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**Submission to the Foreign Affairs, Defence and Trade Committee on the revised Trans-Pacific Partnership Agreement, otherwise known as the Comprehensive and Progressive Agreement on Trans-Pacific Partnership.**

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**SUBMISSION ON THE REVISED TRANS-PACIFIC PARTNERSHIP AGREEMENT**

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1. I am a Professor of Law at the University of Auckland, specialising in international economic regulation. From 2010 I closely monitored the formal negotiations for the Trans-Pacific Partnership Agreement (TPPA), analysed draft texts as they were leaked, wrote technical briefings for governments and specialist communities, and published numerous books, articles and commentaries on the Agreement.
2. This submission addresses the revised TPPA among the remaining eleven parties following the US withdrawal. The new agreement comprises nine pages wrapped around the original agreement, with an annex that lists provisions that are suspended pending future reactivation. I note that the agreement has been renamed the Comprehensive and Progressive Agreement on Trans-Pacific Partnership. There is nothing progressive about it. I will refer to it more accurately as the TPPA-11.
3. The Labour, New Zealand First and Green Parties all recorded their opposition to the ratification of the original TPPA in the report on the select committee examination. Those parties now form the majority of the New Zealand Parliament and the government. Labour and New Zealand First now say they support the TPPA-11, even though the substantive text remains the same. Their rationale for doing so is fundamentally flawed, for the reasons set out below.

**Preliminary comments**

1. I wish to make several preliminary points. As I write this submission the government is proposing to consult on a more inclusive and progressive trade policy.[[1]](#footnote-1) The contradiction is glaring. If the government proceeds with the ratification of the TPPA-11, incorporates the TPPA-style rules in the revision of the Singapore agreement, and does not revisit the investment chapter in the review of the China agreement in line with its policy of no investor-state dispute settlement (ISDS), the proposed consultation will not have an iota of credibility.
2. Even though a number of toxic provisions have been suspended, especially on pharmaceuticals, they have not been permanently removed. The very fact they are there creates a dangerous precedent for future negotiations.
3. The objective of the new architecture was to retain the original agreement intact so the US could easily re-join. Former Trade Minister Todd McClay says the suspension of the rules and retention of the market access commitments was intended to rouse US commercial interests to lobby the US administration to re-engage.[[2]](#footnote-2) That strategy continues a long-standing pre-occupation with securing a free trade agreement with the US at almost any price. As President Trump has stated several times, and Todd McClay has acknowledged, re-entry would require additional concessions to the US.[[3]](#footnote-3) Judging by US demands in the review of the North American Free Trade Agreement (NAFTA) that would include, for example, more extensive monopoly rights over pharmaceuticals than those that are currently suspended. Ironically, the Trump administration might seek to remove ISDS, which would be consistent with the new New Zealand government’s position, but be opposed by other TPPA parties, notably Japan. While the Trade Minister was reportedly luke warm about the US statements,[[4]](#footnote-4) and Todd McClay said it would be difficult to accept more concessions, US re-entry is the raîson d’étre for the structure of revised agreement deal. It must be treated as a real possibility when considering the adoption of the TPPA-11. Moreover, the TPPA-11 has retained generic rules that were designed for US corporations, such as those on e-commerce, which they will benefit from without the US paying the price in terms of market access that underpinned the original deal.
4. In deciding to make a submission on this agreement, I want to be clear that I do not accept that the select committee review invests a profoundly anti-democratic negotiating process with any veneer of democratic legitimacy. The revised text has already been signed. Whatever I or others say in submissions will have no effect on the agreement. Moreover, the majority of the select committee has already taken a pre-determined position that supports the agreement. That is not democracy.
5. Nevertheless, submissions put matters on the parliamentary record and hopefully draw some response from officials.

