PROCESS TRACING THE TRANS-PACIFIC PARTNERSHIP (TPP) IN CANADA AND NEW ZEALAND:

UNDERSTANDING THE INCLUSION OF INDIGENOUS PEOPLES IN TRADE NEGOTIATIONS

by

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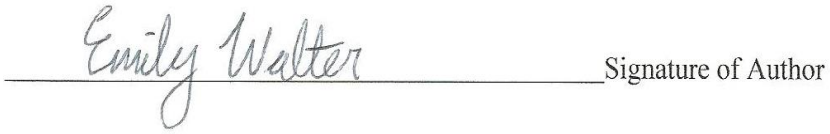

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Abstract

In attempts to achieve 'reconciliation' in a globalized world, several governments are seeking to advance the goal of 'progressive trade' (NZMFAT, 2020c; Government of Canada, 2018a). Yet it is uncertain whether current free trade agreements (FTAs) uphold the principles of reconciliation, and whether they are inclusive of Indigenous interests (UN General Assembly, 2015; Waitangi Tribunal, 2016). There is little knowledge regarding how Indigenous peoples participate in global trade negotiations, which creates a research gap (Kawharu, 2016; Schwartz, 2017; Dalhousie Law Professor, personal communication, March 3, 2020). To address this gap, this thesis uses process tracing through a document analysis to understand how Indigenous peoples in Canada and Māori in New Zealand participated in negotiations for the Trans-Pacific Partnership (TPP) free trade agreement. An analysis of the legal obligations these countries have to domestic stakeholders in international treaty-making provides insight to the often exclusive decision-making process at the international level. Weak and minimal legal obligations for countries such as Canada and New Zealand to include stakeholders, and especially Indigenous peoples in international treaty-making leads them to achieve the 'bare minimum' of domestic inclusion in order to ease the complexity of two-level games (Putnam, 1988; Kindred et al., 2014; Waitangi Tribunal, 2016; Sanderson & Willms, 2019). While Indigenous peoples are often not specifically targeted in these exclusive processes, the most marginalized groups in society are often heard the least ("Native Affairs", 2015; Palmater, 2016; Amnesty International, 2020). There are opportunities for more inclusive decision-making to occur, especially in Canada, where governments could look to New Zealand as a first step towards more meaningful engagement with Indigenous peoples (Cywink, 2017). For Canada and New Zealand to work towards rebuilding relations with Indigenous peoples, more inclusive treaty-making processes at both the domestic and international levels are needed.

Key Words: Trans-Pacific Partnership (TPP), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Free Trade Agreements (FTAs), international negotiations, Indigenous peoples, Māori, public consultation, legal obligations, two-level games, and inclusive treaty-making.

List of Abbreviations

CER Closer Economic Relations Trade Agreement

CETA Canada-European Union Comprehensive and Economic Trade Agreement

CPTPP Comprehensive and Progressive Agreement for Trans-Pacific Partnership

EU European Union

FOMA Federation of Māori Authorities

FTA Free Trade Agreement

GAC Global Affairs Canada

ISDS Investor State Dispute Settlement

MFAT Ministry of Foreign Affairs and Trade

MMP Mixed Member Proportional

MPs Members of Parliament

NAFTA North American Free Trade Agreement

PTA Progressive Trade Agenda

RMA Resource Management Act

TPP Trans-Pacific Partnership

UN United Nations

UNDRIP United Nations Declaration on the Rights of Indigenous Peoples

WTO World Trade Organization

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Land Acknowledgement

I would like to acknowledge that this research took place at Dalhousie University, located in Mi'kma'ki, the ancestral and unceded territory of the Mi'kmaq people. This land is covered by the Peace and Friendship Treaties of 1725-1779 (Wallace, 2018). Land acknowledgements are often meaningless when they lack a commitment to change present actions, systems, and ways of thinking which have historically, and continue to perpetuate harm and colonial injustices for Indigenous peoples. This thesis is a recognition of this harm, and a call for greater action for a more just, inclusive, and equitable world.

I believe it is important to acknowledge that I, the researcher, write from the perspective of a settler on this land. I acknowledge that I still have much to learn about issues I do not have lived experience with. I acknowledge that my voice may not be the best voice to speak about the issues this thesis touches on, yet I write for the purpose of shedding greater light on an issue of utmost importance. I hope to continue to learn from and support my Indigenous peers and those both within and beyond the academic community to engage in respectful solidarity. We are all Treaty People.

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1.0 Introduction

1.1 Topic of the Research

In attempts to achieve 'reconciliation' in a globalized world, several governments are seeking to advance the goal of 'progressive trade' (NZMFAT, 2020c; Government of Canada, 2018a). Yet it is uncertain whether progressive trade can be achieved when free trade can create neocolonial impacts for certain groups (Bargh, 2007). These neocolonial impacts can be seen in how trade agreements have significant implications for Indigenous peoples and their rights (Palmater, 2016; Jones et al., 2020). In working to overcome colonial injustices towards Indigenous peoples, nations such as Canada and New Zealand have agreed to uphold actions for reconciliation (Mulholland, 2016; Liberal Party of Canada, 2019). Reconciliation is defined as:

> "…establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples … there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour" (Truth and Reconciliation Commission of Canada, 2015, p.113).

Despite this commitment, is uncertain whether current free trade agreements (FTAs) uphold the above-mentioned principles of reconciliation (Truth and Reconciliation Commission of Canada, 2015). It is also important to note that while the word 'reconciliation' will be used in this thesis to describe the approaches of Canada and New Zealand in rebuilding relations with Indigenous peoples, 'reconciliation' has different meanings for different groups and may not be the best word to use in working towards decolonized societies. As noted by TallBear (2020), 'reconciliation' often acts as a state-driven project to make opposing views or beliefs compatible with each other, which throughout history has meant making Indigenous beliefs compatible with settler views.

There is little knowledge regarding how Indigenous peoples participate in global trade negotiations, and what the outcomes of these processes are (Kawharu, 2016; Schwartz, 2017;

Dalhousie Law Professor, personal communication, March 3, 2020). This creates a research gap that must be addressed to understand how to move forward in a future where both trade, and Indigenous reconciliation are prioritized. To better understand how Indigenous peoples are involved in negotiations for international trade agreements, this thesis will look at the negotiation process of the Trans-Pacific Partnership (TPP) and the recent ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Government of Canada, 2019c). The term 'TPP' will often be used in this thesis to broadly describe this agreement at all stages of the negotiation process. This thesis will briefly discuss other trade agreements including the recently renegotiated North American Free Trade Agreement (NAFTA), the Australia-New Zealand Closer Economic Relations Trade Agreement (CER), and the Canada-European Union Comprehensive and Economic Trade Agreement (CETA). This will allow for a clear analysis of how stakeholders, and specifically Indigenous populations have been included in and participated in trade agreements over time.

