

Māori and the Trans-Pacific Partnership Agreement

Submission on Trans-Pacific Partnership Agreement

The Māori Party

11th March 2016

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PREFACE

The Māori Party opposes the TPPA.

The Waitangi Tribunal finding WAI-262, 2012 sums up our fundamental concern; *“With each instrument that it signs up to, the Crown has less freedom in how it can provide for and protect Maori, their tino rangatiratanga, and their interests in such diverse areas as culture, economic development and the environment”*.

The Government has failed to date to get informed consent from tangata whenua as required under the United National Declaration of Rights for Indigenous People (UNDRIP) and Te Tiriti o Waitangi. The TPPA negotiations could have involved a bona fide engagement with Māori. This did not occur.

The Māori Party believes that the TPPA impinges upon Māori development and tino rangatiratanga in respect to Te Tiriti o Waitangi and renders Māori vulnerable to foreign states and corporations who have no obligations beholden to them under Te Tiriti and UNDRIP but who may pursue legal rights through international law and mechanisms. The Treaty exception clauses in the TPPA are limited in that the implementation relies on the goodwill of the government to protect Māori rights which repeated Waitangi Tribunal reports have shown it has failed to do.

Successive governments have failed to adequately address Te Tiriti o Waitangi and Māori rights therefore we do not have the confidence in the Crown on its own to interpret those rights in respect to the TPPA.

The Māori Party’s’ role is to work towards ensuring that the Crown honours its obligations guaranteed to Māori under Te Tiriti o Waitangi.

The Māori Party has long campaigned for constitutional change that would properly recognise the Treaty partnership between Māori and the Crown. Those proposals include establishing an Upper Treaty House in Parliament and establishing a Parliamentary Commissioner for the Treaty.

Kia tū Kotahi tātau hei whakamana i te Tiriti o Waitangi.

INTRODUCTION

1. The opposition of the Māori Party to the TPPA is based on the lack of assurances that Treaty of Waitangi and indigenous rights as per (UNDRIP) will be protected. The Māori Party sought both advice from constituents and legal advisers on the following:
 - (a) key issues for Māori arising from the TPP;
 - (b) a view on clauses relating to the Treaty, protection of Māori intellectual property rights and the impact of the 'Investor State Disputes' provisions on Treaty settlements;
 - (c) suggestions for legislation outside of the TPP negotiations to offset negative impacts of the TPP on Māori; and
 - (d) an example of alternative Treaty clauses for use in future FTAs.
2. To undertake this analysis advisers reviewed the full text (unscrubbed) of the TPP and ancillary documentation prepared by agencies, institutions and individuals, including:
 - (a) Ministry for Foreign Affairs and Trade;
 - (b) The New Zealand Law Foundation (Trans-Pacific Partnership Agreement New Zealand Expert Paper Series);
 - (c) The World Bank; and
 - (d) Academic institutions.

EXECUTIVE SUMMARY

3. This submission considers five key issues for Māori, including:
 - (a) the Crown processes for engaging with Māori;
 - (b) the effectiveness of the Treaty of Waitangi Exception in protecting Māori interests;
 - (c) whether the TPP fetters Crown sovereignty and the impact of Investor State Dispute Settlement (**ISDS**);
 - (d) the impacts of the Intellectual Property provisions; and
 - (e) the economic implications of the TPP for Māori.

4. Advice was sought and an analysis of each of these key issues with suggestions for potential mitigation measures was also obtained. These mitigation measures are on a spectrum ranging from extensive reform such as implementing legislation to attempting to negotiate side letters to conducting reviews.
5. **Crown Processes: Engaging with Māori:** In domestic legislation there is currently no legal requirement that the Crown engage with Māori in negotiating international agreements and treaties. The Waitangi Tribunal in its Wai 262 Report critiqued the current status quo in respect of the Crown's engagement with Māori and made recommendations for amendment. These have not yet been implemented by the Crown. In respect of the TPP negotiations specifically, the Waitangi Tribunal in a recent decision was also critical of the Crown's limited and selective engagement with Māori. The Māori Party believes that the Government should conduct a review of its international Treaty making procedures generally as well as specifically review its processes for engaging with Māori. At a general level the TPP has highlighted the discretion that governments have to enter into international agreements that can have great consequence with little engagement from communities. Such a review will likely attract many other stakeholder interests.
6. **Treaty of Waitangi Exception:** The Treaty of Waitangi Exception does permit the Government to take measures that favour Māori that would otherwise be inconsistent with New Zealand's substantive obligations under the TPP. However, there is some uncertainty as to the how the Treaty Exception will be interpreted and the increased risk of litigation under the TPP could create a "chilling effect" on the Government's inclination to adopt such measures. There are a number of measures that could be taken to address these issues ranging from:
 - (a) enacting domestic legislation that specifies how the Treaty Exception is to be applied and interpreted domestically;
 - (b) including a provision in the legislation that is required to ratify the TPP that specifies how the Treaty Exception is to be applied and interpreted domestically;
 - (c) New Zealand entering into side letters with individual TPP Parties clarifying the interpretation of the Treaty Exception; and
 - (d) extending the binding recommendation jurisdiction of the Waitangi Tribunal on matters relating to whether a proposed Government regulation (or an omission by the Government to adopt a regulation) is consistent with the Treaty Exception.
7. **Crown Sovereignty and Investor State Dispute Settlement:** The Crown is exercising its sovereign right to enter into the TPP and it retains its sovereign right to withdraw from the TPP at any time. The Crown's right to regulate is fettered by agreeing to be bound to its obligations under any FTA, including the TPP. In terms of the effect that this has on the Crown being free to legislate and follow its chosen domestic policy, exposure to liability for breaching the TPP, in particular those ISDS provisions that allow an investor to sue a government for loss and damages for breaching TPP protections, could have a "chilling effect" on the Crown's regulatory inclinations. In respect of the Crown's freedom and ability to regulate to advance Māori interests, there are exceptions in the TPP that permits the Crown to breach its TPP obligations. This includes the obvious Treaty Exception as well as some generic exceptions in relation to legitimate public welfare objectives such as health, safety and the environment. Mitigating against the "chilling

effects” is difficult. One suggestion would be to provide legislative protection that in adhering to its Treaty of Waitangi obligations the Crown must not have regards to the fiscal impact of its obligations pursuant to an FTA. This type of suggestion is requiring the government to legislate in a manner that is consistent with its assurances that the TPP secures the regulatory freedom for the Crown to meet its Treaty obligations.

8. **Intellectual Property:** Most of the provisions in the Intellectual Property (**IP**) section of the TPP are consistent with New Zealand’s existing IP framework. However, the changes further entrench the current status quo framework which the Waitangi Tribunal found in its Wai 262 Report breached Treaty of Waitangi principles. Further, the investor protection mechanisms could have a chilling effect on positive developments for Māori in this area of law. The Māori Party suggests that the Crown re-engage with the Wai 262 recommendations in respect of IP.
9. **Economic Implications:** In terms of the economic implications of the TPP for Māori, there is the potential to benefit from the elimination or reduction of tariffs and access to new markets. However a cost-benefit analysis of the TPP to Māori nationally and by region is recommended. A recent report projected that although New Zealand’s GDP is likely to increase due to the TPP that there will be a negative impact on employment. The projection is that in New Zealand 5,000 jobs will be lost by 2025.

PART ONE: KEY ISSUES IN THE TPP FOR MĀORI

A Crown Processes

Should the Crown have engaged with Māori on the TPP?