**Perpetuating secrecy**

1. I am deeply disappointed that the Labour-New Zealand First government has perpetuated the secrecy of the TPPA negotiations, including its refusing to disclose who had agreed to sign side-letters on investment or the content of those letters prior to the signing. This enabled the government to spin those letters in ways that are not justified by their content.
2. The new government has also confirmed that the pact between the original TPPA parties to keep the negotiating documents secret for four years after the agreement comes into force will also apply to the TPPA-11, even though it is purportedly a new agreement and the US that insisted on that pact is no longer a party.
3. This pact sets an extremely dangerous precedent for several reasons. In a legal sense, it makes it impossible for anyone aside from the participating parties to interpret the texts in the context of their negotiating history, consistent with the Vienna Convention on the Law of Treaties. The secrecy pact also shields the parties in government from accountability for the position they took in the negotiations. For example, I understand that the National government did not table a list of items to be suspended in the TPPA-11. The loopholes in the Official Information Act that enable the government to refuse to disclose such information and to redact important information from what is released need to be addressed.
4. I look forward to more openness in the pending negotiations with the European Union, which has adopted a somewhat more transparent approach in recognition that secrecy is a significant factor in the legitimacy crisis facing these agreements. The current EU position should provide the starting point from which New Zealand develops an even more transparent, democratic and inclusive process prior to, during and at the conclusion of any negotiations. That must include a greater role for the Parliament.

**The scope of this submission**

1. This submission addresses three substantive matters, which should cause the Parliament to have deep concern about the TPPA-11 and reject its ratification:
2. the continued application of the original TPPA’s investor protections and ISDS regime in relation to all parties except Peru and Australia, and the contradiction with new government’s policy to reject ISDS;
3. rules that constrain future regulation of the digital domain; and
4. the failure to engage with Maori over more effective protection for the Treaty of Waitangi and Maori rights, as the Waitangi Tribunal advised.
5. My submissions on the original agreement remain fully applicable and are attached. This submission does not repeat that content, except where it is especially applicable to the subsequent actions or inactions of the government.
6. I have read and support the submission from the New Zealand Council of Trade Unions, and do not repeat most of the issues they address.

**No real reduction of NZ’s exposure on Investment**

1. I welcome the instruction from the new government to negotiators not to include ISDS in future agreements. However, that has not been made a red line, as indicated in its acceptance in the TPPA-11. It remains possible that future agreements will include ISDS in its current form or a variation, such as the EU’s investment court system. The government has also indicated that it will not seek to remove ISDS in the current reviews of the Singapore and China FTAs. The government should commit itself to legislation that prevents the adoption of ISDS in future agreements, consistent with New Zealand First’s Fighting Foreign Corporate Control Bill introduced in 2015.
2. While the exclusion of ISDS from future agreements would be a significant advance, the widely documented problems with the investment chapters of agreements like the TPPA-11 are not confined to ISDS. Those chapters still confer one-sided protections and rights on foreign investors that are not available to domestic investors and can be enforced by the other state party. They also privilege the rights of foreign investors over other rights, and New Zealand’s other international obligations, such as those relating to indigenous and other human rights, the environment and climate change, and financial regulation.