The Trans-Pacific Partnership (TPP) was a multilateral agreement negotiated between Singapore, New Zealand, Brunei and Chile initially in 2005, with the added involvement of Canada, the United States, Australia, Japan, Malaysia, Mexico, Peru, and Vietnam in negotiations by 2015 (Council on Foreign Relations, 2019). The goal of the TPP was to give members to the agreement greater access to new export markets through an integrated Pacific economy, and to establish regulations to protect and enhance businesses acting in participating countries (Council on Foreign Relations, 2019). Although the agreement was not ratified due to the United States' abandonment of the agreement in 2017, it entered into force in 2018 as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), when Canada, New Zealand,

Australia, Singapore, Japan, and Mexico ratified the agreement (Council on Foreign Relations, 2019; Government of Canada, 2019c).

Analyzing negotiations for the TPP in different regional contexts will provide a better understanding of how Indigenous peoples around the world participate in negotiations for global trade agreements. New Zealand shares a similar colonial history to Canada, as well as the goal of improving efforts towards Indigenous reconciliation (O'Sullivan, 2017). A glance at how New Zealand has worked to protect Māori through a 'Treaty of Waitangi Exception' in the TPP poses the question of whether Canada should look to New Zealand to understand how to better include Indigenous peoples in international negotiations (Kawharu, 2016; Meloney, 2018). The case studies used in this thesis were thus chosen with the goal of comparing the Canadian and New Zealand models of Indigenous governance.

1.2 The Problem

This past election year, the Liberal Party of Canada committed to increasing efforts for Indigenous reconciliation (Liberal Party of Canada, 2019). Canada has agreed to uphold the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which notes that countries must work towards the inclusion of Indigenous peoples in decision-making, and proceeding in decisions only after getting their "free, prior and informed consent" (Liberal Party of Canada, 2019; United Nations, 2008, p. 8). Despite this goal, Canadian law does not include clear legal requirements to consult Indigenous peoples in international decision-making (Schwartz, 2017). While section 35 of the Canadian Constitution Act of 1982 gives legal weight to Aboriginal and treaty rights, the duty to consult does not appear in any legislation and has only emerged out of

case law (Goff, 2017; Sanderson, 2017; Schwartz, 2017). Considering this, it is uncertain how the duty to consult plays out in negotiation processes for international trade agreements.

Further, the Trudeau government continues to seek a Progressive Trade Agenda (PTA) to ensure trade benefits are distributed with equity and inclusivity to all Canadians (Government of Canada, 2018a). Without legal consultation requirements to ensure meaningful participation of Indigenous peoples in trade negotiations, it may be challenging for Canada to fulfill its obligation to reconciliation efforts while pursuing a PTA (Goff, 2017; Schwartz, 2017). While it is possible that New Zealand has done a better job of including Māori in trade negotiations, the reality of this is uncertain (Kawharu, 2016; Meloney, 2018). New Zealand argued for the 'Treaty of Waitangi Exception' existent in past FTAs to be included in the TPP, to protect Māori interests and to ensure the Crown maintains obligations to Māori outlined in the Treaty of Waitangi of 1840 (Kawharu, 2016). Although this protection exists, details of what consultation processes with Māori looked like in TPP negotiations are lacking in the literature (Waitangi Tribunal, 2016).

The lack of knowledge regarding Indigenous consultation in international trade negotiations is dangerous. Free trade agreements often pose risks to Indigenous peoples, seen in how Investor-State Dispute Settlement (ISDS) clauses which exist in the ratified CPTPP, give foreign corporations rights which may supersede Indigenous rights or domestic obligations to Indigenous peoples (Goff, 2017; Schwartz, 2017). The ways in which trade agreements threaten Indigenous peoples globally make their inclusion in negotiations crucial, yet without an understanding of current consultation and inclusion processes, it is impossible to transform international trade to be more inclusive of Indigenous voices.

1.3 Purpose of the Study

This project seeks to trace the process of the TPP negotiations to explore the impacts of international and domestic legal obligations on negotiation practices. This will be done by analyzing what the consultation processes and Indigenous participation looked like in Canada and in New Zealand during negotiations for the TPP, and what the legal obligations of these countries were in including the public, and specifically Indigenous peoples in the creation of this treaty. Closing this research gap is important for a future of reconciliation in nations such as Canada and New Zealand. By understanding where Indigenous peoples are excluded by international negotiations, countries can begin realizing how they must change their policies to ensure reconciliation is integrated into all aspects of governance and decision-making.

1.4 Research Questions

1. *What was the process of negotiations for the Trans-Pacific Partnership (TPP) in Canada and in New Zealand, and to what degree did Indigenous peoples and Māori participate in this process?*
2. *How do current international and domestic legal obligations impact how Indigenous peoples in Canada and Māori in New Zealand participate in international treaty-making for trade agreements such as the TPP?*

These questions are defended through an understanding of the research ontology. The first and primary research question operates in the realm of comparative politics. In this case, the boundaries of what will be studied include the activities which occur within both the Canadian and New Zealand states, including political theories, social contracts, and policies which shape governance. The second question looks at this topic through a legal lens, by analyzing how international and domestic policies affect how domestic populations within states participate in negotiations at the international level. Case study analysis is the overarching lens through which these questions will be answered, in looking at negotiations that took place in creating the TPP.

1.5 Keywords

Trans-Pacific Partnership (TPP), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Free Trade Agreements (FTAs), international negotiations, Indigenous peoples, Māori, public consultation, legal obligations, two-level games, and inclusive treaty-making.

1.6 Significance of the Study

As mentioned above, there is much uncertainty surrounding the degree to which Indigenous peoples are included in global trade agreements, and what the consultation processes for these agreements look like, if they occur at all (Kawharu, 2016; Schwartz, 2017; Dalhousie Law Professor, personal communication, March 3, 2020). The participation of Indigenous peoples as partners to the Crown in these negotiations, as well as measures which protect their interests in trade agreements can aid efforts to rebuild relationships with Indigenous peoples through greater inclusion of Indigenous knowledge systems in global decision-making (United Nations, 2008). In a time where the world is seeing increasing climate threats, Indigenous knowledge may be integral to helping globalization occur in a way that does not consume planet earth (Bargh, 2007). The information gathered in this study will be useful to scholars and activists who may hold political leaders accountable for shifting which voices steer the outcomes of international negotiations.

