

IN THE WAITANGI TRIBUNAL

**WAI 1040
WAI 354
WAI 1151-1169
WAI 1514
WAI 1535
WAI 1664**

IN THE MATTER OF

the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

the Te Paparahi O Te Raki Inquiry
District

Affidavit of Professor Elizabeth Jane Kelsey

Dated this 23rd day of June 2016

Annette Sykes & Co.
Barristers & Solicitors
1460A Hinemoa Street
Rotorua, 3010
Phone: 07-460-0433
Fax: 07-460-0434

Counsel Acting: Annette Sykes
Email: asykes@annettesykes.com

AND

IN THE MATTER OF

a claim by **Arapeta Wikito Pomare Hamilton** on behalf of the descendants of **Pomare II** and members of **Ngati Manu, Te Uri Karaka, Te Uri o Raewera** and **Ngapuhi ki Taumarere** tribes (Wai 354)

AND

IN THE MATTER OF

claims made on behalf of the **Kaneihana Wairemana Trust, the Wairemana Whanau Trust, the Eruera Garland Whanau Trust** and the **Wire Mohi Whanau Trust** (Wai 1151-1169)

AND

IN THE MATTER OF

a claim by **Pita Apiata** on behalf of **Ngati Kawa** and **Ngati Manu** (Wai 1514)

AND

IN THE MATTER OF

a claim by **Joyce Baker** and **Deon Baker** on behalf of the descendants of **Pōmare II** and members of the **Ngāti Manu, Te Uri Karaka, Te Uri o Raewera** and **Ngapuhi ki Taumarere** tribes (Wai 1535)

AND

IN THE MATTER OF

a claim by **Marsha Davis, Wiremu Tane** and **Elizabeth Baker** on behalf of the descendants and rightful successors of the **Chiefs and people of Ngati Rahiri ki Waitangi** (Wai 1664)

I, **ELIZABETH JANE KELSEY**, of Auckland, swear/affirms that:

1. I am a professor of law at the University of Auckland, with law degrees from Victoria University of Wellington, Oxford University and the University of Cambridge, and a PhD from the University of Auckland.
2. I research, teach and publish in the related areas of international economic regulation and law and policy, and am widely published in both fields.
3. One part of my academic expertise is contemporary public policy relating to te Tiriti o Waitangi, which was the subject of my PhD thesis awarded by the University of Auckland in 1991. The thesis included critical analysis of contemporary treaty jurisprudence developed in the courts and the Waitangi Tribunal since the early 1980s and the emergence of the concept of the ‘principles of the Treaty’.
4. My academic expertise in the area of international economic regulation focuses on the implications of binding and enforceable trade and investment agreements for the autonomy of governments to make law and policy. Since 1990 I have closely monitored a number of multi-lateral, regional and bilateral negotiations, most recently the Trans-Pacific Partnership Agreement (TPPA). I am an internationally recognised academic expert such agreements.
5. I have written specifically on the tensions between the Crown’s obligations under te Tiriti o Waitangi and the New Zealand state’s obligations under free trade and investment agreements. I have also documented the demands from Maori for effective input into international treaty making, especially the international economic agreements entered into since the 1990s. Maori interventions during the 1990s are discussed in detail in my book *Reclaiming the Future*¹ and in my first affidavit to the WAI 2522 claim.² The Crown’s practices are discussed in a peer-reviewed expert paper on Te Tiriti and the TPPA.³

¹ *Reclaiming the Future. New Zealand as the Global Economy*. Wellington: Bridget Williams Books, Wellington, 1999, esp 263-266, 339-342. Attached as Exhibit ‘A’

² First affidavit of Professor Jane Kelsey to the Waitangi Tribunal Claim WAI 2522, 19 June 2015, esp [62] to [64] and [78] to [84]. Attached as Exhibit ‘B’

³ Carwyn Jones, Andrew Erueti, Claire Charters and Jane Kelsey, ‘Maori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement’, Expert Paper #3, January 2016, 6-9. Attached as Exhibit ‘C’

6. On the basis of both areas of expertise I have presented briefs of evidence to five previous Waitangi Tribunal claims. My evidence in *Te Urewera* claim (WAI 894) *He Maunga Rongo: Report on Central North Island Claims, Stage One* (WAI 1200)⁴ and *Te Waka Kai Ora*, (WAI 262) addressed the tensions between colonial law and te Tiriti, and in particular contemporary Treaty jurisprudence and Treaty policy. My brief for the *National Fresh Water and Geothermal Resources Inquiry* (WAI 2358) specifically addressed the potential chilling effect of investor-state dispute settlement on the ability of the Crown to comply with its obligations under te Tiriti.⁵ Most recently, I was the claimants' expert and presented eight affidavits to WAI 2522 claim on the *Trans-Pacific Partnership Agreement*.⁶
7. This brief of evidence draws on both streams of expertise and addresses three particular matters:
 - A. the current 'principles of the treaty' are not Tiriti-compliant;
 - B. the current approach to international treaty making is not Tiriti-compliant; and
 - C. the challenge to create one voice for two nations.