1. While the governing parties should have remained consistent with their position before the election, I applaud the government for attempting to make ISDS voluntary for New Zealand at a very late in the TPPA-11 negotiations. When it failed to do so it could and should have walked away from the table. Instead, it proceeded to sign up to the original investor protections and the ISDS mechanism intact. Taking advantage of the secrecy prior to the signing and release of the text, it misrepresented the situation to New Zealanders by claiming that it had secured concessions, including through bilateral side-letters not to use ISDS, which made significant changes to the agreement and made it acceptable.
2. Once the text became available it became clear that the only provision of the original TPPA investment chapter that was suspended by a consensus of the eleven parties is that which enables a foreign investor to use the ISDS mechanism to enforce a contract with the government for infrastructure and natural resources. That suspension does not affect, let alone remove, the ability of the same foreign investor to claim that action in relation to that contract has breached one of the investment protection rules in the investment chapter and to bring a dispute using ISDS.
3. The new government asked the other ten parties to sign bilateral side-letters that agree not to apply the ISDS mechanism in the agreement to New Zealand. Such a letter already existed with Australia in the original TPPA, as it has in previous multi-party agreements to which both countries are parties, because the CER agreement has no state-state or investor-state enforcement mechanism. Even with that letter, it must be noted that investors shop around and incorporate companies in countries that do allow ISDS, and that the ‘denial of benefits’ provision in the TPPA is not a guarantee against that occurring.
4. Of the remaining nine parties, three agreed to side-letters with New Zealand. The government refused to identify them until the agreement has been signed. As I predicted, the letters are with Brunei, Malaysia, Vietnam and Peru, countries whose investments in New Zealand are negligible.
5. The only one of these additional side-letters that gives New Zealand complete protection from ISDS claims is with Peru, with which New Zealand has no other free trade agreement.
6. The side-letters with Malaysia, Vietnam and Brunei still allow an ISDS dispute to proceed if consultations and negotiations between the investor and the host state are unable to resolve the matter within six months. The host state can withhold its consent to that dispute.
7. However, that veto power is negated by New Zealand’s other agreements with all three countries, which contain ISDS and remain in play, notably the Australia New Zealand ASEAN FTA (AANZFTA). The side letters with Vietnam and Brunei make it clear that the rights and obligations between each state and New Zealand under the AANZFTA continue and the investor is entitled to the better treatment in that or the TPPA-11. The side-letter with Malaysia confirms a previous side-letter, which also refers to AANZFTA and the NZ Malaysia FTA.
8. In any case, the co-existence provision in Article 1.2.1 of the TPPA would have a similar effect. An option under Article 1.2.2 to consult where there is an inconsistency between agreements would apply, but failure of the parties to agree on how to reconcile them would not affect the ability of parties to exercise their rights under the AANZFTA.
9. The side-letter with Singapore also affirms the co-existence of the Singapore New Zealand FTA, the AANZFTA and the TPPA-11, and enables investors to take advantage of the better treatment under any of them. As Deputy Prime Minister Winston Peters highlighted when announcing his choice of coalition partner, the Singapore NZ FTA 2001 allows New Zealand and Singapore to veto an ISDS claim against either of them. The TPPA has no such veto power, meaning it has less protection than the 2001 FTA. However, it appears that this has already been given away in the AANZFTA, which has a side-letter allowing investors to choose the better of either agreement for them.
10. The side-letter with Chile confirms the co-existence of the Trans-Pacific Strategic Economic Partnership Agreement (P4), but that agreement does not have an investment chapter and ISDS. The TPPA-11 chapter applies to Chile.
11. There is no side-letter with Japan, which has the 5th largest stock of foreign direct investment in New Zealand, or with Canada which has the 9th largest FDI stock in New Zealand.[[5]](#footnote-5)
12. The Declaration between Canada, Chile and New Zealand issued at the time of the TPPA-11 signing says they will ‘work together on matters relating to the evolving practice of investor state dispute settlement (ISDS)’. That declaration has no substantive content and is non-binding and unenforceable. If the three parties did agree on some positive alternative, they could not alter the TPPA-11 itself, and it is questionable whether they could plurilaterally adopt an alternative that applies just between them under the agreement, rather than simply not applying or imposing a condition on the ISDS mechanism.
13. In sum, the only advance by the government was a new, but largely meaningless, protection from an ISDS dispute brought by Peru’s investors under the TPPA-11.
14. No further protections for the right to regulate foreign investment were secured. As a consequence, the government is rushing amendments to the overseas investment regime through Parliament before the TPPA-11 comes into force.
15. By ratifying the TPPA-11, they will foreclose the ability of future New Zealand governments to regulate foreign investment by tightening the categories to which the investment vetting regime applies and will expose central and local governments to ISDS for various other regulatory actions.
16. The previous and current government, and the other ten parties, also failed to take steps to remedy the lack of effective protections in the investment chapter of the TPPA-11. The US opposed the application of the general exception provision that relates to measures on the environment, health and other public interests, which applies in all New Zealand’s other agreements. Under the TPPA-11 that exception still does not apply to the investment chapter. The exception is itself very weak, and something much stronger is needed. But there was not even an attempt to reinstate the exception. Presumably, this was because they wished to retain a text that is agreeable to the US. Other rhetorical references to rights to regulate foreign investment for public policy have no substance. Claims that the right to regulate in those and other public policy areas is effectively protected are therefore untrue.
17. The government has claimed that the provision for a 3-year review of the TPPA-11 could lead to the removal of ISDS.[[6]](#footnote-6) The original TPPA (Article 27.2.1(b)) provides for a review of the entire agreement in 3 years. Such reviews are inevitably with a view to further liberalisation, even where that is not explicit. Article 6 of the TPPA-11 adds that a party can seek a review of the operation of the agreement, including an amendment, where the entry into force of the original agreement is imminent (presumably to reactivate the suspended items among the parties) or if the TPP is unlikely to enter into force (it is unclear how that might be judged). In theory, either review could result in the removal of the ISDS provisions or the extended monopoly rights for pharmaceutical companies or the prohibitions against requiring disclosure of source code. But all of the parties would have to agree. If they could not agree to do so in 2017, why would we believe they might all agree to do so in several years’ time?
18. As pointed out in my previous submission, the Most-Favoured-Nation provisions in New Zealand’s existing free trade agreements mean that New Zealand will also have to extend the higher thresholds for investment vetting, and additional investor protections, in the TPPA to China, South Korea and Taiwan.
19. In sum, the grounds relating to foreign investment on which the Labour and New Zealand First coalition parties have justified their u-turn on the TPPA are a sham.