1.7 Outline of the Thesis

This thesis will begin by reviewing the literature in the following two contexts. First, this thesis will evaluate the domestic treaties in both Canada and New Zealand, and Crown obligations to Indigenous peoples in these countries. Second, literature on the TPP as well as the processes which shaped it will be explored. The remainder of this thesis will be crafted around the method

of process tracing TPP negotiations through a document analysis of media and grey literature published in Canada and New Zealand. Interviews with three law professors at Dalhousie University help to inform the analysis of the international and domestic legal obligations of nations in trade negotiations. This gathered information can help fill the research gap of how Canadian Indigenous peoples and Māori participate in international treaty-making processes. The research findings of what happened in the creation of the TPP will be outlined in the 'Results and Analysis' section, which will be followed by a discussion of how legal obligations impact how Canada and New Zealand include Indigenous peoples in international negotiations. The thesis will conclude with final remarks and recommendations for further research.

2.0 Literature Review

2.1 Treaty Structures and Domestic Constraints

Domestic treaties and obligations between governments and Indigenous peoples in Canada and in New Zealand are important to consider when analyzing how Indigenous peoples participate in trade negotiations. Understanding what legal requirements governments must follow for including Indigenous peoples in international treaty-making is critical, to know whether governments met their international and constitutional obligations in negotiation processes. A review of the effectiveness of these obligations can illuminate where constraints exist to the inclusion of Indigenous peoples in negotiations, and where these obligations could be improved to make for more inclusive treaty-making at the international level.

2.1.1 Treaty structures in Canada

Reynolds (2018) describes how treaties in Canada are divided into the categories of historic and modern treaties. Historic numbered treaties include all those created before 1975 and are

typically focused on Indigenous peoples giving up their rights to the land in return for hunting and fishing permission, small yearly payments, as well as the creation of reserves and schools (Reynolds, 2018). In the Maritimes, there are Peace and Friendship Treaties which differ from numbered treaties as they do not state the cessation of lands by the Mi'kmaq people (Reynolds, 2018). In contrast, modern treaties often apply to particular groups as opposed to regions, and include over 20 treaties formed after 1975 until the present day (Reynolds, 2018). Modern treaties cover issues such as Indigenous resource management, taxation, self-government, and dispute settlement (Reynolds, 2018).

In addition to treaties, Indigenous peoples are 'protected' in Canada through the Constitution Act of 1982. Section 35 of the Constitution legally recognizes the Aboriginal and treaty rights of Indigenous peoples in Canada (Reynolds, 2018) (See Appendix A). Aboriginal rights are collective rights which broadly encompass rights to land, resources, self-government, and traditional practices, whereas treaty rights are those which are derived directly from treaty conditions (Reynolds, 2018). Finally, Aboriginal rights include Aboriginal title, which refers to the collective right of Indigenous peoples to their land and to use it as they wish, which existed before British sovereignty (UBC First Nations Study Program, 2009a).

2.1.2 Treaty structures in New Zealand

New Zealand has one main treaty, the Treaty of Waitangi, signed in 1840 between Māori chiefs and members of the British Crown (Hayward, 2003). The purpose of the Treaty of Waitangi was similar to the goals of Canadian treaties; to help Indigenous peoples and settlers live together in 'peace' (Hayward, 2003). The Treaty of Waitangi outlines how Māori would cease their lands to the British Crown in exchange for the protection to control their lands, resources, and other

treasures such as property rights, as well as to have the same rights as British subjects (Hayward, 2003). There has been much conflict and debate over the Treaty of Waitangi, stemming from how the British Crown and Māori chiefs signed two different versions of the Treaty, and thus understood it differently (McHugh, 1991). Māori understood they were allowing the British Crown to have 'kawanatanga', meaning the permission to govern the lands, while the Māori would maintain 'rangatiratanga', meaning the right to lead their own people (McHugh, 1991). However, the British understood this as the Māori giving up complete 'sovereignty' of the lands and their people, which are very different things (McHugh, 1991). The disputes arising from this mistranslation led to the creation of the Waitangi Tribunal.

2.1.3 Tribunals

In Canada, the structures which exist to protect Indigenous rights include courts and tribunals. Tribunals oversee project developments and approval processes of these developments, such as environmental assessments and potential project impacts on Indigenous peoples (Lambrecht, 2013). Indigenous peoples can ask tribunals to reject projects or make recommendations if they feel a project will infringe their rights, and can file land claims or instances of rights infringement to the courts (INAC, 2010). The problem with these structures is that the onus is on Indigenous peoples to prove an infringement of their rights, or a claim to land (INAC, 2010). This system is ineffective in upholding the rights of Indigenous peoples since the protection of their rights cannot be guaranteed without action to defend them.

New Zealand's Waitangi Tribunal was established in 1975 under the Treaty of Waitangi Act, in order to implement a system for dealing with Māori claims against the Treaty (McHugh, 1991). Today, the Tribunal is composed of both Māori and non-Māori members who make

decisions on historic and modern claims for Crown infringement of the Treaty of Waitangi (McHugh, 1991). McHugh (1991) notes the unique ways in which the Tribunal interprets the treaty in decision-making; not simply using the strict legal terms and wording of the document, but in understanding the treaty's principles. For example, while the word 'partnership' is not mentioned in the treaty, the Tribunal decided it was a key principle when interpreting the treaty in relation to claims (McHugh, 1991). Further, this concept of partnership presents an opportunity for greater collaboration between Māori and settlers at all institutional, social, and political levels of New Zealand life (Hayward, 2003).

2.1.4 Duty to consult

Case law has developed a key obligation of the Canadian government to Indigenous peoples, which is the duty to consult (Reynolds, 2018). The duty to consult is most frequently triggered when a government project or action, such as the development of a new oil pipeline, may infringe the rights or title of an Indigenous group (Reynolds, 2018). While consultation processes are becoming more common in Canada, they are often not meaningful, and Canadian law does not require the Crown to obtain the "free, prior and informed consent" of Indigenous peoples for new developments and decisions, even though this is outlined in UNDRIP (United Nations, 2008, p.8; Reynolds, 2018). The limitations of the duty to consult are that since it is not explicitly outlined in Canadian law, consultations do not always occur when they should, and the lack of a framework for effective consultation means these processes are often meaningless (Schwartz, 2017; Reynolds, 2018). It is important to note that Indigenous groups are not monolithic, and individuals within communities will have different views on an issue. This makes it increasingly important for the government to meaningfully engage with communities in a way that allows a multitude of voices to be heard.