A. THE PRINCIPLES OF THE TREATY ARE NOT TIRITI COMPLIANT

8. My PhD thesis completed in 1990,⁷ the associated book *A Question of Honour?*,⁸ and several articles,⁹ located the emergence of the 'principles of the Treaty of Waitangi' as the product of a particular political and intellectual period in Aotearoa New Zealand. During the 1980s, the Crown was confronted with

⁴ *He Maungo Rongo: Report on Central North Island Claims, Stage One*, (WAI 1200) 2007

⁵ *National Fresh Water and Geothermal Resources Inquiry* (WAI 2358) Interim report, August 2012, esp pp.177-84.

⁶ *Report on the Trans-Pacific Partnership Agreement*, (WAI 2522), March 2016

⁷ Jane Kelsey, *Rogernomics and the Treaty of Waitangi. The Contradiction between the Economic and Treaty Policies of the Fourth Labour Government 1984-1990, and the Role of Law in Mediating that Contradiction in the Interests of the Colonial Capitalist State*, 1991.

⁸ Jane Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989*, Allen and Unwin, 1990, chapter 8. Attached as Exhibit 'D'

⁹ Jane Kelsey, 'Treaty Justice in the 1980s', in P. Spoonley et al (eds.) *Nga Take. Ethnic Relations and Racism in Aotearoa/New Zealand*, Dunmore Press, 1991, 108-130. Attached as Exhibit 'E'; Jane Kelsey, 'Judicialisation of the Treaty: A subtle cultural repositioning', 10 *Australian Journal of Law and Society*, 1994, 131-164. Attached as Exhibit 'F'; 'From Flag-poles to Pine Trees. Tino Rangatiratanga and Treaty Policy Today', in P. Spoonley et al (eds.) *Nga Patai. Ethnic Relations and Racism in Aotearoa/New Zealand*, Dunmore Press, 1996, 177-201. Attached as Exhibit 'G'

demands from Maori to honour te Tiriti, coupled with academic writings from Maori and Pakeha that challenged colonial accounts.

9. In response, the courts, the executive and the Waitangi Tribunal reconstructed the constitutional relationship between the Crown and iwi and hapu under te Tiriti through the construct of ‘principles’ that over-state the authority conferred through kawanatanga and deny the essence of tino rangatiratanga.
10. The Court of Appeal President Sir Robin Cooke described the resulting shifts in Crown policy, legislation and jurisprudence as a ‘subtle cultural repositioning’.¹⁰
11. In my opinion, the current principles of the Treaty are therefore neither neutral nor immutable and should not be treated as such.

(a) Judicial interpretation of ‘the principles’

12. The recognition of aboriginal title in *Te Weehi*,¹¹ reference to the Treaty was an interpretive tool in *Huakina Development Trust*,¹² and the reasoning in the *New Zealand Maori Council* cases, starting with the *Lands* case¹³ in 1987, represented a significant shift from the overt racism of *Wi Parata v Bishop of Wellington*.¹⁴ However, the doctrine of aboriginal title is derived from English common law, and the unquestioned premise of the *Lands* cases was the ratio of *Te Heuheu Tukino*¹⁵ that the Treaty is not binding on the Crown unless incorporated into domestic law.
13. The separate judgements in the *Lands* case reflect in varying ways the English text of the Treaty:¹⁶ the Crown acquired sovereignty, with the right to govern and make law and policy, and in doing so must actively protect Maori interests so far as reasonably practicable, make informed decisions about the implications for Maori, consult with them where it requires further information, and provide a process to remedy past breaches. In return, Maori are to be loyal to the Queen as British

¹⁰ Kelsey, ‘Judicialisation of the Treaty’, 137. Attached as Exhibit ‘F’

¹¹ *Tom te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114

¹² *Huakina Development Trust v Waikato Valley Authority* (1987) 12 NZPTA 76

¹³ *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353

¹⁴ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC). For a brief discussion of the cases see Jane Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989*, Allen and Unwin, 1990, 213-215. Attached as Exhibit ‘D’

¹⁵ *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590

¹⁶ Kelsey, *A Question of Honour?*, 215-220. Attached as Exhibit ‘D’

subjects, recognise the authority of her government, and be reasonably cooperative. Tino rangatiratanga o nga rangatira me nga hapu was totally subordinated.

14. The ‘principles’ developed in the *Lands* case set the terms for subsequent cases, some of which refined them further in favour of the Crown while others made minor adjustments in favour of Maori.¹⁷ Most significantly, in rejecting the precedent of *In re 90 Mile Beach*, the majority judgements of the Supreme Court in *Ngati Apa* nevertheless affirmed the sovereignty of the Crown and relied on English common law.¹⁸
15. Contemporary Treaty jurisprudence and the construct of Treaty principles reflect the political reality that common law always has been a partisan of the Crown. The authority of the Queens’ courts and the Queens’ judges stems from the presumed legitimacy of the Crown’s sovereign authority. The origins of common law are sourced in that immutable assertion of sovereignty, however flawed its foundations. The *modus operandi* of *stare decisis* maintains those parameters, as if constitutionally flawed interpretations of the Treaty relationship become legitimate by their repetition, even when the institutions and rules imposed by the colonial state preclude and exclude any alternative jurisprudence or source of judicial authority.
16. It follows that ‘principles of the Treaty’ that are drawn principally from this source of jurisprudence will not be Tiriti-compliant in the sense recognised by this Tribunal in the Stage 1 report, because they deny the authority intrinsic to tino rangatiratanga and the legitimacy of tikanga as the rules and processes to govern relationships and behaviour and resolving disputes.