10. In domestic legislation there is currently no legal requirement that the Crown engage with Māori in negotiating international agreements and treaties. In New Zealand, the power to enter into or withdraw from an international treaty resides with the Executive (in practice this is the Prime Minister and Cabinet).
11. Prior to the conclusion of the TPP negotiations, a number of claims were submitted to the Waitangi Tribunal for an urgent hearing on the TPP.¹ One of the claims was that the Crown had undermined its Treaty partner by failing to provide information and failing to actively consult with Māori in good faith over the TPP negotiations.²
12. The Crown submitted that the core claims and views of the claimants in relation to the key issues for Māori had been extensively canvassed through litigation, law reform and other processes. The Crown argued that it was aware of these issues and they informed its position in negotiations. The Crown recognised that it was required to make informed decisions but submitted that the amount and type of engagement had been adequate. The Crown further contended that it had engaged in meaningful talks with Māori including taking advice from Te Puni Kokiri, Māori industry and other bodies.³ The Crown argued that it is also not New Zealand’s negotiating practice to share documents and information to persons outside of Government due to confidentiality and security of information.⁴

¹ This included Wai 2522, Wai 2523, Wai 2530, Wai 2531 and Wai 2532.

² Wai 2522 (et at) Decision of the Waitangi Tribunal 31 July 2015 at [8], [11], [14], [17] and [21].

³ Radio New Zealand ‘Crown defends TPP secrecy at Waitangi Tribunal hearing’ <http://www.radionz.co.nz/news/te-manu-korihi/279579/crown-defends-tpp-secrecy-at-tribunal-hearing>

⁴ Wai 2522 (et at) Decision of the Waitangi Tribunal 31 July 2015 at [54].

13. The Waitangi Tribunal decision was that, given the secrecy of the TPP negotiations, there was not proper basis to intervene and exercise the Tribunal's statutory powers at the final stage of negotiations of the TPP. One of the issues for urgent inquiry would be what Māori engagement and input is now required over the steps needed to ratify the TPP. The Waitangi Tribunal was particularly critical of the Crown engagement with Māori, indicating that the Crown's domestic engagement appears to be based on a view of selected Māori organisations as stakeholders rather than Māori more generally as Treaty partners and evidence of the degree of engagement with Māori appeared to be relatively limited and selective.
14. The Waitangi Tribunal has also previously considered the process followed by the Crown to enter into international agreements and treaties. In the Wai 262 Report, the Tribunal said in respect of entering into international agreements that the Treaty:⁵
 - (a) Gives the Crown the right to govern, but in return requires the Crown to protect the tino rangatiratanga (full authority) of iwi and hapū in relation to their 'taonga katoa' (all that they treasure, including their own affairs).
 - (b) In this context, the Treaty allows the Crown to represent New Zealand internationally and to develop foreign affairs policies. But in doing so the Crown must actively protect Māori interests in taonga, including interests relating to the culture, identity and traditional knowledge of iwi and hapū.
15. The Wai 262 Tribunal further held that, in its international relations, the Crown is obliged to protect Māori interests to the extent that is reasonable and practical under the circumstances. This requires a dialogue in which the Crown informs Māori of upcoming international developments and how these might affect Māori interests, and Māori inform the Crown as to whether and how they believe their interests should be protected. The level of engagement between the Crown and Māori, and the level of priority accorded Māori interests, should depend on the importance of those interests to Māori and on the likely impact of the relevant international instrument on those interests. The Tribunal also found that engagement should not always be limited to consultation. When an international instrument relates to matters of core importance to Māori interests engagement should go beyond consultation to consensus and, preferably, negotiated agreement.
16. The Waitangi Tribunal also had concerns that existing policies were not effectively implemented – for example that information was not provided to the right people at the right time so that effective consultation could take place. The Tribunal recommended reforms including:
 - (a) that the Crown amend the Strategy for Engagement with Māori on International Treaties to require engagement over both binding and non-binding instruments, and to provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest;

⁵ Waitangi Tribunal 'Ko Aotearoa Tenei – Factsheet 9 – The Making of International Instruments' http://www.google.co.nz/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjsIKvz5cTKAhUBPZQKHRg7AS4QFggeMAA&url=http%3A%2F%2Fwww.justice.govt.nz%2Ftribunals%2Fwaitangi-tribunal%2Fdocuments%2Fgeneric-inquiries%2Fflora-and-fauna%2Fwai-262-the-making-of-international-instruments&usg=AFQjCNENOWKilTI3hA0v1CmYNr_R9bj-0g

- (b) that the Crown identify relevant Māori bodies which could serve as partnership forums for discussion about international instruments, and create partnership bodies where they do not exist;
- (c) that the Crown adopt a policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums; and
- (d) that the Crown put in place accountability mechanisms, including regular reporting about Crown actions relating to international instruments to iwi and Māori organisations, and to Parliament's Māori Affairs Select Committee; and that the National Interest Analysis carried out when Parliament considers international instruments includes consideration of any effect on Treaty rights and interests.

17. These suggested reforms have not yet been adopted by the Government.

Mitigation Measures: Crown Processes

18. The Māori Party considered the positions that could be taken to mitigate the potential negative impacts on Māori of the TPP, these included;

Review International Treaty Making Procedures (Non-legislative)

19. The Māori Party recommends that the Government conduct a review of its international Treaty making procedures generally. The TPP has highlighted the discretion that governments have to enter into international agreements that can have great consequence for New Zealand. In particular, this proposed review could be undertaken with specific reference to Māori engagement and identifying all of the avenues where it could be appropriate to ensure that either a Treaty of Waitangi assessment or a Māori specific assessment is undertaken throughout the negotiation and execution phases.

20. All FTAs, including the TPP, must be ratified and incorporated into domestic legislation through the Parliamentary treaty examination process. The Parliamentary process is comprised of a series of steps and is as follows:⁶

- (a) the Cabinet Manual and Standing Orders require the government to present all multilateral treaties and major bilateral treaties of particular significance to the House before binding treaty action is taken;⁷
- (b) A National Interest Analysis must be prepared that that considers addresses the reasons for New Zealand becoming party to the treaty; the implications for New Zealand of becoming party; and the means of implementing the treaty.⁸
- (c) once a treaty has been presented to the House (with an accompanying National Interest Analysis), it is the subject of select committee consideration;
- (d) the government refrains from taking any binding treaty action in relation to a treaty that has been presented to the House until the relevant select committee

⁶ Guide to Cabinet and Cabinet Committee Process, <<http://cabguide.cabinetoffice.govt.nz/parliamentary-treaty-examination-process>>.

⁷ Cabinet Manual at [7.113].

⁸ Standing Orders of the House of New Zealand Representatives 2014 at [398]. Standing Order 398 requires that a National Interest Analysis is undertaken. There are a series of measures that the Government (through the Ministry for Foreign Affairs and Trade) are required to assess, although not one of these measures is specific to Māori.

has reported, or 15 sitting days have elapsed from the date of presentation, whichever is sooner;

- (e) if the select committee report contains recommendations to the government, a government response to the recommendations must be presented to the House within 90 days of the report;⁹
- (f) in rare situations, the government may take urgent treaty action in the national interest before the treaty is presented to the House. When this occurs, the treaty must be presented to the House as soon as possible after the binding treaty action has been taken, with a National Interest Analysis and an explanation of why it was considered necessary to take urgent action.