New Zealand law does not explicitly outline a legal duty for the Crown to consult with Māori in decision-making (McHugh, 1991). However, many New Zealand politicians see governance which ignores consultation as unconstitutional, which is understandable given the Tribunal's stated principle of 'partnership' between the Crown and Māori (McHugh, 1991). This 'partnership' first materialized with the implementation of the 1991 Resource Management Act (RMA), which includes provisions stating the importance of protecting Māori lands and resources, and tools for establishing collaborative decision-making between Māori, governments, and third parties (Hayward, 2003; New Zealand Ministry for the Environment, 2018). Yet since this principle of 'partnership' is not written in New Zealand law it can be neglected, as will be seen in case studies of Māori participation in TPP negotiations.

This thesis will primarily explore consultation processes with Indigenous peoples as a form of participation in international trade negotiations, as this is the primary format governments have established for including Indigenous peoples in decision-making (McHugh, 1991; Reynolds, 2018). However, it must be noted that conducting consultation by no means achieves inclusion; it does not work meaningfully towards 'reconciliation', nor recognizes the principle of 'partnership' between Indigenous peoples and the Crown (Jones et al., 2020; TallBear, 2020). As this thesis will demonstrate, consultation processes are flawed and inadequate, and better systems for inclusive decision-making are needed for governments to begin rebuilding relationships with Indigenous peoples.

2.1.5 Illuminating constraints

The understanding of treaty structures and Indigenous rights in Canada and in New Zealand is critical to this analysis as it highlights various constraints. When negotiating free trade, what the

Canadian government decides is constrained by the obligation to uphold Aboriginal and treaty rights (Reynolds, 2018). Further, Canada cannot make any decisions which may infringe Aboriginal and treaty rights, without the consultation of Indigenous peoples due to the duty to consult (Reynolds, 2018). Similarly, the New Zealand government is constrained by the text, and inferred principles of the Treaty of Waitangi in all its decision-making, as the Crown must ensure the protection of Māori in all agreements and developments (McHugh, 1991). Identifying these constraints is important for highlighting where protections are lacking. In New Zealand, there is no written requirement for the Crown to ensure 'partnership' with Māori in all developments and decisions (McHugh, 1991). In both Canada and in New Zealand, there are no legal obligations in place which ensure consultation occurs in all scenarios, or that free, prior, and informed consent is given before a development moves forward (McHugh, 1991; UN General Assembly, 2015; Schwartz, 2017; Reynolds, 2018).

2.2 The Process of International Treaty Making

2.2.1 Treaty-making in Canada

In Canada, the Executive branch of the federal government consists of the Prime Minister, the Governor General, and the Cabinet (Parliament of Canada, 2012). Depending on the international treaty negotiation, the lead team of negotiators may vary, but it often consists of a small group of Executive members and politicians (H. Kindred, personal communication, February 24, 2020). While the Executive has authority to negotiate and implement international treaties, there must be some transparency between the Executive and Parliament (GAC, 2014). The Executive must gain a negotiating mandate from Cabinet before commencing negotiations, which must explain how the Executive has consulted with civil society, provincial governments, and

Indigenous peoples (GAC, 2014). Further, when the treaty is tabled in Parliament, the attached explanatory memorandum must describe what consultations occurred in the negotiation process (GAC, 2014). The treaty-tabling period ensures Members of Parliament (MPs) and provinces are included in discussions before an international treaty is ratified (GAC, 2014).

2.2.2 Treaty-making in New Zealand

New Zealand follows a treaty-making process similar to Canada, where an Executive body of government has the power to negotiate a treaty, while Parliament and the judiciary have the implementing authority (The Law Commission, 1997). In New Zealand, the Executive

> "embraces the administrative powers and functions of central government and includes all the government departments under ministerial control" (The Law Commission, 1997, p. 5)

The Executive is often a group of members within the Ministry of Foreign Affairs and Trade (MFAT) (The Law Commission, 1997, p. 5). In 1997, the Law Commission of New Zealand recommended an improved treaty-making process where Parliament would be more involved in decision-making (1997). These recommendations led to revised Standing Orders of the House, and now New Zealand must present international agreements to the House before ratification and perform a national interest analysis (NZMFAT, 2019).

2.3 International Obligations

An understanding of the treaty structures and domestic obligations in Canada and in New Zealand provides the knowledge needed to analyze how these constraints should theoretically play out in international trade negotiations. Phare (2004) argues:

> **"**It is logical that a constitutional constraint upon the Crown could not be ignored merely through the shift in arena from the domestic to the international" (p. 178).

This means the obligations and treaties governments follow in domestic negotiations must also be applied to international agreements (Phare, 2004). International trade agreements have direct implications for Indigenous peoples, such as the development of industries on Indigenous lands or the exploitation of natural resources (Phare, 2004; UN General Assembly, 2015). Despite this, there are no domestic policy statements in Canada or in New Zealand which state how Indigenous peoples should be included in international trade negotiations, and what consultation processes or consent should look like (McHugh, 1991; Phare, 2004; Reynolds, 2018). The result of this is that domestic constraints are often not accounted for in international trade. This issue is further influenced by how the need for countries to meet domestic obligations is not enforced internationally through the World Trade Organization (WTO), and that the multi-player games which occur in international relations may restrict a nation's desire and ability to do so.

2.3.1 The World Trade Organization (WTO)

The World Trade Organization (WTO) is an international body established by an agreement between over 160 countries, which works to regulate and set the rules for international trade (WTO, 2020). By analyzing some of the WTO principles, it can be better understood whether state adherence to domestic constraints is legally enforced, or what may be lacking in this enforcement. The WTO principles which are applicable to this thesis include a) national treatment and exceptions, b) transparency, and c) participation.

a) National treatment and exceptions

The principle of national treatment describes how nations party to a trade agreement must not treat foreign goods, service providers or industries less favourably than those which are domestic (Gehring et al., 2006). However, WTO exceptions allow members to violate certain

WTO principles in cases where complying with them may harm the well-being of their citizens, or national assets (Gehring et al., 2006). An example of this can be seen in New Zealand's Treaty of Waitangi Exception, which runs counter to the principle of national treatment (Gehring et al., 2006). It states that New Zealand will provide "more favourable treatment to Māori" (See Appendix B) over foreign actors in order to protect Māori lands, rights and opportunities (Kawharu, 2016; CPTPP, 2020, p. 29-9). Despite this protection, the statement of 'more favourable treatment to Māori' has been criticized for lacking clarity for how it should operate (Kawharu, 2016; Waitangi Tribunal, 2016). In light of this, perhaps the WTO needs clearer rules for how exceptions should be drafted to protect domestic interests.