(b) Executive constructs of ‘the principles’

17. Treaty ‘principles’ became a term of art in the late 1980s, which my research shows were consciously manipulated by the Crown.¹⁹ In 1989 the newly created

¹⁷ Kelsey, ‘Judicialisation of the Treaty’. Attached as Exhibit ‘F’

¹⁸ *Attorney-General v Ngati Apa* [2003] NZLR 641

¹⁹ Kelsey, *A Question of Honour?*, ch 9, esp 257-260, Attached as Exhibit ‘H’; ‘Treaty Justice in the 1980s’, 126-127, Attached as Exhibit ‘E’; ‘From Flag-Poles to Pine Trees’, 184, Attached as Exhibit ‘G’;

Treaty of Waitangi Policy Unit (TOWPU) devised, and Cabinet approved, five principles to guide government policy:

- i. ***Kawanatanga***: the Crown right to govern and make laws, or exercise sovereignty, subject to Maori interests being accorded an ‘appropriate priority’;
- ii. ***Rangatiratanga***: tribal ‘self management’ and control over those resources they wish [sic] to retain;
- iii. ***Equality***: Pakeha and Maori are equal citizens under British law which was ‘selected’ by the Treaty;
- iv. ***Cooperation***: consultation should occur on major issues of common concern and requires mutual good faith, balance and commonsense; and
- v. ***Redress***: the Crown, having provided a process for resolution of grievances, expects reconciliation to result.

18. Described as the ‘Crown Principles for Action on the Treaty of Waitangi’, the Crown’s assertion of absolute sovereignty made this a *de facto* rewriting of the Treaty to assert superior authority and claim legitimacy by drawing on the new jurisprudence.

19. It was the Crown’s attempt to impose these principles that te Pihopa o Aotearoa the Rt Rev Whakahuihui Vercoe rejected in his speech on the Treaty grounds at Waitangi on the 150th anniversary of Te Tiriti:

Some of us have come here to remember what our tupuna said on this ground: that the treaty was a compact between two peoples. But since the signing of that treaty 150 years ago I want to remind our partners that you have marginalised us. You have not honoured the treaty. We have not honoured each other in the promises we made on this sacred ground. Since 1840 the partner that has been marginalised is me – the language of this land is your, the custom is yours, the media by which we tell the world who we are yours ...

What I have come here for is to renew the ties that made us a nation in 1840. I don't want to debate the treaty, I don't want to renegotiate the treaty, I want the treat to stand firmly as the unity, the means by which we are made one nation. ... The treaty is what we are celebrating. It is what we are trying to establish so that my tino rangatiratanga is the same as your tino rangatiratanga (absolute sovereignty). And so I have come to Waitangi to cry for the promises that you made and for the expectations of our tupunas made 150 years ago. ... I want to say to the Government don't produce principles of the Treaty – the treaty is already there.²⁰

20. These objections were ignored and the principles constructed in the 1980s infused the National government's policies in the 1990s.²¹ The Crown's right to govern and the subordination of tino rangatiratanga fuelled controversies over the Sealord deal in 1993,²² followed by the proposed Fiscal Envelope of \$1 billion that was intended to settle outstanding Treaty claims.²³ The Hirangi Hui hosted by Ta Hepi te HeuHeu in 1995 outright rejected the Crown's approach that reduced its obligations under Treaty to the settlement of claims and ignored the fundamental question of constitutional power.²⁴ Subsequent versions of Crown policies for Treaty settlements are variations on the same sources and practices.
21. The Crown's ability to mix and match selectively parts of the Treaty and te Tiriti that suit its argument has been strengthened by the inappropriate practice of segmenting te Tiriti/the Treaty into 'article 1, 2 and 3 rights'. That now-common practice ignores the need for a holistic understanding of both the text and the context in which it was debated and endorsed, as provided in the *Muriwhenua Land Report*.²⁵

²⁰ Reported in 'We have not honoured each other's promises', *New Zealand Herald*, 7 February 1990, cited in Sue Abel, *Shaping the News. Waitangi Day on Television*, Auckland University Press, 1997, Appendix 5, 212-214, Attached as Exhibit 'I'

²¹ Kelsey, 'From Flag-Poles to Pine Trees', 189-191. Attached as Exhibit 'G'

²² Kelsey, 'From Flag-Poles to Pine Trees', 191-193. Attached as Exhibit 'G'

²³ Kelsey, 'From Flag-Poles to Pine Trees', 193-194. Attached as Exhibit 'G'

²⁴ Mason Durie, 'Proceedings of a Hui held at Hirangi marae, Turangi, 25 *Victoria University of Wellington Law Review* 1995, 109-117, Attached as Exhibit 'J'; Kelsey, 'From Flag-Poles to Pine Trees', 193-194. Attached as Exhibit 'G'

