

Submission:

International treaty examination of the Trans-Pacific Partnership Agreement

To: Foreign Affairs, Defence and Trade Select Committee, Parliament Buildings, Wellington

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SELECT COMMITTEE HEARINGS

1. We do not wish to appear before the Select Committee to speak to our submission about the **Trans Pacific Partnership Agreement (TPPA)**.

SUPPORT FOR OUR SUBMISSION

2. This submission is made on behalf of the iwi authority for Ngāti Kuri, the **Ngāti Kuri Trust Board (the Trust Board)**.¹ Ngāti Kuri are the direct descendants of the original inhabitants and the founding peoples of the northernmost peninsula of Aotearoa, Te Hiku o Te Ika. The contemporary Ngāti Kuri rohe extends north of a line from Maunga Tohoraha (Mt Camel) in the east to Hukatere in the west and extending north-west to Motuapao, across to Te Rerenga Wairua and then east to Murimotu and including the islands of Manawatawhi (The Three Kings) and Rangitahua (the Kermadecs). The 2013 Census shows Ngāti Kuri's population at 6,486,² although our whakapapa (genealogy, kinship) calculations indicate the number is significantly greater.

GENERAL POSITION ON THE TPPA

3. The Trust Board fully supports the the concept of equity of access into internation markets that as owners of traditional assets (Fishing, Forestry and Farming) will allow us to market our products and services to a larger customer base.
4. However on balance, The Trust Board opposes the TPPA due to the numerous reported³ risks it poses for Ngāti Kuri social, environmental, cultural and economic wellbeing, and for the exercise of our tino rangatiratanga generally.
 - 4.1. In addition, while promoted as a “free” trade agreement, we understand that only six of the chapters in the TPPA concern actual traditional free trade matters (like tariff liberalisation). The rest deal with protecting foreign corporate interests re policy matters which are ordinarily the responsibility of State Governments to determine (like public health and the environment). On this count, we are deeply concerned with the **Investor-State Dispute Settlement mechanism (ISDS)**⁴ and other TPPA provisions which appear to be a direct circumvention of, and attack by transnational corporations and other TPPA architects regarding, Aotearoa’s sovereignty, Māori indigenous responsibilities, rights and interests, and the basic freedoms and human rights of all New Zealand citizens.
 - 4.2. The Trust Board’s concerns are too numerous, and the Crown’s engagement with Ngāti Kuri so inadequate, that we have little faith in the ability of the Select Committee examination process to protect Ngāti Kuri’s responsibilities, rights and interests. We therefore highlight only a few key issues below, and call on the Crown to:

- a. Postpone its ratification of the TPPA, pending proper consultation with iwi Māori and civil society regarding the TPPA; and
- b. Secure Māori free, prior and informed consent before ratifying the TPPA.

CROWN’S OBLIGATIONS UNDER TE TIRITI O WAITANGI, AND WAI 262

5. The Trust Board recognizes and supports Te Tiriti o Waitangi concerns about the TPPA as raised by and under the Wai 2522 and other TPPA claims.⁵
 - 5.1. More specifically to Ngāti Kuri as a Wai 262 iwi claimant, we observe that the Crown has failed to implement the findings and recommendations of

the Waitangi Tribunal's report "Ko Aotearoa Tēnei". In particular, Chapter 8 of the report, "The Making of International Instruments",⁶ relates to the processes by which the Crown (primarily through the Ministry of Foreign Affairs and Trade) engages with Māori when it develops New Zealand's position on, and binds New Zealand to obligations under, international instruments (like the TPPA).

- 5.2. The Tribunal acknowledged that the Crown has a right to represent New Zealand internationally and to make foreign policy. However, when such affects Māori rights and interests the Crown is obliged to actively protect those rights and interests "to the extent that is reasonable and practical under the circumstances". This requires the Crown to inform and consult Māori when it is developing New Zealand's position. In cases where an instrument relates to "a matter of core importance" to Māori, the Tribunal found that the Crown was obliged to obtain Māori consent.
- 5.3. Furthermore, Tribunal recommendations included mandatory Crown engagement with Māori on International Treaties, and that the Crown go beyond consultation where appropriate. To facilitate this, the Crown must identify (or help create where they do not exist) appropriate Māori engagement forums.⁷ The Crown should also implement a policy, co-designed with Māori, for funding independent Māori engagement in international forums. Other accountability mechanisms included regular reporting to iwi and Māori organisations on Crown actions relating to international instruments, and to Parliament's Māori Affairs Select Committee.

CROWN'S INTERNATIONAL OBLIGATIONS

6. We consider that the manner in which the Crown has dealt, and continues to deal, with the TPPA also violates its international obligations as recognized by the following:
 - 6.1. The United Nations Declaration on the Rights of Indigenous Peoples 2007,⁸ in particular (but not limited to) Articles 1 (re fundamental freedoms), 17 (re labour rights), 32 (lands, territories and other resources; and free, prior and informed consent) and 40 (re dispute resolution⁹);
 - 6.2. The World Conference on Indigenous Peoples Outcome Document 2014,¹⁰ in particular (but not limited to) Operative Paragraphs 3 and 20 (re free, prior and informed consent), 12 and 13 (re health), 23 and 24 (re major developments, extractive industry and transnational corporations), 25 and 26 (re subsistence activities, economies, livelihoods, food security and agriculture) and 36 (re climate change mitigation and adaptation); and

- 6.3. The UN Guiding Principles on Business and Human Rights 2011,¹¹ in particular (but not limited to) guidelines:
- a. “9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts”;
 - b. “11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”; and
 - c. “26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”¹²