b) Transparency

The WTO requires nations to practice internal and external transparency in trade (Gehring et al., 2006). Internal transparency means that WTO member states communicate with each other about trade policies, and that parties to a regional agreement are open with each other regarding the terms of the agreement (Gehring et al., 2006). In contrast, external transparency describes how nations must be open about trade agreements domestically and inform citizens about negotiation processes and trade policies (Gehring et al., 2016). Despite this principle, scholars and critics have argued that negotiations for the TPP were not transparent (Waitangi Tribunal, 2016; Christopher et al., 2017; Jones et al., 2020). Many groups, such as industries, the public, and Indigenous peoples were not meaningfully consulted in negotiation processes, and the TPP working text was not released to the public until a month after negotiations ended and a draft agreement was made (Kawharu, 2016; Waitangi Tribunal, 2016; Christopher et al., 2017). Considering this, it seems that international rules are not effective in regulating transparency of international trade documents.

c) Participation

There are minimal established frameworks for the participation of individuals and third parties in international trade. Governments have the most power in determining outcomes of WTO agreements, and third parties are disadvantaged in influencing these agreements as they must rely on governments to ensure their interests are included (Gehring et al., 2006). While both Canada and New Zealand have systems for third parties to raise issues to governments, the onus is on them to come forward to have a voice in agreements; they are not given it through the WTO rules (Gehring et al., 2006; Lambrecht, 2013; Waitangi Tribunal, 2016). These minimal participation standards are seen in the weak processes of consultation with Māori in TPP negotiations, where claimants had to file reports to the Waitangi Tribunal to argue this lack of inclusion (Waitangi Tribunal, 2016). This demonstrates how the WTO does not establish frameworks for third party participation, as claimants must raise concerns to domestic governments for their views to be addressed.

WTO rules are enforced internationally, as if a nation fails to uphold WTO principles in relations with other WTO states, that state can be brought in front of a WTO panel (H. Kindred, personal communication, February 24, 2020). In contrast, the fact that the WTO lacks adequate principles for ensuring member states meet domestic obligations in negotiation processes demonstrates how constitutional obligations of countries are minimally addressed through international trade law (Gehring et al., 2006). The lack of international enforcement for upholding constitutional constraints may disincentivize states from doing so, as there are no punishments if governments neglect their domestic duties, other than repercussions or backlash from citizens (H. Kindred, personal communication, February 24, 2020). Perhaps this is why the most marginalized

groups in society are the most discriminated through the international arena, as they may lack the power and resources to fight against the government in a way that is harmful to its political success.

2.3.2 Vienna Convention on the Law of Treaties

While minimal protections for domestic citizens exist at the international level, obligations for nations to adhere to the agreements which they are party to are present and enforced. The Vienna Convention on the Law of Treaties was created in 1969 by the International Law Commission of the United Nations, with the goal of regulating treaties between states (United Nations, 1980). Presently, half of the United Nations (UN) member states, including both Canada and New Zealand have agreed to the convention, and most of those who have not recognize its validity (United Nations, 1980). While states who fail to uphold the convention's rules can be brought to the International Court of Justice, the enforcement of this treaty offers no protection for the interests of domestic citizens (H. Kindred, personal communication, February 24, 2020). Article 27 of the treaty, titled *Internal law and observance of treaties*, states:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (United Nations, 1980, p. 339).

This statement demonstrates how domestic obligations of nations party to the convention are not protected, as international obligations between states trump the weight of domestic law.

2.3.3 UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN in 2007 to work towards greater protection of Indigenous rights across the globe (UBC First Nations Study Program, 2009b). While 144 nations have signed on to it, including both Canada and New Zealand, the agreement is not legally binding, meaning there are no direct punishments to governments who fail to uphold the terms of the agreement (United

Nations, 2020). As will be seen in this analysis, both Canada and New Zealand have breached the terms of UNDRIP in how they failed to obtain the "free, prior, and informed consent" of Indigenous peoples and Māori before signing and ratifying the TPP (United Nations, 2008, p.8; Palmater, 2016; Jones et al., 2020).

2.4 How Constraints Play Out in Negotiations

2.4.1 Two-level games

An explanation for why it may be challenging for constitutional constraints to be adequately fulfilled in the international arena can be better understood upon analyzing two-level games. Putnam (1988) uses the term 'two-level games' to describe how international negotiations involve a balancing of needs at both the domestic and international levels. At the domestic level, negotiating parties are met with concerns from citizens, domestic groups, and organizations, and they must form coalitions and make bargains with these groups to gain power and support (Putnam, 1988). Internationally, leaders must try to achieve and protect their domestic interests, while maintaining leveraging power over other states to avoid unfavorable foreign developments (Putnam, 1988).

Satisfying players at these two levels is crucial, as international agreements can only be achieved when there is an overlap of 'win-sets', meaning there are enough international conditions that can be ratified domestically (Putnam, 1988). Since larger win-sets increase the likelihood of an agreement succeeding, win-set sizes can be used as a leveraging strategy for states to get what they want (Putnam, 1988). States with large win-sets may be pushed around to adhere to the needs of other states with smaller win-sets, who may use the tactic of saying that while they wish to be

party to an agreement, certain clauses will not be accepted domestically (Putnam, 1988). This gives certain states more power over others in influencing agreement outcomes.

2.4.2 Two-Level games and leveraging power

The idea of using win-sets as a leveraging strategy may provide insight to the case of the renegotiated NAFTA, and Canada's failed attempt to include an Indigenous peoples' chapter. While Canada argued for the inclusion of a NAFTA chapter which would protect the rights and interests of Indigenous peoples, the United States shot this down (McGregor, 2018). Perhaps Canada lost this argument as the United States may have claimed that they would never get it passed at home (Putnam, 1988). Putnam (1988) notes that the United States has done this before, such as in negotiations for the Panama Canal Treaty, where the American delegation exaggerated the difficulty of passing the Treaty in order to have leverage over Panama. This demonstrates the power of the United States in using their win-set as a form of leveraging power over other nations. Despite Canada's aim to protect Indigenous peoples in the renegotiated NAFTA, the nature of the two-level game meant that the United States had more leveraging power over Canada to deny this clause. For Canada to achieve international goals of profitable free trade with other nations, they had to let this domestic desire go.