**High Risks of Electronic Commerce**

1. The TPPA’s e-commerce chapter is novel and complex, and cross-fertilises with a number of other complex chapters, in particular those on cross-border services, financial services, telecommunications, transparency, and the exceptions. The chapters’ substantive provisions were among the first to be concluded. The text was never leaked, so there was no technical analysis or public debate before the final text was published. My discussions reveal that few negotiators understood its ramifications.
2. The constraints it imposes on governments right to choose how to regulate the digital domain, not just on trade but more generally, is more far-reaching than any other part of the TPPA. However, no part of the original e-commerce chapter was suspended in the TPPA-11.
3. I did not address electronic commerce in my earlier submission, because my analysis of the text was still embryonic and based on the analysis of a leaked document from the TiSA negotiations. For the past eighteen months I have intensively analysed the regulatory, political, social and employment implications of the TPPA, and e-commerce texts and proposals based on it. This work includes UNCTAD workshops for high-level policy makers in different parts of the world, three presentations at UNCTAD E-commerce week in Geneva, presentations to developing country negotiators at the intergovernmental South Centre in Geneva, an invited expert paper for an ASEAN think tank, a paper to the academic track at the 11th WTO Ministerial Conference in Buenos Aires, and reports commissioned by global union federations on transport, logistics and supply chains, finance and telecommunications, and food systems. I am currently finalising a paper on taxation, which I plan to present to the New Zealand tax policy review.
4. My research shows these rules codify the demands made by the US tech industry lobby to the US Trade Representative, consolidated into what the USTR calls its Digital2Dozen principles.[[7]](#footnote-7) The goal and effect is to cement the oligopoly that entities like Google, Amazon, Facebook and Apple (GAFA) have established in the absence of domestic regulation. They seek to lock in that regulatory void through binding international rules that prevent governments from regulating their operations, as the risks become more apparent.
5. The significance of this cannot be understated. Every day we are seeing regulatory problems arising from a combination of the rules in the TPPA’s e-commerce and other chapters. Amazon’s predatory practices to drive competitors out of business,[[8]](#footnote-8) Uber’s regulatory evasion by defining itself as a computer rather than a transport service,[[9]](#footnote-9) UberEats lack of onshore presence for consumer complaints,[[10]](#footnote-10) Apple’s tax avoidance,[[11]](#footnote-11) Facebook’s[[12]](#footnote-12) and Google’s abuses of data,[[13]](#footnote-13) Google’s anti-competitive practices by elevating own companies to prime positions in searches,[[14]](#footnote-14) dynamic pricing that gives consumers different quotes depending on their search and purchasing profiles,[[15]](#footnote-15) gender, race, nationality and class profiling when displaying commercial, advertising and news information,[[16]](#footnote-16) manipulation of political and social views, including the latest Cambridge Analytica scandal,[[17]](#footnote-17) purportedly self-employed workers who are denied the protections of domestic labour laws,[[18]](#footnote-18) and a lot more.
6. There has been extremely limited public discussion or legal analysis of the implications of the e-commerce disciplines. I have made several Official Information Act requests for the analyses prepared by New Zealand officials on this matter so I can engage at a more technical level with their analysis of the implications of these texts. The documents I have received to date are heavily redacted, making it impossible to engage with and critique the basis for officials’ advice to the government.
7. The response to my request to the new Minister for Broadcasting, Communications and Digital Media for any analyses provided to her on this text was especially concerning. I was told that the information I requested did not exist, indicating that she has not been briefed on what officials refer to as ‘New Zealand’s standard approach’ on a text that critically constrains the policy options available to the government for regulating the digital domain.
8. I have still not received a response to a request I made on 20 December 2017 for analyses of the e-commerce chapter in TPPA, TiSA and other negotiations, including its relationship to cross-border services, financial services, and telecommunications. That response is still outstanding on the grounds that consultations among agencies were required. The latest date I have been given is 24 April.