TPPA RISKS FOR NGĀTI KURI WELLBEING, TINO RANGATIRATANGA

Whānau, hapū, iwi wellbeing

7. Currently, our central and local governments exercise their mandate to make decisions on a whole range of policy matters, and many of these are in the interests of Māori wellbeing. For example, Northland Regional Council might tighten its policy to exclude genetically modified organisms or declare itself an oil drilling free zone; the Government might legislate an increase in the minimum wage, make medicines more affordable for whānau, or strengthen environmental regulations to mitigate the climate crisis. The Trust Board is alarmed at that the TPPA both enables corporations to sue for any such decisions which may reduce that company’s profits, and the “chilling effect” this intimidating threat will have for the protection of iwi, state and public interests.¹³

Ngāti Kuri tino rangatiratanga

8. As wellbeing lies at the heart of Ngāti Kuri’s ability to be self-determining, the TPPA constraints on Government policy making as explained above will necessarily have profound implications for the exercise of Ngāti Kuri tino rangatiratanga.
- 8.1. The TPPA contains a Treaty of Waitangi “exception” to this situation which the Government now includes in every trade agreement. The Government claims the exception protects policy decision-making and therefore enables it to fulfil its Treaty of Waitangi obligations to Ngāti

Kuri. However, several experts argue that in potential corporate dispute situations, the exception will fail for several reasons including¹⁴:

- a. The Government must first agree that something is a Treaty of Waitangi obligation. But experience tells us Māori and Government interpretations on that point differ significantly.
- b. If Ngāti Kuri disagrees with the Government's interpretation of the Treaty, Ngāti Kuri can't effectively challenge it.
- c. Even if Ngāti Kuri and the Government agrees there's a Treaty of Waitangi obligation, the Government must still be prepared to act on that obligation (even if acting may mean a potential TPPA breach). However, New Zealand governments have in the past been unwilling to do so.

8.2. The Trust Board is therefore highly circumspect that the TPPA exception clause offers sufficient protection of Ngāti Kuri responsibilities, rights and interests.

CONCLUSION

9. The Trust Board opposes the TPPA , and *calls on the Crown to*:

9.1. Postpone its ratification of the TPPA, pending proper consultation with iwi Māori and civil society regarding the TPPA; and

9.2. Secure Māori free, prior and informed consent before ratifying the TPPA.

Nāku noa,



Harry Burkhardt
Chairperson, Ngāti Kuri Trust Board

¹ Our website address is <http://ngatikuri.iwi.nz/>.

² See <http://tpk.idnz.co.nz/tpk/overview?es=5>.

³ Our research sources include but are not limited to documentation and analysis associated with the Wai 2522 and other TPPA claims (see “TPP Legal” at: <https://tpplegal.wordpress.com/waitangi-tribunal/>); the Wai 262 claim, particularly the findings and recommendations re Chapter 8 “The Making of International Instruments” in the Waitangi Tribunal’s report “Ko Aotearoa Tēnei” (see report “Factsheet 9” re Chapter 8, at <http://www.justice.govt.nz/tribunals/waitangi-tribunal/documents/generic-inquiries/flora-and-fauna/wai-262-the-making-of-international-instruments/view>); “It’s Our Future New Zealand” at <http://itsourfuture.org.nz/tppa-text/>; and Action Station’s “TPPA Facts” at <http://www.tppafacts.co.nz/explore-issues/>.

⁴ See for example “Investors Rights”, at <http://www.tppafacts.co.nz/explore-issues/investors-rights/>; and “The Basics”, at <http://www.isdscorporateattacks.org/#!basics/c66t>.

⁵ See “TPP Legal” at: <https://tpplegal.wordpress.com/waitangi-tribunal/>.

⁶ See report “Factsheet 9” re Chapter 8, at <http://www.justice.govt.nz/tribunals/waitangi-tribunal/documents/generic-inquiries/flora-and-fauna/wai-262-the-making-of-international-instruments/view>.

⁷ In addition to failing to consult with Ngāti Kuri in the negotiating stages of the TPPA, the Crown has scheduled iwi TPPA hui – the closest for Ngāti Kuri happening three hours south in Whangarei *after* the 11 March 2016 closing date for submissions to the Select Committee examining the TPPA: see <http://www.tpp.mfat.govt.nz/events#hui>.

⁸ At http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁹ As concerns especially the TPPA ISDS risks.

¹⁰ “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples” (25 September 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2.

¹¹ “The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” (21 March 2011), at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹² This is of particular relevance as concerns the TPPA ISDS provisions.

¹³ The TPPA Investment Protections and Investor-State Dispute Settlement (ISDS) process has been widely criticised as unfairly biased in favour of the corporations, but we don’t have time to go into that here. For more details, see Dr. Carwyn Jones, Associate Professor Claire Charters, Andrew Erueti, Professor Jane Kelsey, “Expert Paper #3: MĀORI RIGHTS, TE TIRITI O WAITANGI AND THE TRANS-PACIFIC PARTNERSHIP AGREEMENT”, beginning p15, at <https://tpplegal.files.wordpress.com/2015/12/tpp-te-tiriti.pdf>.

¹⁴ See Dr. Carwyn Jones, Associate Professor Claire Charters, Andrew Erueti, Professor Jane Kelsey, “Expert Paper #3: MĀORI RIGHTS, TE TIRITI O WAITANGI AND THE TRANS-PACIFIC PARTNERSHIP AGREEMENT”, “The Treaty of Waitangi Exception” section beginning p22, at <https://tpplegal.files.wordpress.com/2015/12/tpp-te-tiriti.pdf>.