²⁵ *Muriwhenua Land Report*, WAI 45, 1997, 110-116

(c) **The Waitangi Tribunal and ‘the principles’**

22. The Waitangi Tribunal accommodated itself to the new jurisprudence.²⁶ The Tribunal reports on *Motunui*,²⁷ *Kaituna River*²⁸ and *Manukau*²⁹ stressed the autonomous authority embodied in rangatiratanga and said explicitly that the functions of kawatanga conferred by te Tiriti were limited and less than a cession of sovereignty.
23. The Tribunal report on the *Orakei* claim³⁰ was first heard in May and July 1985 but reported after the *Lands* case. A newly constituted Tribunal reiterated the position from the *Manukau* report that kawatanga was less than British sovereignty, qualified by the words ‘on its face’.³¹ No longer giving primacy to the Maori text as previous tribunals had done, the *Orakei* report also said that such a finding on kawatanga did not invalidate the proclamation of sovereignty that followed³² and that a ‘cession of sovereignty was implicit from surrounding circumstances’.³³ Subsequent reports on both the *Muriwhenua Fisheries*³⁴ and *Mangonui Sewerage*³⁵ claims referred to a cession of sovereignty, with *Muriwhenua Fisheries* downgrading tino rangatiratanga to tribal self-government akin to local government.
24. I note also that interpretation of the phrase the ‘practical application of the principles’ in the Treaty of Waitangi Act 1975 has shifted over time. The *Muriwhenua Fisheries* report noted, following the *Waiheke* and *Orakei* reports, ‘that in making recommendations, there is no requirement that the Tribunal make only practical recommendations’.³⁶ That has given way to interpretations that stress ‘reasonableness’ as an element of the Treaty principles and a requirement of recommendations.

²⁶ Kelsey, ‘Treaty Justice in the 1980s’, 124-125. Attached as Exhibit ‘E’

²⁷ *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (WAI-6), 1983, p.51

²⁸ *Finding of the Waitangi Tribunal on the Kaituna Claim* (WAI-4), November 1984

²⁹ *Findings of the Waitangi Tribunal on the Manukau Claim* (WAI-8), July 1985

³⁰ *Report of the Waitangi Tribunal on the Orakei Claim* (WAI-9), November 1987

³¹ *Orakei Report*, 135

³² *Orakei Report*, 189

³³ *Orakei Report*, 208

³⁴ *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, (WAI-22), 1988, 187

³⁵ *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, (WAI-17), 1988, vii and 4

³⁶ *Muriwhenua Fisheries Report*, A3.4.5.6.

25. As part of my research I interviewed in confidence a number of people involved with the Waitangi Tribunal at the time who conceded that the *Lands* case had influenced these revisions. That was not surprising, given the potential for judicial review of the Tribunal's reports at a time when Treaty politics was increasingly fraught. I believe from my research that this was a pragmatic decision and should not be subject to *ex post* rationalisation as having a principled intellectual foundation.
26. As with the early court cases, the capitulation of Tribunals after the *Lands* case laid the foundations for more recent Tribunal jurisprudence, including on international treaties discussed in Part B below.
27. The hearing of explicitly constitutional claims by Ngai Tuhoe and Ngapuhi, with others to come, poses fundamental challenges to this recent history and provides an opportunity to rethink the distribution of power and responsibilities, revisit these flawed interpretations, and restore tino rangatiratanga and tikanga Maori to the core of both Treaty principles and Tribunal jurisprudence. As this Tribunal said in the Stage 1 claim, it is from the agreement between Maori and the Crown in February 1840 'that the treaty principles must inevitably flow'.³⁷
28. The *Tuhoe* report sets out the challenge:

From the evidence, we consider that Tuhoe did not begin to recognise the Crown's sphere of operation in relation to themselves until the last three decades of the nineteenth century, and then only incrementally. ... But not until the end of the nineteenth century, with the circumstances surrounding the creation of the Urewera district native reserve, can it fairly be said that the Crown and Tuhoe formally acknowledged each other's authority.

This is not to say that Tuhoe have at any time shared the Crown's view of the extent of its own authority: manifestly, they have not. Nor are they alone in contesting the meaning of the Crown's sovereignty/kawanatanga and, particularly, how it should be tempered by the tino rangatiratanga retained by Maori generally, and by the mana

³⁷ *He Whakaputanga me te Tiriti. The Declaration and the Treaty. The report on stage 1 of the Te Paparahi o Te Raki Inquiry*, (WAI 1040), para 10.4 (online)

motuhake retained by Tuhoe.

29. The *Tuhoe* report made it clear that any co-existence cannot be unilaterally determined by the Crown, but requires negotiation in good faith to reach a principled conclusion and may vary according to the matter at hand:

*In their respective languages, the concepts of 'sovereignty' on the one hand, and 'tino rangatiratanga' or 'mana motuhake' on the other, connote absolute authority, and so cannot co-exist in different people or institutions. Therefore, striking a practical balance between the Crown's authority and the authority of a particular iwi or other Maori group must be a matter for negotiation, conducted in the spirit of cooperation and tailored to the circumstances.*³⁸

30. For that to occur the Crown has to be prepared to revisit the presumption of absolute sovereignty. The self-serving arguments that the Crown can bypass its Tiriti obligations through the construct of 'principles', validate the denial of tino rangatiratanga and tikanga Maori through the doctrine of *stare decisis*, or claim legitimacy for its unilateral assertion of sovereignty through a 'revolutionary seizure of power',³⁹ are unethical and untenable.
31. Given its mandate, the Tribunal is uniquely placed to generate new Treaty principles that truly reflect the constitutional relationship. That would have made a significant difference to the Tribunal's own findings in the WAI 262 and WAI 1055 claims in relation to the international treaty-making power of the Crown, discussed below.