9. A Cabinet document released to me on the revision of the Singapore New Zealand FTA advised that the TPPA chapter would not require changes to New Zealand’s current law, but the provisions do ‘relate to policy space in a relatively new and fast-moving area’.[[19]](#footnote-19) In other words, New Zealand has not yet developed a regulatory regime for the rapidly evolving and disruptive digital domain. Yet the government’s ability to do so in response to rapid, unpredictable and currently unforeseeable developments will be constrained by these new rules. Because it doesn’t require changes to the law, it will not be addressed in the implementing legislation for the TPPA or agreements modelled on it.
10. The poor quality of the official analysis on this chapter is deeply disturbing. The executive summary of the original National Interest Analysis (NIA) from January 2016 says: ‘TPP’s Electronic Commerce Chapter aims at promoting the adoption of domestic frameworks capable of building confidence among e-commerce users, while avoiding the imposition of unnecessary barriers to the use and development of e-commerce.’[[20]](#footnote-20) The fuller discussion takes less than two pages and portrays the rules in this unprecedented chapter as ‘consistent with internationally developed model frameworks and support consumer confidence in e-commerce’.[[21]](#footnote-21) This is mirrored in pages 50-52 of the February 2018 version of the NIA.
11. Yet the NIA does not address any of the principal provisions of the text. It refers in passing to ‘requiring non-discriminatory treatment of digital products and minimising unnecessary barriers relating to the cross-border transfer of information by electronic means, the location of computing facilities, and access to source code.’[[22]](#footnote-22) Every one of these rules has huge consequences for the ability of governments to regulate the digital domain in the future.
12. I have written extensively on those consequences. I invite the Committee to convene a special inquiry into this question as a matter of urgency, given the TPPA text now underpins New Zealand’s ‘standard’ approach.
13. The assurances provided in the NIA regarding safeguards preserved in the TPPA is shallow and misleading. The NIA says the chapter gives ‘clear acknowledgement of the importance of consumer protection, the protection of personal information of users of electronic commerce’. It suggests the quality of New Zealand’s privacy and consumer protection laws could have a signalling effect for other countries. Not only is New Zealand’s Privacy Act seriously out of date; a claim about ‘signalling’ is meaningless in a legal sense.
14. The TPPA does not protect either interest effectively. A major reason the TiSA negotiations have been stalled is the EU’s refusal to accept TPPA-style rules, because it has a constitutional obligation to protect privacy. New Zealand may need to upgrade its privacy protections as part of ongoing reviews by the EU of compliance with its new General Data Protection Regulation, and with the privacy provisions in the proposed EU NZ FTA.
15. However, those stronger requirements are inconsistent, and potentially incompatible with the TPPA. The US does not respect privacy. Data today is held in the ‘cloud’, which means servers mainly in the US that has very weak privacy protections and intrusive national security legislation. More recently, we are hearing that servers are being relocated in even more secretive tax havens. The privacy protection in Article 14.8 of the TPPA e-commerce chapter requires parties to have a privacy law, but does require any minimum standard.
16. This is especially important because Article 14.11 says each party can have its own regulatory requirements for transfer of information by electronic means, but that is subject to the restrictions in the rest of the provision. New Zealand must allow information to be sent and held outside the country when that is for the conduct of a business of one of the parties. In the digital era, that is almost every business.
17. While governments can take measures for ‘legitimate public policy’ reasons, they must be the least burdensome to achieve those objectives. The US has made clear that voluntary mechanisms are an effective and least burdensome approach. The Cabinet paper on the SNZCEP refers to these conditions and says New Zealand’s tax regime complies. I tend to agree, although there are counter-arguments, which I am exploring in my current paper on tax and finance. The paper refers also assesses that the current restrictions on cross-border transfer of certain health information would be permitted, but concedes that stronger or broader controls even on health information may not be protected. It does not address any other current or future regulatory measures that might require data to be held inside the country, and hence subject to New Zealand’s laws and enforcement mechanisms. These are crucially important questions, especially as the need for protections is constantly changing with new technologies. The government seemed happy to foreclose those options without any informed public debate on the matter.
18. Article 14.7 likewise merely requires the adoption of laws for consumer protection, without setting any baseline. If commercial transactions, or search engines and platforms, operate from offshore, they are likely to be subject to the legislative regime and enforcement mechanisms of the host country, not of New Zealand.