While some may question why Canada chose inclusion in international trade over the protection of domestic interests, the answer is clear when analyzing Kim's (2018) argument of the harm of relative losses. Kim (2018) argues that from a realist lens, domestic protectionism results in relative losses which diminish a state's security in an anarchic world, by weakening their position of power in relations with other states. By participating in free trade, states become more secure as they can achieve relative gains and maintain their position of power on the world stage

(Kim, 2018). Therefore, in an agreement with the United States and Mexico, where the United States has the most leverage in driving the agreement, it is safer for Canada to adopt the agreement on the United States' terms, than to leave the agreement and incur relative losses, and thus a weakened position of power. It seems that the lack of international legal enforcement mechanisms, as well as the need for leaders to balance two-level games in negotiation processes constrains both the ability and the will of governments to meet domestic obligations in a meaningful way. These theories are important for analyzing the negotiations of the TPP, as they can provide deeper insight as to why this agreement played out in the way it did.

2.5 Case Study Analysis of Agreements

2.5.1 NAFTA: Original and renegotiated

The first NAFTA agreement was signed in 1994 between Canada, the United States, and Mexico with the goal of improving the economies of all three nations by reducing trade barriers and increasing economic cooperation in this region (NAFTA Secretariat, 2014; Office of the United States Trade Representative, 2020b). Since NAFTA was the first major free trade agreement in North America, in the years leading up to NAFTA many Canadians opposed free trade agreements (Boskin, 2014). While most Conservatives saw free trade as an opportunity for economic growth, many Liberals feared that globalization movements may increase unemployment and inequality and have adverse effects on the environment and on industry operations (Boskin, 2014). To address these concerns, Canadian Prime Minister Mulroney campaigned year to year for free trade, emphasizing Canadian values of society and culture, and national sovereignty in his campaigns to appeal to various groups (Boskin, 2014). When NAFTA was finalized these values may not have been prioritized, seen in how the Investor State Dispute

Settlement (ISDS) clause provides protections to foreign investors at the expense of domestic protections over lands and resources (NAFTA Secretariat, 2014; Schwartz, 2017).

In NAFTA renegotiations, Canada worked to create an agreement that was more inclusive to Canadians by arguing for the creation of a chapter that would protect Indigenous rights and interests, as well as a chapter that would protect gender rights (Porter, 2017). While both chapters were not included in the final agreement, Canada claims that language which protects women and Indigenous peoples is still present in the new NAFTA (McGregor, 2018). While this sounds like an achievement, Indigenous rights have been 'protected' in past trade agreements through these 'carve-outs' or exceptions for Indigenous rights in text reservations (Schwartz, 2017). Schwartz (2017) argues that reservations for Canadian Indigenous peoples in the original NAFTA were ineffective, as they failed to include measures for expropriation and the minimum standard of treatment, which are crucial clauses for having the means to claim treaty violations. Considering past issues with carve-outs for Indigenous peoples in free trade agreements, the inclusion of language which 'protects' Indigenous rights in the new NAFTA may be no step forward for Canada, as it will likely not help the process of rebuilding relations with Indigenous peoples.

2.5.2 The CER

The Australia-New Zealand Closer Economic Relations Trade Agreement (CER) is an active agreement between Australia and New Zealand, which was signed in 1989 as a new deal evolving from previous trade agreements between these two nations (Australian Government, 2020). Similar to NAFTA, the agreement sought to grow the economies of these countries by encouraging the free movement of goods and services between them, and thus creating opportunities for specialization and innovation (Andre et al., 2003). Negotiation documents

indicate that in both countries, consultations with interested parties often included consultation with industry workers and representatives, but these documents did not explicitly mention Australian Aboriginal peoples, or Māori (Andre et al., 2003). Near the end of the process, New Zealand's ministers understood that since consultation had been conducted with third parties during negotiations, a presentation to the public was not needed following the drafting of the main issues of the CER (Andre et al., 2003). Andre et al. (2003) demonstrates how New Zealand's failure to uphold domestic obligations in free trade negotiations has been a reoccurring issue throughout history. Moreover, this provides another example of the New Zealand government lacking transparency in negotiations, which reinforces the idea that WTO principles lack teeth.

2.5.3 The TPP

Negotiations for the Trans-Pacific Partnership (TPP) began in 2004 and by 2015 included 12 Pacific-bordering states (Council on Foreign Relations, 2019). The United States' failure to ratify the agreement in 2017 meant that by 2018, the TPP became a ratified agreement between six countries, and was renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Council of Foreign Relations, 2019). The CPTPP has been criticized in both Canada and in New Zealand for lacking transparency and for neglecting adequate consultation and inclusion of interested parties during negotiations (Christopher et al., 2017; SCIT, 2017; Hailes, 2018).

The Parliament of Canada's Committee Report on the TPP outlines extensive consultations with various organizations and industry sectors in the negotiation process of the agreement (SCIT, 2017; Parliament of Canada, 2020). While the report states that the Canadian Government consulted with Indigenous peoples, scholars and activists have argued that Indigenous peoples

were not consulted in a meaningful way in the negotiation processes (Palmater, 2016; SCIT, 2017; Parliament of Canada, 2020). Considering how the TPP will have serious implications for Indigenous lands, rights and resources, critics argue that this lack of meaningful consultation violates both the Canadian Constitution and the principles of UNDRIP, which Canada has committed to upholding (UN General Assembly, 2015; SCIT, 2017; Liberal Party of Canada, 2019; Parliament of Canada, 2020).

For New Zealand, scholar Kawharu (2016) has argued that the 'Treaty of Waitangi Exception' included as a reservation in the TPP to protect Māori interests and Crown obligations to Māori, is flawed (See Appendix B). Kawharu (2016) notes how while the clause states that the TPP should not interfere with New Zealand's obligation to provide "more favourable treatment to Māori" regarding issues of the TPP, this clause is vague (CPTPP, 2020, p. 29-9). Without a clearly defined meaning for this clause, Māori have weak protections against groups such as foreign investors who may threaten to sue the New Zealand government if they feel their interests are not protected (Kawharu, 2016). In addition to these weak protections, Māori did not participate in meaningful consultations in TPP negotiations (Waitangi Tribunal, 2016). This poor treatment of Māori in negotiations is ironic considering New Zealand's efforts to ensure protection of Māori in the agreement text, as well as the practiced principle of 'partnership' in the interpretation of the Treaty of Waitangi (Waitangi Tribunal, 2016; Hayward, 2003). However, without international enforcement of proper treatment, this 'partnership' may not be prioritized as the small state of New Zealand strives to secure its place on the international stage.