B. INTERNATIONAL TREATY MAKING IS NOT TIRITI COMPLIANT

32. International law and international treaties have rarely featured in Tiriti discourse, aside from discussions about recognition of indigenous rights through the United

³⁸ Report of the Waitangi Tribunal Part One, *Chapter 3: Te Tono Ture Tikanga a Tuhoe – The Treaty and the Tuhoe Constitutional Claim, 1840–65* (WAI 894), 2009, p 126

³⁹ Asserted, for example, in Jock Brookfield *Waitangi and Indigenous Rights. Revolution, Law and Legitimation*, Auckland University Press and referred to by Simon Upton, cited in Kelsey, 'From Flagpoles to Pine Trees', 178. Attached as Exhibit 'G'

Nations Declaration on the Rights of Indigenous Peoples, the International Labour Organization Convention 169 and similar instruments.

33. That is due in part to the dualist approach to international treaties followed by the Westminster system, in which domestic and international law are viewed as distinct legal domains. International treaties only bind the Crown when incorporated in domestic law – a notion familiar in Treaty of Waitangi jurisprudence from *Te Heuheu Tukino*. That stark binary has been weakened over time as the subject matter of international treaties relates more directly to domestic affairs, and enforcement can impact directly and indirectly on domestic decisions and actions on policy and regulation.
34. It also reflects the changing nature of international treaties, which now apply binding and enforceable external rules to matters that were previously considered the domain of domestic law and policy. Knowledge – in the form of rights over intellectual property - is a prime example.
35. My evidence here centres on the right to make international treaties, rather than the substantive impacts of international treaties on the claimants, and argues that the Crown's presumed authority to make international treaties needs to be reconsidered in light of four factors.
 - i. The purpose for which the Tribunal ~~Maori~~ recognised the Crown's foreign affairs powers in He Whakaputanga, using its personal relationships with other monarchs to conduct international relations, is no longer pertinent.
 - ii. Treaty making is no longer principally a matter of foreign policy and high politics, but involves agreements whose rules are more normative and apply to matters that were previously considered matters of domestic policy and law.
 - iii. The ever-broadening scope of international economic treaties has been shown to have direct implications for the rights and interests of Maori under Te Tiriti and He Whakaputanga.

- iv. International economic treaties confer rights on foreign states and foreign actors that are superior to those recognised by the Crown in relation to Maori.

(a) *International law as an imperial construct*

36. From the perspective of the Crown, international treaty making is an exercise of the Crown's prerogative to conduct foreign affairs and the traditional function of the Executive in the Westminster system. As Claire Neilson observes, this locus of power is as much a matter of political theory as it is a technical question of law, and hence contingent.⁴⁰ Both the locus and form of that power is currently contested, as seen in debates over the role of Parliament vis-a-vis the Executive, as well as the role of the Crown vis-a-vis nga rangatira me nga hapu under te Tiriti.
37. International law is especially contested in the colonial context, and is as much an imperial construct as English common law. In his landmark book *Imperialism, Sovereignty and the Making of International Law*, Anthony Anghie remarks that 'colonialism was central to the constitution of international law and the sovereignty doctrine'.⁴¹ On the latter he writes that:

*Sovereignty was forged out of the confrontation between cultures and, at least in the colonial confrontation, the appropriation by one culture of the powerful terms "sovereignty" and "law". ... Sovereignty is formulated in such a way as to exclude the non-European; following which, sovereignty can then be deployed to identify, locate, sanction and transform the uncivilized.*⁴²

38. Anghie describes 'a history in which international law continuously disempowers the non-European world, even while sanctioning intervention within it'.⁴³ That description applies as much to contemporary international economic law and treaties as it does to the colonisation project in previous centuries.

⁴⁰ Claire Nielson, 'The Executive Treaty-making Prerogative: A history and critique', (2007) 4 New Zealand Yearbook of International Law 173. Attached as Exhibit 'K'

⁴¹ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, 310. Attached as Exhibit 'L'

⁴² Anghie, 311. Attached as Exhibit 'L'

⁴³ Anghie, 312. Attached as Exhibit 'L'

*The creation of international law in its necessarily endless drive towards universality is based on the compelling invocation of this “other”. The drive is necessarily endless because even while seeking to create a universal system it generates the difference that makes this task impossible and, further, because these imperial projects inevitably provoke rebellion and opposition.*⁴⁴

39. One contemporary site of contest is the rapid expansion of international economic agreements. I wrote of them in relation to Aotearoa a decade ago that:

*the concentration on recognition of mana Maori in policies and regulations at the national level has obscured significant, and sometimes overriding, developments at the international level. A rapidly expanding menu of binding international economic agreements on services, investment and intellectual property aims to construct a free market on a global scale and threatens to pre-empt national options. The constraints that this imposes on domestic policy and regulation further embed the Western paradigm and potentially lock the door against a resource management regime within Aotearoa that reflects Te Tiriti o Waitangi and tikanga Maori.*⁴⁵

(b) *The Stage 1 Report*

40. The Stage 1 report concluded that the rangatira did not cede their authority to make and enforce law over their people and within their territories, and did not surrender the sole right to make and enforce law over Maori to the British. They agreed to share power and authority with the Crown as equals while performing different roles with different spheres of influence.⁴⁶
41. The report discussed the treaty making powers of the Crown under He Whakaputanga and Te Tiriti only in passing. In discussing paragraph 4 of He Whakaputanga, the Tribunal said ‘the description of the king as “matua” in our

