori during the negotiations.

(ii) the substance of the agreement will be inconsistent with, or would prevent the Crown addressing, matters arising from te Tiriti and the Declaration and from other international obligations, including UNDRIP. Examples cited were: unresolved matters arising from WAI-262; impacts of investor rights and investor-state dispute settlement on natural resources, notably mining and water; and rights to health through access to affordable medicines and the Smokefree 2025 strategy.

How did the Crown respond?
The Crown said that the Treaty of Waitangi exception provides full protection for Maori interests, although it refused to disclose the exact wording, just that it would follow previous examples. The Crown refused to allow an independent expert assessment of the exception in the week before the meeting as a matter of urgency before ministers were due to meet to conclude the deal, saying it was not prepared to reopen any agreed text as that would allow other countries to demand to do the same

to New Zealand's disadvantage – although it did then insert a new provision in the intellectual property chapter to address UPOV 1991, an example raised to support concerns about the implications for WAI262. The Crown refused to allow the Tribunal to see any of the draft text.

What does the Treaty of Waitangi exception cover?

> **Article 29.6: Treaty of Waitangi**
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> 1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.
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> 2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

The exception applies to the entire agreement, but it has a number of serious limitations:

- The government must be prepared to take an action that may breach the TPPA rules. As a rule, New Zealand governments will be unwilling to do so because they believe it encourages others to do the same in areas of importance to NZ.
- The government must agree that something is a Maori or Tiriti obligation – seabed and foreshore and water show examples where it has refused to do so.
- It must be prepared to act on that obligation, despite the potential to breach the TPPA rules.
- If one government says it is not an obligation and refuses to act, and a future government changes its mind, that could be considered arbitrary discrimination, raising a problem with the first part of the exception.
- Even if the government agrees it has a Treaty obligation and is prepared to act, the exception only applies where the government's action involves discrimination in favour of Maori - not, for example, where demands for a general measure, such as a ban on fracking, are based on te Tiriti, or where Maori are predominantly affected by a measure, such as ETS. It was to address this inadequacy in the exception that the government got a last minute change inserted into the TPPA change to allow it not to sign up to UPOV 1991, but to do something different (although that has its own problems).
- The government can also act give more favourable treatment to Maori where a Tiriti obligation is not involved, but similar issues arise.
- While the government's interpretation of the Treaty cannot be challenged in a dispute, a measure not based on te Tiriti (eg the UN DRIP) can be challenged.
- The measure can still be challenged in a dispute brought by another party to the TPPA or an investor of a TPPA country (except Australia) for being arbitrary or unjustified discrimination. This wording is untested in this context, especially before an investment tribunal.
- The measure can also be challenged for being a disguised way to benefit local providers of goods, services and investment.
- The threat of a dispute can have a 'chilling' effect of deterring a government from taking proposed action.

What is the status of the claim?
The Tribunal declined a request for an urgent hearing in December 2015, before the agreement is due to be signed on 4 February 2016. The hearing is set for 14-18 March 2016. It has been agreed the Tribunal will commission an expert in international trade and investment law and the Treaty of Waitangi to advise it regarding the Exception. Discussions are still underway over the scope of the hearing and the timetable, with the Crown seeking to push out the timeline for a report beyond the select committee process.

What are the potential benefits to Maori economic development?
After the negotiations were concluded, but before the text was published, the government made a number of claims regarding the economic gains to New Zealand, at the same time acknowledging it fell well short of the 'gold standard' it had set as a bottom line for an acceptable deal. There are two main figures, which the government claims will benefit Maori because of their significant presence in natural resource sectors of the economy:

(i) 'tariff savings' of $259 million when the agreement is fully implemented (around 2030); this is deceptive for several reasons, including tariff cuts do not put money in exporters' pockets; tariff cuts may not be passed on to consumers; tariff cuts do not translate to new exports, but may divert trade from other countries; safeguard mechanisms and other protections may be invoked by the importing country; other factors, such as capacity and costs of increased production, may outweigh any new commercial gains.

(ii) gains of $2.7 billion to GDP by 2030. This figure is comprised largely of hypothetical gains from reducing non-tariff barriers, and is methodologically unsound – the government itself halved the original projection arbitrarily.

A critique of the economic arguments will be published shortly.

This rational also ignores broader questions about how an economic model based on tariff cuts serves a future Maori economic development agenda that is built around relationships, values and environmental sustainability. Some rules, such as intellectual property rules on information technology, could also hinder innovative new ventures.

What happens next with the Agreement?
The Executive decides whether and when to sign and ratify the TPPA. Parliament's role is largely token. Once the text is signed the government will table it with a National Interest Analysis (prepared by MFAT) in Parliament. It will be referred to the Foreign Affairs Defence and Trade Committee to hear submissions, but the government controls the committee, and the government is not required to adopt any recommendations for change even if they were made. There is no requirement for Parliament to debate the agreement, let alone vote on it; that may depend on whether the government believes Labour will support it. The government must then introduce any legislative changes that are necessary to comply with the agreement. There are likely to only be a handful of amendments (tariffs, trade remedies, copyrights, investment vetting threshold) because the rules are mainly about locking in the status quo and pre-empting future decisions, or can be addressed by regulation or administrative means.

What can iwi chairs do at this late stage?

- Require immediate Crown engagement and no signing of the TPPA until iwi chairs are satisfied.
- Demand the government secures side letters from all parties that provides an absolutely protection for Maori and te Tiriti.
- Support the Waitangi Tribunal claim.
- Pressure all Maori MPs to actively oppose the agreement until these conditions are met.