2.6 Concluding Remarks

While both the Canadian and New Zealand governments have obligations to meet Indigenous rights outlined in treaties, these obligations are often not upheld in international trade negotiations (Palmater, 2016; Waitangi Tribunal, 2016). This may result from a lack of international enforcement from the WTO, as well as motives and games in the realm of international relations which may run counter to these obligations (Putnam, 1988; Gehring, 2006). For example, as a small state, New Zealand may not have as much leveraging power as other parties to the TPP to negotiate the best outcomes for Māori. While nations may attempt to protect their domestic interests in international negotiations, other nations may not agree to these protections. However, often nations will still sign on to these agreements, as the gain of pursuing valuable international interests outweighs the failure to meet domestic concerns (Kim, 2018).

3.0 Methods

This research is inductive in how it seeks to understand the inclusivity of the TPP negotiation process towards Indigenous peoples and Māori. Using inductive tools to answer the research questions provides flexibility for allowing the emergence of unforeseen themes (Braun & Clarke, 2006). The method of process tracing the events which took place during the TPP negotiations is used through a document analysis. The document analysis includes a review of grey literature, legal and academic literature, and media sources from both the Canadian and New Zealand perspectives. Further, interviews are conducted with legal professors for the researcher to gain professional knowledge on international treaty-making, and the legal obligations of nations to their citizens in this process.

3.1 Qualitative Methods

The document analysis for this thesis employs what scholars have described as ‘thematic analysis’. Braun and Clarke (2006) define thematic analysis as

“a method for identifying, analysing and reporting patterns (themes) within data”. Thematic analysis is flexible in how it offers multiple pathways for categorizing themes in the data (Braun & Clarke, 2006). More specifically, this thesis uses an inductive and semantic thematic analysis. An inductive analysis means that discovered themes are derived from the data itself, as opposed to being derived from the research questions or theoretical approach to the research (Braun & Clarke, 2006). A semantic approach means that themes are obtained from what people have said, and the analysis does not work to interpret meanings beyond the stated data (Braun & Clarke, 2006). This type of analysis allows for a focus on what has been stated by Canadian Indigenous peoples, Māori, and their allies, as well as the governments of Canada and New Zealand, and can help the researcher derive themes from these statements. Since the way Indigenous participation in trade negotiations plays out is unknown due to the stated research gap, it would be counterproductive to conduct the media analysis through a deductive approach based on assumed themes or outcomes (Kawharu, 2016; Schwartz, 2017; Dalhousie Law Professor, personal communication, March 3, 2020).

Due to the inductive nature of the research, the themes are formulated during the process of the document analysis (Braun & Clarke, 2006). This follows the method of a ‘simple content analysis’, where initial themes are established by analyzing a small sample of media and grey literature sources, and then these themes are applied to the entire bundle of materials that will be

analyzed (Michaelson & Griffin, 2005). As more themes emerge during the analysis of the complete bundle of articles, these themes are added as new themes, and researched further.

A list of the initial, general themes created through data collection is outlined in the table:

Theme Categories for Process Tracing TPP Negotiations
How are international treaties made? (Canada/New Zealand)
Domestic obligations to citizens in negotiations (Canada/New Zealand)
Global meetings for negotiation
Approval and ratification processes (Canada/New Zealand)
Consultations and public participation (Canada/New Zealand)
Citizen and organization-led action (Canada/New Zealand)
Legal action (Canada/New Zealand)
TPP impacts on Indigenous peoples in Canada/Māori in New Zealand
What Indigenous peoples/Māori have said in debates
Inclusion of Indigenous peoples/ Māori in Agreement text

Figure 1: Initial categorization of themes during data collection

3.2 Process Tracing

The method of process tracing is used to organize and analyze the data themes. As described by Beach (2017):

> "Process tracing is a research method for tracing causal mechanisms using detailed, within-case empirical analysis of how a causal process plays out in an actual case" (p.1).

Process tracing is beneficial to mapping out the events which took place during and surrounding the TPP negotiations. As data is collected, it is organized into themes or categories of events, as was done above (Braun & Clarke, 2006). Once the data has been categorized, the events are compared to the domestic and international legal obligations of Canada and New Zealand towards citizens during international treaty-making processes. This helps to uncover whether the countries

fulfilled their obligations or not, and whether this fulfillment is adequate for ensuring international trade negotiations are inclusive of citizen voices, especially those of Indigenous peoples. The categorized events are the building blocks of the 'within-case empirical analysis', and the link between the events to the nations' legal obligations is the 'causal process' which can illuminate how obligations are followed, and what the results are in an 'actual case' (Beach, 2017, p. 1).

The connections made between the nations' legal obligations and the events which took place in TPP negotiations is a critical component of process tracing. Beach (2017) notes:

> "This focus on causal explanations means that process tracing involves more than the production of detailed, descriptive narratives of the events between the occurrence of a purported cause and an outcome. Instead, process-tracing research probes the theoretical causal mechanisms *linking* causes and outcomes together" (p.2).

The theoretical causal mechanism in this case is the effectiveness of international and domestic obligations, which may or may not require countries to include citizens in international treaty-making as well as the constraints of two-level games and leveraging power. Instead of simply analyzing the outcome that, for example, Indigenous peoples were not meaningfully included in negotiations to the cause that Canada failed to consult them and include them in the negotiating team, process tracing through the theoretical causal mechanism of obligations reveals how this happened. For example, it seems that Canada did not meaningfully consult due to the weak international and domestic obligations which require them to do so, as well as the need to balance the constraint of two-level games.

3.3 Review of Grey Literature

Document and media outlet analyses are beneficial for process tracing, as they contribute to "account evidence", meaning evidence which describes events that have happened, and "trace evidence", which is proof that an event occurred, such as meeting minutes (Beach & Pederson,

2013, p. 100). A review of grey literature provides the researcher with primary sources of qualitative data through legal and government documents and working papers for the 'behind the scenes' work needed to ratify international trade agreements (Trampusch & Palier, 2016). This review provides a deeper understanding of how Indigenous peoples participate in trade negotiations by including expert knowledge and information on the processes which surrounded negotiations. For example, a key document used in this thesis is the "Waitangi Tribunal Report on the Trans-Pacific Partnership", which was drafted by the Tribunal following an urgent hearing regarding TPP negotiations (Waitangi Tribunal, 2016). This type of literature is useful for presenting the voices of Māori and their allies in negotiation processes for international trade agreements, as it demonstrates how they may have been involved in legal processes leading up to the ratification of agreements, if not the specific negotiations for drafting them.