⁴⁴ Anghie, 312. Attached as Exhibit ‘L’

⁴⁵ Jane Kelsey, ‘Old Wine in New Bottles. Globalisation, Colonisation, Resource Management and Maori’, in Merata Kawharu (ed), *Whenua: Managing our Resources*, Reed, 2002, 373-395, 375. Attached as Exhibit ‘M’

⁴⁶ Stage 1 Report, para 10.4.4

view did not imply British superiority *except* in international affairs, and there the request was not for Britain to usurp Maori authority but to foster it and protect it from foreign threat'.⁴⁷ It then said that 'None of this' - which I interpret to include the Crown's actions in the international sphere - implied any loss or transfer of authority. Moreover, the purpose of the Crown exercising its international role was to ensure that the authority of hapu and rangatira remained in force as contact increased – 'the chiefs' emphasis was on British protection of their independence, not a relinquishment of sovereignty'.⁴⁸

42. I would add two observations. First, 'international affairs' must be read in the context of the 1830s, which involved high matters of foreign policy through personal engagement between the English monarch and other sovereign persons or their personal envoys. Second, it is clear that the Crown's actions in the international sphere were expected to operate to the benefit of rangatira and their hapu by protecting their interests, fostering their authority and engagement in the international arena, and promoting trade, not to exclude them and impede the Crown's ability to honour its Tiriti obligations.

(c) ***Ko Aotearoa Tenei (WAI 262)***

43. The WAI 262 claim is the Waitangi Tribunal's first and only comprehensive review of the international treaty making process. Its report *Ko Aotearoa Tenei* recognised the growing significance of international law for Maori:

*we expect international engagement over those same matters – human rights, the environment, biodiversity, global warming, trade, conflict and diplomacy, and indigenous rights – to increase in the future rather than tail off. Whatever has occurred in the past, it will be important that future engagement occurs on a proper Treaty footing.*⁴⁹

44. International instruments are increasingly likely to affect the interests of Maori:

⁴⁷ Stage 1 Report, para 10.2

⁴⁸ Stage 1 Report, para 10.4.2

⁴⁹ *Ko Aotearoa Tenei. A Report into Claims Concerning New Zealand law and Policy Affecting Maori Culture and Identity (WAI 262)*, 2011, 670

Maori interests in trade and economic development, natural resources, the protection and transmission of Maori culture and traditional knowledge, indigenous rights, and environmental protection, are all profoundly affected by international instruments.⁵⁰

45. In addressing these questions the Tribunal did not have the benefit of the Stage 1 report in this claim, and the question of the legitimacy of the Crown's treaty-making power was not directly engaged. Its approach reflected the prevailing Treaty principles:

In the Treaty of Waitangi, the Crown acquired kawanatanga, the right to govern, which included the right to make foreign policy and to represent the new bicultural nation on the international stage. In return, the Crown promised actively to protect Maori interests and tino rangatiratanga, or full Maori authority over their own affairs. In the modern international arena, this is no small obligation. International instruments affect the rights and lives of all New Zealanders in sometimes profound ways. Specifically, Maori interests in trade and economic development, culture, traditional knowledge, natural resources, and the environment are often at stake. When that is the case, the treaty obliged the Crown and Maori to engage with one another on the basis of good faith, reasonableness, and cooperation. The Crown must work out a level of protection for Maori interests, as identified and defined by Maori, that is reasonable when balanced where necessary against other valid interests, and in the sometimes constrained international circumstances in which it must act.⁵¹

46. The report advocated an approach that reflected a 'sliding scale' of interests rather than one-size-fits-all. The priority accorded to Maori interests would depend on the scale and importance of the matters, ascertained by a properly informed Crown and balanced against any valid interest of other New Zealanders and the nation as a whole, if those interests are in tension.⁵² However, 'it is for Maori to say what their interests are, and to articulate how they might best be protected – in this case,

⁵⁰ *Ko Aotearoa Tenei*, 680

⁵¹ *Ko Aotearoa Tenei*, 684

⁵² *Ko Aotearoa Tenei*, 682

in the making, amendment, or execution of international agreements’, after the Crown has alerted them to pending developments and their implications.⁵³

47. Even this approach could require genuine power sharing. The Tribunal said that limiting engagement to consultation could not always do justice to the interests at stake and would ‘not give effect to the treaty partnership and tino rangatiratanga guarantee’.⁵⁴ At times the significance of the matter may be so important to Maori that the position must be developed by consensus and preferably by negotiated agreement⁵⁵ – in my view, drafting the Treaty of Waitangi exception in international trade and investment agreements is one such example. There may be times when Maori interest is so overwhelming and other interests narrow or limited by comparison that the Crown should contemplate delegating its decision making powers.⁵⁶

48. The Tribunal also found that the treaty making process adopted by the Crown in contemporary trade and investment agreements was not Treaty compliant, even on the interpretation it had adopted. Its recommendations for a more Treaty-compliant process have still not been adopted by the Crown.

