

13 July 2016

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Dear Ms Bennoune, Mr De Zayas, Mr Kaye, Mr Pūras, Ms Tauli-Corpuz, Ms Dandan, and Mr Cannataci,

Thank you for your letter dated 20 April 2016 which attached a joint communication from various United Nations Special Rapporteurs and Independent Experts (UN Experts). The letter from the UN Experts concerned "alleged adverse human rights impact stemming from certain provisions within the Trans-Pacific Partnership" (TPP).

This reply from New Zealand is in response to specific questions raised about New Zealand by the UN Experts. It can be read in addition to the separate reply sent by New Zealand on behalf of TPP signatories.

It appears that at the bottom of page 2 of your letter, a reference is made to claims commenced in New Zealand's Waitangi Tribunal. The Waitangi Tribunal is a permanent commission of inquiry established to hear claims concerning acts, omissions, policies, or practices of the Crown since 1840 that are inconsistent with the principles of the Treaty of Waitangi. The Treaty of Waitangi is New Zealand's founding document – it was signed in 1840 by representatives of the British Crown and approximately 500 Māori chiefs representing many, though not all, of the hapū of New Zealand.

New Zealand ensures that the unique relationship between the Crown and Māori is observed in free trade agreements (FTAs) by ensuring the obligations in New Zealand's FTAs do not impede the Crown's ability to fulfil its obligations under the Treaty of Waitangi. New Zealand has included a specific Treaty of Waitangi exception in all of its FTAs since 2000.

This approach is continued in TPP. Reflecting its constitutional significance for New Zealand, the Treaty of Waitangi is specifically referred to in Article 29.6 of TPP, and also Annex 18-A to the TPP Intellectual Property Chapter. The effect of the Treaty of Waitangi exception is that, provided measures are not used for trade protectionist purposes, TPP will not prevent New Zealand from taking measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by TPP, including in fulfilment of its obligations under the Treaty of Waitangi. The text also specifies that 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 the Agreement (Article 29.6).

TPP includes an obligation related to the latest 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91). The obligation includes a New Zealand-specific approach given the potential overlap between the subject matter of

the provisions of TPP concerning accession to UPOV 91 (which concerns plant variety rights), and the findings of the Waitangi Tribunal in *Ko Aotearoa Tēnei*, the report on the WAI 262 claim (which also concerns plant variety rights).

New Zealand has the option of either acceding to the most recent version of the international convention known as UPOV 91, or to implement a plant variety rights system that gives effect to UPOV 91. This means that when amending its plant variety rights regime, New Zealand has the right to adopt any measures that it deems necessary to protect indigenous plant species in fulfilment of the Crown's obligations under the Treaty of Waitangi, provided measures are not used for trade protectionist purposes.

TPP requires New Zealand to make these changes within three years of the TPP entering into force for New Zealand. This gives the Government ample time to decide, in consultation with Māori and relevant stakeholders, how to best meet the obligations in respect of UPOV 91, while taking into account the recommendations in the Waitangi Tribunal's report *Ko Aotearoa Tēnei* (WAI 262).

The Waitangi Tribunal conducted an urgent inquiry into certain claims concerning TPP. On 5 May 2016, the Tribunal released its report,¹ finding that there was no breach of the Treaty of Waitangi principles arising from the inclusion of the Treaty of Waitangi exception clause (Article 29.6) in the TPP in its current form and concluded that the exception clause offers a reasonable degree of protection to Māori interests affected by TPP. The Tribunal also considered engagement with Māori on the steps needed to ratify TPP, commenting on future engagement practice, and requesting further information concerning future engagement on implementation of the TPP obligation regarding plant variety rights. The Tribunal made no findings of breach of the Treaty of Waitangi principles in relation to the TPP engagement process.

The New Zealand Government has in recent months conducted extensive engagement with New Zealand society about the TPP, including hui (meetings) with Māori (including claimants before the Waitangi Tribunal) and the forum through which iwi leaders coordinate their activities. As a result of this engagement, many Māori have expressed interest in the potential benefits which they or their organisations see in TPP and have asked for further information from the Government about accessing support to achieve positive outcomes.

As with all New Zealand FTAs, TPP has been through the Parliamentary treaty examination process. This involved the Foreign Affairs, Defence and Trade Select Committee (FADTC) examining the TPP text and the TPP National Interest Analysis (NIA), and then tabling its report in the House². During this process FADTC received submissions from the public both in writing and in person at hearings.

Legislative changes in order to implement TPP are also going through Parliamentary procedures, including Select Committee scrutiny and passage through Parliament. These legislative changes are contained in the Trans-Pacific Partnership Agreement Amendment

¹ <http://www.justice.govt.nz/tribunals/waitangi-tribunal/news/tppa-treaty-clause-not-a-breach-tribunal-says> (contains link to Report)

² Available at http://www.parliament.nz/en-nz/pb/sc/documents/reports/51DBSCH_SCR68965_1/international-treaty-examination-of-the-trans-pacific-partnership

Bill, which was introduced to Parliament on 9 May 2016, and was at its first reading referred to FADTC for consideration. FADTC has called for public submissions.³

Only when these steps have been completed, and other countries have completed their own domestic approval procedures, will TPP be able to enter into force.

New Zealand has comprehensively assessed what TPP would mean for New Zealand in the NIA, which was released on 25 January 2016 (found here: <https://www.tpp.mfat.govt.nz/resources#nia>). The NIA finds, amongst other things, that TPP would be in New Zealand's national interest, and would have no effect on human rights in New Zealand.

We hope our response has clarified our views on the matters raised in your letter dated April 20, 2016.

Yours sincerely



Carl Reaich
Acting Permanent Representative to the United Nations

³ For further information see http://www.parliament.nz/en-nz/pb/sc/make-submission/51SCFDT_SCF_00DBHOH_BILL68998_1/trans-pacific-partnership-agreement-amendment-bill