19. If privacy or consumer protection measures fall outside those provisions the government would have to rely on the general exception,[[23]](#footnote-23) which offers extremely weak protection for privacy and consumer rights. It only applies when the measures that allegedly breach the TPPA’s rules are implementing laws that the agreement otherwise allows. It is subject to further restrictions of being least burdensome on commercial interests, which to US firms mean the lowest common denominator, as well as not being arbitrary or justifiable discrimination or a disguised barrier to trade.
20. The section in the NIA on disadvantages, and advice to the minister released in the Official Information Act on related issues, also fails to address potential problems. For example, officials told the Minister that the policy constraint on disclosure of source code ‘is not a concern in relation to future regulation in New Zealand’.[[24]](#footnote-24) Elsewhere it says this prohibition applies to conditions of market entry for software suppliers and is subject to ‘policy space’ exceptions in New Zealand’s services and investment commitments.[[25]](#footnote-25)
21. But the scope is much broader than a condition of access to the market, and the schedules exceptions are generally not relevant to the kind of measures or actions the government might take which breach this rule. The provision actually says New Zealand cannot require access to source code of software as a condition of sale or use in New Zealand of that software, or ‘smart products’ that contain that software. That would include not permitting the sale or use of software that is suspected of inbuilt anti-competitive practices. That could prevent, for example, the Commerce Commission from requiring disclosure of source code in an investigation of anti-competitive practices. Those cases have been occurring increasingly frequently offshore. It could also prevent requirements for disclosure to show compliance with New Zealand quality standards for the products, which would lead to a ban on that software or the smart product, and where there are suspicions but access to the source code is required for proof.
22. Other governments’ negotiators have recognised this problem, after it was pointed out to them, but still failed to address it properly. For example, Article 4 of the e-commerce chapter in the recently concluded EU Japan FTA (which has a more complete ban on requirements of disclosing source codes) provides an exception for ‘requirements by a court, administrative tribunal or competition authority to remedy a violation of competition laws’. However, this still does not allow requirements to actually investigate if a violation has occurred. New Zealand does not even have that protection in the TPPA.
23. Further, the NIA says New Zealand has consistently advocated the extension of the WTO moratorium covering Customs Duties on Electronic Transactions, as per Article 14.3 of the TPPA chapter. In fact, the article relates to electronic *transmissions*, not electronic *transactions*, which are very different. The scope of electronic transmissions is unclear; Indonesia tried unsuccessfully to clarify its scope at the WTO last December, with a footnote to exclude e-books, e-movies etc, and was told it was unnecessary – yet the US considers those transmissions are covered.
24. This moratorium dates back to 1998 when there were minimal transactions. As more commercial activities take place through digital technologies across borders, the impact of removing customs duties on e-transmissions magnifies - for example, additive manufacturing or 3D printing will displace domestic production, with added value coming from the software transmitted across the border. Given New Zealand has few tariffs that may be less significant; but the fact the NIA mis-stated the basic provision reinforces my concern about the inadequacy of analysis to inform debate.
25. Whatever the reason, there is nothing in the analysis of electronic commerce that was provided on the TPPA to alert ministers, policy makers, Parliament or the public to the issues. This an obvious example of why negotiating texts need to be in the public domain, so technical analysis and informed debate can occur before they become set in stone.
26. This poor analysis is especially concerning as the TPPA text has become a template for other negotiations in which New Zealand is involved. The Cabinet document on the SNZCEP upgrade described the TPPA text as ‘consistent with New Zealand’s standard approach’, and as ‘an exemplar’ for future negotiations, including in the WTO. I am aware that New Zealand has endorsed a similar approach in the Trade in Services Agreement (TiSA) (currently suspended), the Regional Comprehensive Economic Partnership (RCEP) (which is being contested by China, India and some members of ASEAN) and proposals for e-commerce negotiations at the WTO, which New Zealand has endorsed but are opposed by a majority of developing countries. That position has been reached without any informed public debate about the implications.