21. A review could highlight areas that could be made more robust for Māori such as:

- (a) the lack of Treaty of Waitangi compliancy measures included in the Treaty Making process prior to the conclusion of negotiations; and
- (b) the National Interest Analysis (required under Standing Order 398) not currently including any measures specific to Māori.

Domestic Legislation

22. Rather than simply reviewing the process by which the Government negotiates and executes international agreements and treaties, it may also be possible to entrench the process by incorporating it into domestic legislation. Doing so could strengthen the Crown's obligations as far as Treaty principles are concerned. For example, a Bill could be introduced that would seek to:

- (a) Outline the procedural requirements the Crown is required to engage when negotiating an FTA that may impact on Māori rights or interests;
- (b) Require the Crown to provide a comprehensive assessment and analysis on the impacts of economic, social, cultural and environmental effects of the treaty entering into force on Māori.¹⁰
- (c) Require international agreements to be assessed to ensure they comply with Te Tiriti o Waitangi obligations. This may include the establishment of a specialist body of Māori who, with adequate resourcing are able to determine whether the agreement is compliant with te Tiriti;¹¹
- (d) Incorporate the suggestions made by the Waitangi Tribunal in its Wai 262 Report outlined at paragraph [22] above such as creating partnership forums for discussion about international instruments, funding Māori engagement and putting in place accountability mechanisms.

B The Treaty of Waitangi Exception

⁹ Cabinet Manual at [7.108] – [7.111]; and Standing Orders of the House of New Zealand Representatives 2014 at [400].

¹⁰ We also recommend that Standing Order 398 is amended to reflect this requirement also.

¹¹ This was one of the findings that the Wai 2523 claims sought see Wai 2522 (et al) Decision of the Waitangi Tribunal 31 July 2015 at [9].

Does the TPP impinge on the Crown's ability to meet its obligations to Māori?

23. One of the strong criticisms of the TPP is that it will prohibit or make it difficult for the New Zealand Government to develop laws and policies that are consistent with the Treaty of Waitangi and Māori rights.¹² The Government's position on this point is that the Treaty Exception (which provides that "nothing in the TPP will prevent the Crown from meeting its obligations to Māori"¹³) secures the necessary regulatory freedom for the Crown to meet its Treaty obligations.¹⁴
24. In summary, our assessment is that the Treaty Exception generally permits the Government to take measures that favour Māori that would otherwise be inconsistent with New Zealand's substantive obligations under the TPP. However, there is some uncertainty as to the how the Treaty Exception will be interpreted and the increased risk of litigation under the TPP could create a "chilling effect" on the Government's inclination to adopt such measures.
25. The Treaty Exception, set out in Article 29.6 of the TPP, states:
- (1) Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.
 - (2) The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be required to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.
- (the **Treaty Exception**).
26. The Treaty Exception is a general exception to the entire TPP and permits measures that would otherwise be inconsistent with New Zealand's substantive obligations under the TPP. The Treaty Exception has been included in every FTA since the Singapore New Zealand FTA 2001. We understand that the New Zealand Government has not yet had to rely on it in an international tribunal to defend a measure taken by the Government to "accord more favourable treatment to Māori" on a matter to which an FTA relates.
27. The issue of whether the Treaty Exception is an effective protection of Māori interests is currently the subject of an urgent Waitangi Tribunal Hearing. The hearing for this matter has been set down for 14-18 March 2016.
28. Numerous documents exist which provide a useful breakdown of the meaning of the Treaty Exception and its implications for the recognition of Māori rights:

¹² For example see Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, 'Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement', Expert Paper #3, January 2016.

¹³ Hon Todd McLay, Press Release: 'Setting the record Straight on TPP and the Treaty', <http://www.beehive.govt.nz/release/setting-record-straight-tpp-and-treaty> (21 January 2016).

¹⁴ Wai 2522 (et at) Decision of the Waitangi Tribunal 31 July 2015 at [56].

- (a) the Affidavit of Penelope Jane Ridings;¹⁵
- (b) the Expert Paper “Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement”;¹⁶
- (c) the Sixth Affidavit of Professor Jane Elizabeth Kelsey;¹⁷
- (d) Todd McClay Press Release ‘Setting the Record Straight on TPP and the Treaty.’¹⁸

29. Key elements of the Treaty Exception include:

- (a) It is for the New Zealand Government to determine what measures it deems necessary to accord ‘more favourable treatment’ to Māori (referred to as a ‘self-judging’ standard). There are domestic forums such as the Waitangi Tribunal and international mechanisms that assist in determining what is required for the Crown to meet its Treaty of Waitangi obligations.
- (b) To be covered by the Treaty Exception, the measures adopted by New Zealand should be directed towards providing Māori with more favourable treatment. If the key rationale for the measure was to provide more favourable treatment to Māori, the exception would be applicable even if non-Māori also received some benefit from the measure. Conversely, if Māori were only incidentally affected by a measure designed to fulfil a general public purpose the exception may not be applicable. Further, general measures that benefit Māori may also be permitted under the TPP through other exceptions such as the Investment Chapter, which provides an exception to the investor protection liabilities for Parties that adopt measures to ensure investments are undertaken in a manner sensitive to “environmental, health or other regulatory objectives”.¹⁹
- (c) The Treaty Exception does not apply to measures taken as a means of “arbitrary” or “unjustified discrimination” against the other TPP Parties or as a disguised restriction on trade in goods. There therefore needs to be a rational connection between the measure taken for the benefit of Māori and its objective.
- (d) The interpretation of the Treaty of Waitangi is not subject to challenge under the TPP dispute mechanism.²⁰ The following, however, could be subject of dispute settlement under the mechanism:
 - (i) whether a non-Treaty of Waitangi measure that is favourable towards Māori is “necessary”;
 - (ii) if a measure is “arbitrary” or “unjustified discrimination”; and

¹⁵ Dated 19 January 2016.

¹⁶ Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, ‘Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement’, Expert Paper #3, January 2016.

¹⁷ Dated 19 January 2016 (in support of the claimant position that the Treaty Exception is not effective)

¹⁸ Hon Todd McLay, Press Release: ‘Setting the record Straight on TPP and the Treaty’, <http://www.beehive.govt.nz/release/setting-record-straight-tpp-and-treaty> (21 January 2016).

¹⁹ See Article 9.15.

²⁰ See paragraph 2 of the Treaty Exception.

- (iii) if a measure is a way to benefit local providers of goods, services and investments over TPP Parties.

30. On our assessment, the key criticisms of the Treaty Exception are that:

- (a) There is some uncertainty as to how certain elements of the Treaty Exception will be interpreted. For example:
 - (i) whether “more favourable treatment” for Māori includes any treatment that gives Māori special entitlements or will be limited to discriminatory treatment in a commercial sense; or
 - (ii) whether a decision on Treaty or Māori rights and interests by a subsequent Government that is inconsistent with a decision of a previous Government would be considered “arbitrary” (for example, if a subsequent Government decides to implement some or all of the Wai 262 recommendations).
- (b) The Crown's future recognition of Māori interests by invoking the Treaty Exception could still be subject to legal challenges. This increased risk of being exposed to litigation could have a “chilling effect” on the Crown’s preparedness to act on its obligations to Māori by invoking the Treaty Exception.
- (c) The dispute provisions do not require input or evidence from an expert in indigenous law or knowledge, nor is there a right for Māori to participate in the dispute process. These factors may disadvantage the Crown if it is required to defend a measure taken in reliance on the Treaty Exception, as the tribunal hearing the dispute may not have an understanding of these nuances.