(d) *The TPPA (WAI 2522)*

49. The WAI 2522 claim that alleged the Trans-Pacific Partnership Agreement breached the Crown’s Tiriti obligations on a number of grounds included Ngapuhi claimants also involved in this claim. The hearing was held under urgency and addressed two limited questions: the effectiveness of the Treaty of Waitangi exception and the forward process for engagement with Maori following the signing of the TPPA. As noted above, I provided expert evidence for the claimants in this claim.

50. The Tribunal recognised the potential impact of the Agreement on Maori:

We do have a concern that the Crown has misjudged or mischaracterised the nature, extent, and relative strength of Māori interests

⁵³ *Ko Aotearoa Tenei*, 11

⁵⁴ *Ko Aotearoa Tenei*, 683

⁵⁵ *Ko Aotearoa Tenei*, 683

⁵⁶ *Ko Aotearoa Tenei*, p.682

put in issue under the TPPA. ... Claimants can and do point to a number of matters that go to the heart of the Crown-Māori relationship, and Māori Treaty interests, such as access to affordable medicines and possible changes to Pharmac, intellectual property rights, and traditional knowledge, [as well as] wide-ranging concerns about future capacity to provide fair redress, including by way of Treaty settlements, [and] whether existing domestic protections will properly protect and respect kaitiakitanga and rangatiratanga. These matters are of high importance to Māori, and any potential adverse impact under the TPPA would be likely to cause significant prejudice.⁵⁷

51. It also recognised that the Crown would be constrained in its future actions domestically:

The consolidation of investment and trade provisions in an agreement of this scale makes the TPPA's exceptional reach and significance difficult to dispute [and] its intertwining of investment, traditional trade, and services means its scope is very broad.⁵⁸

Such agreements impose obligations on the Crown which constrict domestic policy.⁵⁹

Future New Zealand governments cannot act domestically in ways that contravene TPPA provisions New Zealand's policies, subsidiary legislation and exercise of Ministerial and regulatory authority discretions must align with the TPPA, even if changes to statutes are not required.⁶⁰

52. On the substantive question, the Tribunal relied on the flawed Treaty principles to conclude that the Treaty of Waitangi exception

will be likely to operate in the TPPA substantially as intended and therefore can be said to offer a reasonable degree of protection to Māori interests. We have come to this view even though the clause as drafted only

⁵⁷ WAI 2522 Final report, 54

⁵⁸ WAI 2522 Final report, 15

⁵⁹ WAI 2522 Final report, 44

⁶⁰ WAI 2522 Final report, 17

*applies to measures that the Crown deems necessary to accord more favourable treatment to Māori. This raises a question about the scope of the clause.*⁶¹ [emphasis added]

53. It reached this conclusion despite recognising that the TPPA could or would have significant adverse impacts for Maori:

*Despite this finding, we do have concerns. The protections and rights given to foreign investors under the TPPA are extensive. The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, may have a chilling effect on the Crown's willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measure. This issue and the appropriate text for a Treaty exception clause for future free trade agreements are matters about which there should, in our view, be further dialogue between Māori and the Crown.*⁶²

*The Crown however goes further and says that nothing in the TPPA will prevent the Crown from meeting its Treaty obligations to Māori. We have some reservations about this. There are two reasons for this. The first is a concern that the Treaty exception clause as presently structured may not encompass the full extent of the Treaty relationship. ... Our second reservation arises from uncertainty about the extent to which ISDS may have a chilling effect on the Crown's willingness or ability to meet particular Treaty obligations in the future or to adopt or pursue otherwise Treaty-consistent measures. ... Our concern is that by qualifying the Treaty exception clause to that aspect of the Treaty relationship which may allow the Crown to adopt or implement measures more favourable to Māori, the full constitutional reach of the Treaty relationship may not be as clearly protected and preserved under the TPPA as it might be.*⁶³

⁶¹ WAI 2522 Final report, 4 and 51

⁶² WAI 2522 Final report, x

⁶³ WAI 2522 Final report, 49-50

54. It is clear to me from these observations that a Tiriti-compliant interpretation of the ‘principles’ would have resulted in a finding that the Crown had breached its obligations.
55. On the question of process, the Tribunal made several critical observations about the Crown’s attitude to the relationship between the Treaty partners.

It seems to us that, contrary to the findings of the Wai 262 Tribunal, the Crown did not seek or provide a realistic opportunity for Māori to identify their interests in the TPPA as a Treaty partner. The secrecy or confidentiality of the development of Crown policy in relation to the TPPA and its negotiating positions compounded this difficulty, and is likely to have been a factor in low levels of engagement between the Crown and Māori (whether initiated by either party) prior to the lodging of these claims.⁶⁴

56. It criticised the Crown’s assessment of Maori interests affected by the TPPA and against which it determined the need to consult:

[I]t became clear to us in considering the efficacy of the Treaty exception that the Crown has not shown that it has understood the nature and extent of Māori interests affected by the TPPA.⁶⁵

57. The Tribunal also criticised the Crown’s perception of Maori as a mere stakeholder and its failure to take the WAI-262 report on board:

We find ourselves unable to accept the Crown’s characterisation of Māori interests put at issue by the TPPA as simply those they may hold as investors, businesses, or land owners. This seems to us to be an overly reductionist approach to Māori interests, and to the reach of the TPPA. It also misses in fundamental ways the findings and recommendations of the Wai 262 Tribunal.⁶⁶

58. However, recognition that Maori are Treaty partners was subject to the ‘reasonableness’ caveat drawn from the flawed Treaty principles.