**Ongoing breaches or te Tiriti o Waitangi**

1. As the claimants’ expert adviser in the Waitangi Tribunal claim on the TPPA (Wai 2522) I am very familiar with the detail of the claim, the hearing itself, the Tribunal’s report and the Tribunal’s continued engagement with the claim.
2. The Treaty of Waitangi Exception has been rolled over in all of New Zealand’s agreement since the Singapore New Zealand FTA in 2001, without any review of its adequacy, despite the much broader scope of both subsequent agreements and of contemporary claims to the Tribunal, including traditional knowledge (Wai-262), He Whakaputanga and te Tiriti (Wai 1040), water (Wai 2358), health (Wai 2575), among others.
3. The former and present government and officials have repeatedly claimed that the Waitangi Tribunal endorsed the Treaty exception. In fact, the Tribunal in the urgency hearing found there was no breach of the Treaty *principles* because the exception was ‘*likely’* to offer a ‘*reasonable* degree’ of protection for Māori. It did *not* accept the Crown’s claim that ‘nothing in the TPPA will prevent the Crown from meeting its Treaty obligations to Māori’.[[26]](#footnote-26)
4. The Tribunal also said that the Treaty Exception ‘may not encompass the full extent of the Treaty relationship’.[[27]](#footnote-27) That is because it only covers Crown actions that give *preferences* to Māori, not laws or policies that apply generally, but are fully or partly for Tiriti compliance (eg regulating water, mining, fisheries).
5. The Tribunal was especially not convinced that the exception would prevent a foreign investor from challenging actions the Crown takes, for example on water or mining. Consistent with this view, claimants have been argued in Stage 2 of the National Freshwater claim (Wai 2358) that the TPPA and other agreements could be used to justify the Crown not taking action to remedy Tiriti breaches, having a ‘chilling effect’ on the Crown’s willingness to adopt any effective redress.
6. The Tribunal suggested there should be dialogue with Maori on a more effective Tiriti exception.[[28]](#footnote-28) The claimants suggested ways to achieve proper protection and a process that genuinely reflects a Tiriti partnership. Those suggestions have so far been ignored.
7. More recently, Trade Minister David Parker has acknowledged the Tribunal’s more nuanced position. However, he minimised its concern, saying it ‘suggested you could tickle it in one or two ways to make it better’, but that it was unnecessary to do so.[[29]](#footnote-29)
8. The minister also suggested it is too risky to change the wording,[[30]](#footnote-30) because that would open the current text up for negotiation and Māori might end up in something worse. The claimants’ position in the Waitangi Tribunal was that Māori should decide whether to take that risk, not the Crown. The Tribunal said the Crown’s argument was not a good enough reason not to engage in dialogue over the question.[[31]](#footnote-31)
9. The TPPA actually puts the lie to claims that the Crown cannot successfully propose different wording or additional protections. Leaked texts of the intellectual property chapter showed New Zealand would be required to adopt the International Convention for the Protection of Plant Varieties (UPOV 1991). The Waitangi Tribunal in *Ko Aotearoa* Tenei (Wai 262) and a Cabinet document had bot acknowledged that UPOV 1991 would be inconsistent with te Tiriti. The TPPA claimants’ submissions pointed out that the Treaty exception would not protect New Zealand from that obligation, because a decision not to adopt it would not be a measure that gives preferential treatment to Maori. Late in the negotiations, the government sought and secured an additional provision that allows the alternative of a Tiriti-compliant approach to adopting a plant varieties convention (UPOV 1991). The provision is itself problematic, as explained below, and was adopted without consultation with the Wai 262 claimants. But it nevertheless shows that new Tiriti related provisions can be achieved.
10. The Tribunal has maintained an active oversight of the UPOV 1991 obligation. This matter is being pursued by the Ministry for Business, Innovation and Employment as part of a broader review of the Plant Varieties Act 1987. However, this element cannot await the conclusion of the review, because legislation to meet New Zealand’s obligations must be implemented within three years of the TPPA-11 coming into force.
11. In February 2018 I convened a workshop in Wellington for claimants in the Wai 262 and Wai 2522 claimants and their lawyers to identify a way forward. They also met with negotiators and other officials. I then met separately with MBIE. It is my considered view that this matter cannot be resolved within the time permitted by the TPPA. Yet neither the National or current government sought to have this obligation removed, or even suspended, during the TPPA-11 negotiations. That failure is, in itself, a breach of the Crown’s Tiriti obligations.
12. The Waitangi Tribunal heard the original TPPA claim under urgency and limited its consideration to the Treaty Exception. Other aspects of the claim relating to traditional knowledge, water, health, mining and other issues were not addressed. The urgency inquiry itself was truncated because the National government rushed to introduce the TPPA’s implementing legislation. Once that was introduced the Tribunal lost its jurisdiction under the Treaty of Waitangi Act 1975.
13. The claimants have continued to express concern to the Tribunal over the inadequacy of the Crown’s consultation processes, its response to the Tribunal’s report, and the outstanding the UPOV 1991 obligations.
14. The Tribunal has been actively considering the completion of its inquiry. However, it faces a similar problem: the government’s timeline to introduce legislation for implementing the TPPA-11 would prevent the Tribunal from hearing and reporting on the rest of the claim until after the legislation is passed. It is nevertheless considering that latter option.
15. These cumulative failures in my view to constitute further breaches of the Crown’s obligations of good faith under te Tiriti.