Mitigation Measures: Treaty of Waitangi Exception

Bilateral Side Letters

- 31. The Māori Party wishes to investigate the benefits of the Government entering into negotiations for the purpose of agreeing to bilateral side-letters with individual TPP Parties to mitigate the uncertainty that could arise in interpreting the Treaty Exception clause. For example, these bilateral side letters could clarify how the Treaty Exception will be interpreted.
- 32. Side letters are instruments negotiated in conjunction with FTAs. The purpose of a side letter is to clarify bilateral matters between two TPP Parties that do not affect the rights and obligations of the other TPP Parties.
- 33. While New Zealand has already entered into side agreements with most TPP Parties, there is nothing to preclude the Government from entering into further side agreements.

Amend Treaty Exception Clause

- 34. We consider that the primary issue with the Treaty Exception clause is that there is some uncertainty as to how the clause will be interpreted by an international arbitration panel in an investment state dispute settlement.
- 35. We understand that it is too late to suggest amendments to the Treaty Exception clause, as it appears in the TPP. Accordingly, and as suggested above, it seems that one

option to *effectively* amend the Treaty Exception clause in the TPP is to clarify its interpretation in bilateral side-letters with individual TPP Parties.

36. It may be possible to draft an alternative Treaty Exception clause that can be used in future FTAs entered into by the New Zealand Government.

Other Options

37. Because the primary issue with the Treaty Exception clause relates to how it will be interpreted, another option could be to provide for a specific process by which such issues will be determined. In this regard, the Māori Party wishes to investigate how the Waitangi Tribunal could be responsible for determining such issues, perhaps with the power to make binding recommendations on whether a particular regulation (or an omission to regulate) falls within the Treaty Exception.
- (a) The Waitangi Tribunal is the most expert body on matters relating to the Treaty. Its expertise on Treaty matters has been recognised regularly and consistently by the Courts and international tribunals.
 - (b) Having the Waitangi Tribunal determine whether or not the Treaty Exception applies will assist the Crown should it be challenged by other TPP Parties over a measure taken in reliance on the Treaty Exception. The Tribunal's findings could be used as evidence to support the Crown's domestic regulatory actions (or omissions).
 - (c) Extending the Waitangi Tribunal's binding jurisdiction to considering whether or not a Crown act or omission is consistent with (or in proper reliance on) the Treaty Exception is relatively easy to implement.
38. Another option to investigate could be to require that the Crown act as a guarantor to Māori for its own Treaty making arrangements with third parties in the TPP. This would effectively require the Crown to "make good" any negative impacts to Māori arising under the TPP.

C Sovereignty and Investor State Dispute Settlement (ISDS)

Does the TPP fetter New Zealand's sovereign right to regulate?

39. The Crown is exercising its sovereign right to enter into the TPP and it retains its sovereign right to withdraw from the TPP at any time.²¹ Therefore to that extent, the Crown's sovereignty is not affected. However, the Crown's right to regulate is fettered by agreement to be bound to its obligations under FTA's including the TPP.
40. One of the major implications of the TPP is that it provides a greater level of protection for foreign investors and their investments than New Zealand's existing trade and investment treaties. Investors are conferred rights that they can directly enforce through the dispute settlement provisions of the Investment Chapter. The main substantive obligations on a State with respect to foreign investors include:
- (a) to provide treatment no less favourable than that provided to nationals in circumstances (the **National Treatment Obligation**),²²

²¹ See Article 30.6. A withdrawal takes effect six months after a Party provides the required written notice.

²² See Article 9.4.

- (b) to provide a minimum standard of treatment for investors including fair and equitable treatment (includes not denying justice and due process in proceedings) and full protection and security (includes police protection) (the **Minimum Standard Obligation**);²³ and
 - (c) to protect investors from direct or indirect expropriation or nationalization except for a public purpose or on payment of compensation (the **Non-Expropriation Obligation**).²⁴
41. Investors are able to sue TPPA governments on the basis of an alleged breach of these substantive investor protections.²⁵ Tribunals can award monetary payments for loss or damages and there is no limit on the amount that can be awarded.²⁶ There is also no appeal from the Investor State Dispute Settlements (**ISDS**) or State-to-State dispute settlement decisions.
42. The TPPA, that gives investors the right to directly sue the New Zealand government for loss and damages in relation to their investments, expands New Zealand's exposure to claims. This is particularly the case as a significant proportion of investment into New Zealand is sourced from TPPA countries including the most litigious – the United State. This exposure coupled with the uncertainty of the interpretation of some of the clauses could be a disincentive in respect of a Government's willingness to regulate in a manner that risks breaching the TPP. This "chilling effect" is therefore a practical fetter on the Crown's regulatory inclinations.
43. There are however a number of exceptions that are scattered throughout the TPP that aim to preserve regulatory autonomy in respect of certain matters this includes:
- (a) the Treaty Exception;
 - (b) the Preamble; and
 - (c) reservations in the Investment Chapter;
44. In respect of the ability of the Crown to regulate to recognise and protect Māori rights and interests, the Treaty Exception carves out a specific exception to the TPP including the Investment Chapter that opens the Crown up to liability for certain investment breaches. This exception is for measures that the New Zealand Government deem are necessary to accord more favourable treatment to Māori including in fulfilment of its Treaty of Waitangi obligations. This exception is discussed in paragraphs [31] to [46] above. Regulatory autonomy is therefore preserved in this respect.
45. Further, it is notable that the National Treatment Obligation is subject to reservations in the Annexes that set out permissible non-conforming measures.²⁷ New Zealand has reserved a range of measures to which it reserves discretion to implement measures that might be contrary to the National Treatment Obligation. This includes:
- (a) public law enforcement and correctional services;

²³ See Article 9.6.

²⁴ See Article 9.7.

²⁵ See Section B of the Investment Chapter.

²⁶ See Article 9.28.

²⁷ See Annex II Schedule of New Zealand.

- (b) certain social services;
 - (c) the sale of State-owned enterprises;
 - (d) water, including the allocation, collection, treatment and distribution;
 - (e) protected areas set up for heritage management, public recreation and scenery preservation, foreshore and seabed, and other marine concessions;
 - (f) publicly funded research and development; and
 - (g) cultural heritage of national value.
46. In these circumstances the Government retains the right to regulate without having to rely on the Treaty of Waitangi Exception.
47. The Preamble to the TPP also includes the following general statement of the right to regulate:
- [The Parties recognize] their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare obligations, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.
48. This type of preamble affirming the right of a State to regulate is a recent innovation and its impact remains to be seen. In the substantive Agreement, however, Article 9.15 of the Investment Chapter states that:
- Nothing in this Chapter shall be construed as preventing a party from adopting any measure to ensure that investments are undertaken in a manner sensitive to environmental, health or other regulatory objectives.
49. This is reinforced by the definition of “expropriation” in Annex 9-B. Direct expropriation includes a formal transfer of title or outright seizure. Indirect appropriation requires a case-by-case inquiry that considers the economic impact of government action, the extent to which government action interferes with reasonable investment-backed investments and the character of the government action. Non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment do not constitute indirect expropriations except in rare circumstances. Such regulatory actions to protect public health specifically include actions relating to the regulation, pricing, supply, and reimbursement of pharmaceuticals including biologics.²⁸
50. Although these provisions indicate that the general regulatory autonomy of a State in relation to these public policy areas (that could benefit Māori interests) is preserved, there is a lack of case law to indicate the extent to which these kinds of clauses may lead a Tribunal to prefer an interpretation that is favourable to regulatory autonomy.²⁹ For example the “rare circumstances” that a Government could be held liable by indirect expropriation through implementing public welfare measures, is unclear.