⁶⁴ WAI 2522 Final report, 54-55

⁶⁵ WAI 2522 Report, 6

⁶⁶ WAI 2522 Report, 19

*Further, engagement with Māori is not always going to be perfect. But, as we have said, Māori are not just another interest group; Māori are the Crown's Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances.*⁶⁷

59. This was critically important because the Tribunal adopted the 'balancing' approach from the WAI 262 report which vests the power in the Crown throughout the process, including decisions on appropriate engagement, and potentially subordinates Maori interests to a general national interest:

The Crown must work out a level of protection for Māori interests, as identified and defined by Māori, that is reasonable when balanced where necessary against other valid interests, and in the sometimes constrained international circumstances in which it must act. ...

60. As a result of its decision on the substantive matter, the Tribunal did not make formal findings or recommendations regarding the question of process. But it made quasi-recommendations for dialogue on the appropriate text for a Treaty exception clause for future free trade agreements and

*... given the increased exposure to ISDS under the TPPA, we believe it would be both prudent and Treaty-consistent for the Crown to engage in a dialogue with Māori, with a view to reaching agreement on a protocol that would govern the procedure if there was an ISDS dispute in which the Treaty exception is likely to be relied on for participation of Maori and maximising expertise.*⁶⁸

61. I am aware that the claimants and the Iwi Chairs Forum have both sought to advance this dialogue through complementary proposals, without success.
62. The Minister of Trade Todd McClay informed me verbally on 14 June 2016 that the same Treaty of Waitangi exception will be tabled in the current negotiations for the Regional Comprehensive Economic Partnership, which is a significant new 16 country agreement.

⁶⁷ WAI 2522 Report, 12

⁶⁸ WAI 2522 Report, 57

63. Subsequent to the Tribunal hearing on WAI 2522 on 5 May 2016 I also received a response to an Official Information Act request regarding the Ministry of Foreign Affairs and Trade's Maori Policy Stocktake in 2013.⁶⁹ The information I received was disturbing, not least because the Ministry had been unable to locate the submissions to and papers prepared for the stocktake despite extensive research. The documents reveal a weak understanding of the Crown's obligations in relation to foreign affairs and treaty making, and a lack of coordination and commitment within the Ministry to give effect to those obligations.

C. ONE VOICE FOR TWO NATIONS

64. The Crown has asserted in WAI 262 and WAI 2522 that New Zealand must speak with one voice in the international arena. It is true that the Vienna Convention on the Law of Treaties, which codifies customary international law, recognises states as the operative agent. However, a single voice does not preclude a plurality of nations developing common positions or mutually agreed compromises, including where there is no consensus. The problem with 'one voice' arises where there is no commitment or mechanism to conduct that engagement and a lack of mutual respect for the equality of the partners.

65. The Crown's recent behaviour reveals that it consider Maori are one of a number of competing interests in developing what it described in WAI 262 as a 'NZ Inc' position.⁷⁰ It argued that it cannot impose its own negotiating timetables or unilaterally delay negotiations to suit demand for engagement by New Zealand stakeholders,⁷¹ although I note that it asserts the power and need to do just that in relation to commercial matters, such as market access for dairy products.

66. This approach is rationalised by reference to Treaty principles:

The Crown said that it had acted reasonably and in good faith where it had obligations to consult with Maori and recognise and protect Maori

⁶⁹ Secretary of Foreign Affairs and Trade to Professor Jane Kelsey, 5 May 2016, esp 1 and 11-16 of file. Attached as Exhibit 'N'

⁷⁰ *Ko Aotearoa Tenei*, 679

⁷¹ *Ko Aotearoa Tenei*, 679

*interests, and that it was doing all that was reasonably necessary in the dynamic world of international relations.*⁷²

67. This evidence shows the risks to the Tiriti rights of the claimants from the Crown’s assumption that it has supreme authority in international treaty making. The Crown appears unwilling to engage seriously with Maori to develop mutually agreed processes and outcomes, even when urged to do so by the Waitangi Tribunal - let alone to recognise that tino rangatiratanga and the legal concepts, values and processes of tikanga Maori require a fundamentally different approach to how it exercises international treaty making power.
68. The WAI 2522 Tribunal declined to apply the conclusion of the Stage 1 report that Maori signatories in the North did not cede sovereignty, noting its scope was limited to the largely historical claims and made no conclusions about the Crown’s exercise of sovereignty today. However, it implicitly recognised the potential for Stage 2 to reconsider the Crown’s treaty making power:

*We also consider that an urgent inquiry is not the appropriate forum to address broad constitutional questions, particularly those concerning the Crown–Māori relationship in respect of international instruments. We do not have the time, evidence, or range of interested parties to properly conduct such an inquiry.*⁷³

69. In my opinion, if this Tribunal does not seize the opportunity to revise the Tiriti principles, then non-compliant principles will continue to govern and violate the Treaty relationship for the indefinite future. The same applies to the international treaty making process.

SWORN / AFFIRMED at:)

On:) Professor Elizabeth Jane Kelsey

Before me:)

A Solicitor of the High Court of New Zealand

⁷² *Ko Aotearoa Tenei*, 680

⁷³ WAI 2522 Final report,7-8