I wish to speak to this submission before the select committee.

1. https://www.beehive.govt.nz/release/progressive-and-inclusive-trade-all-agenda-launched [↑](#footnote-ref-1)
2. http://www.radionz.co.nz/news/political/354981/cool-response-from-trade-minister-to-trump-s-tpp-u-turn [↑](#footnote-ref-2)
3. ‘Senators cautiously optimistic about Trump’s TPP directive to Lighthizer, Kudlow’, *Inside US Trade,* 12 April 2018 [↑](#footnote-ref-3)
4. https://www.radionz.co.nz/news/political/354981/cool-response-from-trade-minister-to-trump-s-tpp-u-turn [↑](#footnote-ref-4)
5. https://www.nzte.govt.nz/investment-and-funding/investment-statistics [↑](#footnote-ref-5)
6. http://www.nzherald.co.nz/business/news/article.cfm?c\_id=3&objectid=11981117 [↑](#footnote-ref-6)
7. https://ustr.gov/sites/default/files/Digital-2-Dozen-Final.pdf [↑](#footnote-ref-7)
8. https://www.investors.com/news/technology/amazon-monopoly-problem-antitrust-action-vs-amazon-facebook-google/ [↑](#footnote-ref-8)
9. https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu [↑](#footnote-ref-9)
10. Ubereats http://www.nzherald.co.nz/business/news/article.cfm?c\_id=3&objectid=12032458 [↑](#footnote-ref-10)
11. http://www.nzherald.co.nz/business/news/article.cfm?c\_id=3&objectid=11984006 [↑](#footnote-ref-11)
12. https://www.stuff.co.nz/technology/digital-living/102569574/nz-privacy-commissioner-has-pulled-up-facebook-for-breach-of-privacy-laws [↑](#footnote-ref-12)
13. https://www.stuff.co.nz/technology/digital-living/103165837/the-spotlights-on-facebook-but-google-is-also-in-the-privacy-hot-seat [↑](#footnote-ref-13)
14. http://europa.eu/rapid/press-release\_IP-17-1784\_en.htm [↑](#footnote-ref-14)
15. https://www.forbes.com/sites/gregpetro/2015/04/17/dynamic-pricing-which-customers-are-worth-the-most-amazon-delta-airlines-and-staples-weigh-in/#7388f2e05f04 [↑](#footnote-ref-15)
16. https://marketingland.com/carnegie-mellon-study-finds-gender-discrimination-in-ads-shown-on-google-134479 [↑](#footnote-ref-16)
17. https://www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far [↑](#footnote-ref-17)
18. https://www.theguardian.com/business/2018/feb/07/gig-economy-workers-angry-at-lack-of-bogus-self-employment-curbs [↑](#footnote-ref-18)
19. Hon David Parker to Jane Kelsey, 9 February 2018, Singapore-New Zealand Closer Economic Partnership Upgrade Negotiations: Closing mandate (undated), page 9 out of 20 [↑](#footnote-ref-19)
20. Trans-Pacific Partnership National Interest Analysis, 25 January 2016, p.2 [↑](#footnote-ref-20)
21. NIA, 66-68 [↑](#footnote-ref-21)
22. NIA p.67 [↑](#footnote-ref-22)
23. Article 29.1.3 imports the exception from Article XIV of the GATS [↑](#footnote-ref-23)
24. Official Information package, page 8 of 36 [↑](#footnote-ref-24)
25. Official Information package, page 21 of 36 [↑](#footnote-ref-25)
26. Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement 2016, Wai 2522, p.49 [↑](#footnote-ref-26)
27. Wai 2522, p.49 [↑](#footnote-ref-27)
28. Wai 2522, p.57 [↑](#footnote-ref-28)
29. https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb\_20180228\_20180228\_24 [↑](#footnote-ref-29)
30. https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb\_20180228\_20180228\_24 [↑](#footnote-ref-30)
31. Wai 2522, p.57 [↑](#footnote-ref-31)