²⁸ Annex 9-C, footnote 37.

²⁹ Amokura – page 9.

Does the investor protections prohibit the Government from settling future Treaty of Waitangi settlements?

51. The Treaty Exception clause provides the Government with a defence against a breach of the TPP including the investor protections if they legislate in a manner that it deems “necessary” to give preferable treatment to Māori. This specifically includes those matters necessary to fulfil its obligations under the Treaty of Waitangi.
52. The Government is therefore prima facie not prohibited from settling future Treaty of Waitangi settlements where it involves preferable treatment for Māori and there is a direct connection between the settlement of a Treaty of Waitangi claim (or the upholding of a Treaty of Waitangi obligation) and the measures taken to address that claim. The Crowns interpretation of the Treaty of Waitangi is not open to challenge by TPP parties.
53. There is some uncertainty as to how the Treaty Exception might be interpreted. This is discussed further at paragraphs [31]-[46]. Further, when the TPP is breached by a measure that gives preferential treatment to Māori there are also potential challenges that could be made on the basis that the measure is “arbitrary”, “unjustified discrimination” or is disguised restriction on trade. This risk could create a “chilling effect” on the government from taking measures.

Mitigation Measures: Sovereignty and ISDS

Domestic Legislation

54. Mitigating against the “chilling” effect is difficult. One option, however, would be to advance a bill that would mitigate uncertainty by clearly stipulating the process through which the Crown will discharge its obligations to Māori in light of its obligations in the TPP.
55. For example, the Bill could provide legislative protection stipulating that the Crown is obliged to adhere to its Treaty obligations domestically without regard to its obligations, or the fiscal impact of its obligations, pursuant to an FTA including but not limited to future Treaty Settlements, all rights and obligations in regard to natural resources, and any other Treaty-based obligation raised by Māori.

D Intellectual Property Rights

Does the TPP negatively impact Māori Intellectual Property Rights?

56. The Intellectual Property (IP) Chapter of the TPP harmonizes IP standards across the TPP region and strengthens the rights of IP holders.
57. Most provisions in the IP Chapter of the TPP are consistent with New Zealand’s existing IP regime. Some of the changes that will be required in domestic legislation include:³⁰
 - (a) extending the copyright term from 50 to 70 years;
 - (b) implementing stronger technological protection measures to protect copyright works;

³⁰ Ministry of Foreign Affairs and Trade (New Zealand) “Intellectual Property” available at http://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Intellectual-Property.PDF

- (c) extending rights to performers of copyright works such as musicians and actors;
 - (d) increasing data protection mechanisms for new agricultural chemicals from 5 to 10 years;
 - (e) extending the terms of patents to compensate for any unreasonable delays in the patent examination process;
 - (f) reviewing the period of market exclusivity (currently 5 years) for biological pharmaceuticals after 10 years;
 - (g) putting in place a system that enables a pharmaceutical patent holder to be notified that a generic version of their product has been submitted for regulatory approval;
 - (h) implementing procedures to oppose and cancel geographical indications (being signs or names in relation to goods that have a specific geographical origin such as Champagne);
 - (i) provide additional damages for trademark infringement; and
 - (j) joining the following multilateral intellectual property treaties: World Intellectual Property Organisation (WIPO) Copyright Treaty; WIPO Performances and Phonograms Treaty, Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.
58. The TPP also includes a requirement for New Zealand to within three years of entry into force of TPP, either accede to the most recent 1991 version of the International Convention for the Protection of New Varieties of Plant (**UPOV 91**) or under a New Zealand specific approach implement a plant variety rights system that gives effect to UPOV 91.³¹ When implementing this obligation New Zealand is able to adopt any measure that it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi.³² This is not subject to the dispute settlement provision in the TPP.
59. Beyond UPOV91, in terms of the specific impact of the TPP on Māori IP rights, the inclusion of the Treaty of Waitangi exception in the TPP means that the New Zealand government can take regulatory action to change the domestic legal framework to offer preferential treatment to Māori to better protect their intellectual and cultural property. The limitations of the Treaty Exception are set out above at [31]-[46].
60. A critique of the TPP provisions are that they:
- (a) further entrench and bolster the current status quo; and
 - (b) the “chilling effect” of the ISDS provisions may impact on the Government’s willingness to legislate for positive developments for Māori in this area of law.

³¹ See Annex 18-A.

³² See Annex 18-A at [2].

61. The limitations of the current IP framework in relation to Māori intellectual and culture property were acknowledged in the Wai 262 Report. The Waitangi Tribunal agreed that the Crown had breached its obligations to Māori by failing to provide adequate protections under the current IP framework for Māori intellectual and cultural property.³³ The Waitangi Tribunal recommended an alternative framework be set up to provide for this protection including the establishment of:³⁴
- (a) a general objection mechanism to prohibit the derogatory or offensive public use of “taonga works”,³⁵ “taonga-derived works” and matauranga Māori;
 - (b) a mechanism by which kaitiaki can prevent any commercial exploitation of taonga works or matauranga Māori unless there had been consultation and where appropriate, kaitiaki consent; and
 - (c) an expert Commission to replace the Trade marks advisory committee to perform an adjudicatory function, establish best practice guidelines and administer a register of taonga works.
62. To our knowledge, since the Waitangi Tribunal released their report in June 2011 the government has done very little to implement any of the recommendations suggested by the Waitangi Tribunal in Wai 262.

Mitigation Measure: Intellectual Property Rights

Give effect to Wai 262

63. The MFAT “Fact Sheet” on IP states in respect of its UPOV91 obligations and the specific Treaty exception that “This gives the Government flexibility to decide in consultation with relevant stakeholders, how to best meet the obligations in respect of UPOV91, while taking into account the recommendations in Waitangi Tribunal report Ko Aotearoa Tēnei (Wai 262).”³⁶
64. The implementation of the Governments obligations in respect of UPOV91 will therefore be a forced impetus for the Government to engage with Māori Treaty rights in respect of plants. The Māori party recommends that the Government re-engage with the extensive recommendations and commentary made by the Waitangi Tribunal in Wai 262.

E Economic Implications

Does the TPP provide Māori with economic benefits?

65. The TPP is an agreement designed to liberalise trade. Therefore to the extent that Māori businesses are engaged or intend to engage in exporting goods there are potential benefits from the TPP through:

³³ See Waitangi Tribunal ‘Ko Aotearoa Tenei – Te Taumata Tuatahi, (Wai 262), 2011, Chapter 1.

³⁴ Ibid at 56 - 57.

³⁵ A taonga work is defined by the Waitangi Tribunal as a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori. See See Waitangi Tribunal ‘Ko Aotearoa Tenei – Te Taumata Tuatahi, (Wai 262), 2011, at 1.1.2.

³⁶ Ministry of Foreign Affairs and Trade (New Zealand) “Intellectual Property” available at http://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Intellectual-Property.PDF at 5.

- (a) the elimination or reduction of tariffs on New Zealand goods exports to TPP markets;
 - (b) access to new markets that New Zealand has not had FTAs with before such as the United States, Japan, Canada, Mexico and Peru; and
 - (c) obtaining the competitive advantage that other TPP countries will have in exporting their goods.
66. The TPP is the first FTA with the United States, Japan, Canada, Mexico and Peru. Tariffs will be eliminated on over 93% of New Zealand's exports to these new FTA partners once TPP is fully phased in.³⁷ TPP will also eliminate tariffs of New Zealand exports to Malaysia and Vietnam that are not already subject to tariff elimination in previous FTA's such as wine and liquid milk to Malaysia.
67. The value of the Māori asset base is over \$40 billion.³⁸ In respect of the Māori export market Māori Authorities:³⁹
- (a) Exported goods to the value of \$526 million in 2014 up from \$349 million in 2011 and \$434 million in 2012;
 - (b) Fisheries and seafood were the top export commodity in 2014, making up over 50 percent of total exports by Māori authorities;
 - (c) Māori authorities' top three export commodities were fisheries and seafood, dairy, and meat and fish preparations. These commodities made up over 90 percent of the total value of exports by Māori authorities in 2014; and
 - (d) China was the top export partner, receiving 44 percent of Māori authorities' total exports. Other top export partners were Australia and the United States.
68. Māori exports are significantly targeted towards the primary sector. Some of the tariffs that will be eliminated or reduced over time include:⁴⁰
- (a) **Beef:** the elimination of tariffs from the United States, Canada and Mexico and the reduction of tariffs from Japan.
 - (b) **Sheep:** the elimination of tariffs from the United States, Canada, Peru and Mexico.
 - (c) **Processed meats:** the elimination of tariffs from the United States, Canada and Japan.
 - (d) **Dairy:** the elimination of tariffs on some protein products in Japan, the United States and Canada, the elimination on cheese tariffs in Japan, the elimination of tariffs on one of New Zealand's cheese lines and milk powers in the US, the elimination of tariffs on infant formula in the US, Canada and Mexico.

³⁷ Ministry of Foreign Affairs and Trade (New Zealand) "Goods Market Access" available at http://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Goods-Market-Access.pdf

³⁸ Te Puni Kokiri commissioned: "Māori Economy Report 2013" (April 2015).

³⁹ *Tauranga Umanga Māori 2015: Updated Statistics on Māori Authorities* (available: http://www.stats.govt.nz/browse_for_stats/people_and_communities/maori/tauranga-umanga-maori-2015.aspx#)

⁴⁰ Ministry of Foreign Affairs and Trade (New Zealand) "Goods Market Access" available at http://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Goods-Market-Access.pdf

- (e) **Seafood:** the elimination of tariffs fish and fish products into Japan; the elimination of remaining duty free imports of fish into the US, the elimination of tariffs on mussels into Mexico; the elimination of all traded fisheries lines not already eliminated; the elimination of those products not currently traded in any significant volume;
- (f) **Honey:** the elimination of tariffs from Japan and the US.

69. On 21 January 2016, and in response to growing public concerns about the implications of the TPP to Māori, Trade Minister Hon Todd McClay released a statement summarising the implications of the TPP to Māori, including a summary of the economic implications as:⁴¹

The value of the Māori asset base is now over NZ\$40 billion, a significant amount of which is oriented towards primary sectors and our export economy. Māori own between 10% and 40% of key primary sector assets including red meat, dairy, kiwifruit, forestry, and seafood. Over three-quarters of the output of these sectors is exported. For some, such as dairy and kiwifruit, this is closer to 95%. Tariff savings under TPP on current exports across these sectors are estimated to be more than \$200 million a year once TPP tariff commitments are fully phased in. There are a number of opportunities for Māori economic interests to benefit from TPP, particularly exporters in primary sectors.

70. Since the text of the TPP has been released, there have been three relevant inquiries into the economic impacts of the TPP:

- (a) *Global Economic Prospects, Topical Issue: Potential Macroeconomic Implications of the Trans-pacific Partnership* (World Bank, January 2016).
- (b) *Trading Down: Unemployment, Inequality and Other Risks from the Trans-Pacific Partnership Agreement* (Jerome Capaldo, Alex Izurieta, Jomo Kwame Sundaram, Tufts University, January 2016).
- (c) *The Economics of the TPPA* (Barry Coates, Rod Oram, Dr Geoff Bertram and Professor Tim Hazeldine, The Law Foundation New Zealand, January 2016).

71. The projected economic benefits in the aforementioned reports vary between an increase in GDP by 0.77% by 2025⁴² to 3.0% by 2030.⁴³

72. New Zealand is projected to have the highest increase in net exports over the next 10 year period (2.3% in contrast to -0.58% for Canada, 0.20% for USA and 0.71% for Australia). However, the projected impacts of the TPP on employment, and in particular low-skilled labour, show a decline in the employment force.⁴⁴ The projected decline in the New Zealand labour force is approximately 5,000 jobs by 2025 (or 1.4% of the GDP).⁴⁵

⁴¹ Hon Todd McClay, Press Release: 'Setting the record Straight on TPP and the Treaty', <http://www.beehive.govt.nz/release/setting-record-straight-tpp-and-treaty> (21 January 2016).

⁴² *Trading Down: Unemployment, Inequality and Other Risks from the Trans-Pacific Partnership Agreement* (Jerome Capaldo, Alex Izurieta, Jomo Kwame Sundaram, Tufts University, January 2016).

⁴³ *Global Economic Prospects, Topical Issue: Potential Macroeconomic Implications of the Trans-pacific Partnership* (World Bank, January 2016)

⁴⁴ *Trading Down: Unemployment, Inequality and Other Risks from the Trans-Pacific Partnership Agreement* (Jerome Capaldo, Alex Izurieta, Jomo Kwame Sundaram, Tufts University, January 2016).

⁴⁵ *Trading Down: Unemployment, Inequality and Other Risks from the Trans-Pacific Partnership Agreement* (Jerome Capaldo, Alex Izurieta, Jomo Kwame Sundaram, Tufts University, January 2016).

73. While modelling has been undertaken to provide generalised projections to determine the economic implications of the TPP, to our knowledge there have been no reports that comprehensively address the economic benefits and negatives for Māori specifically, including:
- (a) tariff savings for Māori exporters;
 - (b) employment opportunities in industries specific to Māori (for example, labouring which is the most common occupation for Māori);
 - (c) impacts of an increase in GDP (for example, whether the cost of living will increase/decrease).

Mitigation Measures: Economic Implications

*Economic Analysis*⁴⁶

74. The Maori Party recommends that the Government through the Ministry for Foreign Affairs and Trade and Treasury undertake a modelling exercise to provide full cost-benefit analysis⁴⁷ of the TPP to be assessed and included with the National Interest Analysis, including:
- (a) a full cost-benefit analysis of the TPP to New Zealand by region;
 - (b) a full cost-benefit analysis of the TPP to Māori, nationally and by region;
 - (c) a full analysis of the tangible tariff saving benefits to New Zealand exporters;
 - (d) a full analysis of the tangible tariff saving benefits to Māori exporters by key sectors (e.g. agriculture, horticulture, fisheries);
 - (e) a full costs-benefit of potential economic effects on employment rates, including the employment sectors of most relevance to Māori (for example, labour).
75. The Maori Party believes that assessing TPP economic implications will advance the strategic dialogue between Maori and Crown.

Review International Treaty Making Procedures (Non-legislative)

76. The Maori Party recommends that International Treaty Making procedures undergo a review to incorporate processes for incorporating Treaty of Waitangi compliancy measures prior to the conclusion of negotiations.

⁴⁶ Based on the analysis of economists previously referred to in this report, we provide a summary of their recommendations only. Kahui Legal do not provide accountancy or economic advice and therefore we recommend that the Māori Party seek specialist accountancy or economic advice in respect of forming your conclusions on the economic implications of the TPP.

⁴⁷ As proposed by Coates et al, in 'Expert Paper #5: The Economics of the TPPA at p 11.

PART TWO: MITIGATION MEASURES

Introduction

77. A table of mitigation and public law reform options and recommendations for consideration by the Māori Party is set out at **Appendix [A]**.

Domestic Legislation

The Cabinet Manual provides that:⁴⁸

Regulations should not, in general, deal with matters of substantive policy, have retrospective operation, purport to levy taxes, or contain provisions that purport to amend primary legislation.

78. The Legislation Advisory Committee (LAC) guidelines 2014 provide further assistance and states that, “[a]s a general rule, matters of policy and principle should be included in primary legislation.”⁴⁹
79. Any reform relevant to the TPP necessarily contains measures of widespread public interest, potentially significant policy amendments (for example, where additional obligations were placed on the Crown to consult with Māori in respect of specific matters prior to entering into an FTA) and amendments to statutes.
80. Regulations may be required to supplement primary legislation although this is a matter than can be considered in further detail where the Māori Party considered it appropriate to seek the introduction of primary legislation to protect Māori rights in the TPP and in future FTA negotiations.
81. Once the TPP has been entered into, the TPP will have to be ratified and incorporated into domestic legislation. The TPP will be subject to New Zealand’s domestic legislation processes including Select Committee, public consultation and Cabinet Manual requirements including that a Minister, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Treaty.⁵⁰
82. Domestic legislation that seeks to protect Māori rights pursuant to the TPP could be addressed through either:
- (a) Legislation that will ratify the TPP specifically (Ratification Legislation); and/or
 - (b) A stand alone Treaty of Waitangi (Free Trade Agreement) Bill with broader application for the TPP.

⁴⁸ New Zealand Cabinet Manual at [7.77].

⁴⁹ LAC Guidelines (2014) at [13.1].

⁵⁰ New Zealand Cabinet Manual at [7.60(a)].

Ratification Legislation

83. The Maori Party is of the preliminary view that there are several ways to ensure that Treaty of Waitangi rights and Māori rights are protected, including a stand-alone section that sets out how the Crown will approach its interpretation of the Treaty Exception clause.
84. We note that to date, the domestic legislation ratifying or agreeing to international treaty obligations have not included a stand-alone Treaty protection provision.
85. There is potentially merit for seeking to include a provision in the Ratification Legislation that would require the Crown to undertake their obligations pursuant to the TPP in a manner that is not inconsistent (or at the least, is consistent) with the principles of the Treaty of Waitangi. The drafting of such a provision will determine how bound the Crown is by this obligation.

Treaty of Waitangi (Free Trade Agreements) Bill

86. A Bill could be introduced that would seek to:
 - (a) Mitigate uncertainty and clarify the nature, intentions and processes for engaging the Treaty Exception;
 - (b) Outline the procedural requirements the Crown is required to engage when negotiating an FTA that may impact on Māori rights or interests;
 - (c) Require the Crown to provide a comprehensive assessment and analysis on the impacts of economic, social, cultural and environmental effects of the treaty entering into force on Māori;⁵¹ and
 - (d) Provide legislative protection stipulating that the Crown is obliged to adhere to its Treaty obligations domestically without regard to its obligations, or the fiscal impact of its obligations, pursuant to an FTA (including but not limited to future Treaty Settlements, all rights and obligations in regard to natural resources, and any other Treaty-based obligation raised by Māori.
87. We consider a stand-alone bill would be a persuasive and useful measure to mitigate against the substantial uncertainties that have been raised as concerns by critiques of the TPP and other FTAs.

Review International Treaty Making Policy and Procedures (Non-Legislative)

88. As discussed above, the Maori Party recommends a thorough review process of the International Treaty making process to identify all of the avenues where it could be appropriate to ensure that either a Treaty of Waitangi assessment, or a Māori specific assessment is undertaken throughout the negotiation and execution phases.

⁵¹ We also recommend that Standing Order 398 is amended to reflect this requirement also.

Treaty Exception Clause

89. We consider that the primary harm with the Treaty Exception clause is that there is sufficient uncertainty as to how the clause will be interpreted by an international arbitration panel in an investment state dispute settlement.
90. Having regard to the difficulties with the Treaty Exception clause, we consider that there are several possible mitigation measures that could be advanced, including:
- (a) drafting an alternative Treaty clause that could be used in future Free Trade Agreements.
 - (b) seeking an agreement or a guarantee or legislation stating that if the Waitangi Tribunal recommends acting in respect of the TPP that the government will take action under the Agreement.
 - (c) seeking an amendment to the Treaty of Waitangi Act that the government shall take into account the Treaty of Waitangi provisions (have a mandatory Treaty clause).
 - (d) that the Crown act as a guarantor to the claimants for its own Treaty making arrangements with third parties in the TPPA.

Bilateral Side Letters

91. As discussed above, we propose requesting that the Government enters into negotiations for the purpose of agreeing to bilateral side-letters to mitigate the uncertainty that could arise in interpreting the Treaty Exception clause, the Government could negotiate bilateral side letters with certain parties (or all parties) to the TPP that clarify how the Treaty exception clause could be interpreted.

Economic analysis⁵²

92. As previously discussed, we propose requesting that the Government through the Ministry for Foreign Affairs and Trade and Treasury undertake a modelling exercise to provide full cost-benefit analysis⁵³ of the TPP to be assessed and included with the National Interest Analysis, including:

⁵² Based on the analysis of economists previously referred to in this report, we provide a summary of their recommendations only.

⁵³ As proposed by Coates et al, in 'Expert Paper #5: The Economics of the TPPA at p 11.

- (a) a full cost-benefit analysis of the TPP to New Zealand by region;
- (b) a full cost-benefit analysis of the TPP to Māori, nationally and by region;
- (c) a full analysis of the tangible tariff saving benefits to New Zealand exporters;
- (d) a full analysis of the tangible tariff saving benefits to Māori exporters by key sectors (e.g. agriculture, horticulture, fisheries);
- (e) a full costs-benefit of potential economic effects on employment rates, including the employment sectors of most relevance to Māori (for example, labour).

APPENDIX A: MITIGATION AND PUBLIC LAW REFORM OPTIONS

Issue	Description of threat sought to be addressed	Public Law reform options		
Government process for entering into FTAs	Engagement Lack of procedural requirements to engage with Māori prior and during FTA negotiations.	Option	Purpose	Rationale
		Review international treaty making procedures (Non-legislative)	To clarify the procedural requirements for engaging with Māori prior, during and post negotiations for FTAs.	To give effect to the Waitangi Tribunal's findings to engage with Māori throughout the FTA negotiation process.
		Implement Domestic legislation (For example, the Treaty of Waitangi (Free Trade Agreements Bill))	To require the Crown to provide a comprehensive assessment and analysis on the impacts of economic, social, cultural and environmental effects of the treaty entering into force on Māori.	
Treaty Exception Clause	Interpretation How an international arbitration panel will interpret Treaty obligations.	Option	Purpose	Rationale
		Domestic legislation (e.g the Treaty of Waitangi (Free Trade Agreements) Bill)	To mitigate any matters that create uncertainty as to the Crown's Treaty based obligations.	Where the Treaty exception is relied on as a defence to a claimed breach against NZ pursuant to the TPP (or other FTA with the Treaty exception), an international panel can look, as a matter of fact (not law), to the types of Treaty based actions the Crown does or intends to do to comply with its

				<p>obligations pursuant to the Treaty.</p> <p>The Treaty of Waitangi (Free Trade Agreements) Bill will clarify the nature and extent of Treaty based obligations intended to be included in the Treaty Exception clause for Free Trade.</p>
		<p>Amend future FTA Treaty exception clauses</p>	<p>To strengthen the Treaty Exception clause and mitigate against the current interpretation uncertainties.</p>	<p>There are several forms of exception clauses in international FTAs that provide for the rights of indigenous peoples'. However, there is significant uncertainty as to the strength of these exceptions.</p> <p>The NZ Treaty exception clause should be reviewed in light of the original drafter's intentions, indigenous exception clauses that have been drafted since 2001 and any relevant case law to ensure that the Treaty exception remains fit for purpose.</p>
		<p>Bilateral side letters</p>	<p>The purpose of a side letter is to clarify bilateral matters between two Parties that do not affect the rights and obligations of the other TPP Parties.</p>	<p>To mitigate the uncertainty that could arise in interpreting the Treaty exception Clause, the Government could negotiate bilateral side letters with certain parties (or all parties) to the TPP that clarify how the Treaty exception clause could be interpreted.</p> <p>While New Zealand has already entered into side agreements with most countries, and will have concluded these discussions prior to the intended signing</p>

				on 4 February, there is nothing to preclude the Government from entering into further side agreements post the 4 February signing.
	<p>No right of enforcement for Māori</p> <p>The Crown only can rely on the Treaty exception clause as a defence to claim that NZ has breached its obligations to Māori.</p>	<p>Option</p>	<p>Purpose</p>	<p>Rationale</p>
		<p>Domestic legislation</p> <p>(e.g the Treaty of Waitangi (Free Trade Agreements) Bill)</p>	<p>To set out a clear process that would require the Crown to raise a defence on the basis of the Treaty exception clause.</p>	<p>The Treaty exception clause is only a defence to a claim from a TPP Party claiming that NZ has breached its TPP obligations.</p> <p>The Bill would set out a clear process for the circumstances when the Crown would be required to rely on the Treaty exception clause, and could also include provisions that could require the Crown to consult with Māori in certain circumstances prior to determining whether to raise a Treaty exception clause defence.</p>
	<p>Expertise in indigenous law:</p> <p>No requirement that an international arbitration panel is required to have an expert in indigenous law as a panellist; Māori do not have an automatic right to participate in the panels either.</p>	<p>Option</p>	<p>Purpose</p>	<p>Rationale</p>
		<p>Bilateral side letters</p>	<p>Clause 28.14 provides that any disputing party, or the panel, can call expert evidence.</p> <p>Where New Zealand raises the Treaty Exception clause as a defence, there is no requirement that a panellist must be someone who is an expert in indigenous law. Therefore, where New Zealand</p>	<p>New Zealand could enter into bilateral side letters with certain TPP (or all TPP) Parties to set out the procedural rights, including an expert in indigenous law, be appointed as a panellist, where the Treaty exception clause is relied upon as a defence and the parties have indicated that they will call expert indigenous law (or Treaty) evidence from an expert pursuant to clause 28.14.</p>

			calls an expert witness to describe compliance with New Zealand's Treaty obligations, there is no certainty that their evidence will be assessed by a person with sufficient expertise to assess the nuances of Treaty of Waitangi compliance measures domestically.	While New Zealand has already entered into side agreements with most countries, and will have concluded these discussions prior to the intended signing on 4 February, there is nothing to preclude the Government from entering into further side agreements post the 4 February signing.
	<p>Chilling effect on Treaty obligations</p> <p>Due to the increased international litigation risks, this could have a 'chilling effect' on the Government's desire to develop regulation or policy that upholds its Treaty obligations.</p>	Option	Purpose	Rationale
<p>Domestic legislation</p> <p>(e.g the Treaty of Waitangi (Free Trade Agreements) Bill)</p>		Provide legislative protections stipulating that the Crown is obliged to adhere to its Treaty obligations domestically without regard to its obligations, or the impacts of its obligations, pursuant to an FTA (including but not limited to future Treaty Settlements, all unsettled claims in respect of natural resources (e.g. freshwater, geothermal etc), and any other unsettled Treaty-based claim raised by Māori).	The purpose is to provide an added layer of protection for Māori and Treaty based rights domestically.	
Amend Waitangi Tribunal's jurisdiction		<p>Waitangi Tribunal to make binding recommendations in certain circumstances related to FTAs.</p> <p>Provide for a specific process that the Crown or Māori could engage to determine whether an proposed action would affect Māori rights.</p>	Provide the Waitangi Tribunal with limited jurisdiction to make binding recommendations to require the Crown to engage with Māori whose rights or interests may be affected by a FTA.	

Investor State Dispute Settlements – Impacts on the Crown’s sovereign right to govern	Chilling effect on Treaty obligations	Option	Purpose	Rationale
	The ISDS could create a “chilling effect” on the Crown’s regulatory inclinations to uphold and protect Māori rights and obligations that stem from the Treaty of Waitangi.	Domestic Legislation (For example, the Treaty of Waitangi (Free Trade Agreements Bill))	To mitigate uncertainty by clearly stipulating the process through which the Crown will discharge its obligations to Māori in light of its obligations in the TPP.	Provide a degree of certainty to Māori that the Crown’s obligations to Māori have not diminished, particularly in areas of significance (future Treaty settlements, natural resources and any other Treaty-based claim that could be made by Māori).
Intellectual Property Rights	Entrenches the Crown’s status quo position on Māori intellectual property rights in contravention of the Waitangi Tribunal findings in Wai 262.	Wai 262 Give effect to the recommendation in Wai 262 through domestic legislation or public policy.	To provide a clear exception when Māori intellectual property rights are at issue. To mitigate against the potential of a “chilling effect” in respect of Māori Intellectual Property rights.	The implementation of the Governments obligations in respect of UPOV91 could be a forced impetus for the Government to engage with Māori Treaty rights in respect of plants. It could provide the opportunity and platform to push for the Government to also re-engage with the extensive recommendations and commentary made by the Waitangi Tribunal in Wai 262.
Economic Implications	Insufficient detail to assess the impact of the TPP on Māori	Option	Purpose	Rationale
		Further Information - National Interest Analysis Request that the	Three economic analysis reports have been made publically available that provide for varying degrees of economic benefits and losses (including employment opportunities). A comprehensive	An in-depth economic analysis on the final outcomes of the TPP and its benefit on the following has not been undertaken (or if so, has not been made publically available):

		<p>Government through the Ministry for Foreign Affairs and Trade and Treasury undertake a modelling exercise to provide full cost-benefit analysis of the TPP to be assessed and included with the National Interest Analysis.</p>	<p>cost-benefit report would provide greater certainty for the Māori Party in terms of determining support for the economic elements of the TPP, and for the broader NZ public.</p>	<ul style="list-style-type: none"> ▪ a full cost-benefit analysis of the TPP to New Zealand by region; ▪ a full cost-benefit analysis of the TPP to Māori, nationally and by region; ▪ a full analysis of the tangible tariff saving benefits to New Zealand exporters; ▪ a full analysis of the tangible tariff saving benefits to Māori exporters by key sectors (e.g. agriculture, horticulture, fisheries); ▪ a full costs-benefit of potential economic effects on employment rates, including the employment sectors of most relevance to Māori (for example, labour).
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