Grey literature materials are searched using a variety of methods. The process begins with basic searches through search engines to understand which government agencies, experts, and organizations have published material on Indigenous participation in the TPP negotiations. This then leads the researcher to the websites of those agencies and organizations to access specific legal, government, or organization documents. Further, relevant grey literature is searched using databases such as *Nexis Uni, Canadian Legal Information Institute (CanLII)* and *New Zealand Legal Information Institute (NZLII)*, which contain legal and business documents, court cases, and news sources. Finally, established academic and political contacts in both Canada and New Zealand are used to direct the researcher to relevant grey literature and working documents which were produced during negotiations.

3.4 Media Analysis

The document analysis includes a media analysis of newspapers, magazines, and radio and television programs in Canada and in New Zealand to aid in the collection of 'account evidence' (Beach & Pederson, 2013, p. 100). Given the short time frame of an honours thesis, there is not enough time to meaningfully recruit Indigenous participants and get ethics clearance for conducting interviews. It is for this reason that a media analysis is critical to the document analysis, as it can help to illuminate the voices of Canadian Indigenous peoples and Māori in the TPP negotiation processes in an ethical, respectful way. Sources are searched through broad google searches, as well as through the *Nexus Uni* database and media outlets based on keywords (See introduction). This selection process can ensure only media which mentions Indigenous participation or voiced opinions on the selected trade agreements are included.

3.5 Interviews

Three interviews are conducted with legal scholars at the Dalhousie Law School. The goal of these interviews is to gain professional knowledge on the legal requirements countries must follow when negotiating international trade agreements. This can allow for detailed and expert insight into whether countries are required by international law to uphold domestic obligations, such as those through treaties, when negotiating agreements at the international level, and if so, what the processes for doing so look like. These interviews will serve to verify the information gathered from grey literature as well as academic and legal literature regarding the process of international treaty-making, and the obligations of nations in including citizens in decision-making. Since these interviews focus on the professional knowledge of the scholars and not on their personal opinions, an ethics review is not required for this process.

The interviews are semi-structured to allow for flexibility in the discussion and for the interviewee to provide information or knowledge that may have been overlooked by the researcher (See Appendix G for interview questions). These interviews are audio-recorded with the consent of the interviewee, and pen and paper notes are taken. Two out of the three interviewees are cited in this thesis and while one is be named, one remains anonymous and is given the title 'Dalhousie Law Professor'. The information gained through the interviews is woven into the analysis and discussion of the final thesis. Since the interviews are meant to provide understanding of international legal processes and are not meant to directly help answer the research questions, there is no need to transcribe and code these interviews.

4.0 Results and Analysis

The analysis aims to understand the legal obligations of nations at each part of the negotiation process. This will help illustrate and compare where engagement with Indigenous peoples in Canada, and Māori in New Zealand occurred, and whether this engagement achieved simply the bare minimum requirements to uphold obligations, or whether it could be improved. In process tracing the events which took place during negotiations for the TPP, eight results have been organized into three categories: 1) The process of TPP negotiations, 2) public participation in TPP negotiations, and 3) ratification and surrounding debates.

4.1 The Process of TPP Negotiations

Result 1: High level of secrecy in the TPP

> *"Secret negotiations result in 'trust us'. We won't tell you what's in the deal but it will be good for you. This is not democracy!" – Jane Kelsey, Professor at Auckland University, NZ ("Native Affairs", 2015)*

The TPP negotiations were criticized for being highly secretive in both Canada and in New Zealand ("Native Affairs", 2015; Christopher et al., 2017). While many negotiations and discussions occurred from the time Canada joined the 15th round of discussions in 2012 to when negotiations concluded in 2015, Canadian and New Zealand citizens nor MPs were permitted to see the draft text of the agreement (Government of Canada, 2018b; Christopher et al., 2017). TPP negotiations concluded on October 5th, 2015, yet the text was not publicly released until November 5th, 2015 (Christopher et al., 2017). Citizens and politicians relied on leaked documents from Wikileaks to be informed on the new trade deal. The deal was signed by all 12 nations in February 2016 (Government of Canada, 2018b).

In January 2017, the Trump administration pulled out of the TPP, and the 11 remaining parties to the deal were forced to return to the negotiating table (Glass, 2019). With the United States out of the picture, nations met consistently throughout 2017 to renegotiate the TPP as the Comprehensive Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Government of Canada, 2018b). While leaders claimed that the CPTPP was designed to ensure 'free, fair and progressive trade', the negotiation process was still secretive, and the CPTPP text is the same as that of the TPP, with a few dropped clauses in the absence of the United States (Government of Canada, 2018b; Hailes, 2018).

While the WTO encourages nations to be transparent with domestic citizens regarding agreements negotiated at the international level, both the Canadian and New Zealand governments are not required by law to be transparent with their citizens about international trade negotiations (Gehring et al., 2006; Waitangi Tribunal, 2016; H. Kindred, personal communication, February 24, 2020). In both countries, international treaties are negotiated by an 'Executive body' within

their respective departments of foreign affairs (Kindred et al., 2014). The Executive government has the authority to negotiate international treaties, without the inclusion or consultation of other members of Parliament (MPs), the provinces, or civil society (Kindred et al., 2014).

The absence of an obligation for the government to include stakeholders in international treaty-making is dangerous as it may lead to 'democratic deficit', meaning decision-making becomes undemocratic (The Law Commission, 1997). As noted by professor Jane Kelsey from the University of Auckland, in the case of the TPP, the New Zealand government convinced the public to trust them in negotiating a deal that was 'good' for New Zealand, without letting the public or MPs see draft texts of the deal ("Native Affairs", 2015; Jones et al., 2020). While trust may play out in favour of some groups, such as businesses, this argument is not appealing to Māori, who may not trust the government to act in their best interest due to historical and present infringements of their rights and sovereignty ("Native Affairs", 2015). If politicians and the public are left in the dark about the decisions being made, they are unable to hold the Executive bodies accountable to ensuring decisions support the best interests of all stakeholders, which is undemocratic.

Result 2: Provinces not adequately included in Canadian negotiations

A contentious issue regarding the TPP in Canada was that provinces were not adequately present at the negotiating table. As outlined by legal scholar de Beer (2015),

> "While the federal government has the power to negotiate treaties. . . putting an agreement into legal effect may—under the division of constitutional powers—require action from Canada's 10 provinces"

Professor Kindred at Dalhousie University noted that while the federal government is the obligation-bearer of international treaties, some treaty provisions may be in provincial jurisdictions

(personal communication, February 24, 2020). The federal government cannot force provinces to fulfill these obligations, and if provinces fail to do so, the federal government is at fault and must pay the price (H. Kindred, personal communication, February 24, 2020). For example, if provinces are left out of negotiations, they may be unhappy with the results of the agreement and fail to uphold its provisions, for example Investor-State Dispute Settlement (ISDS), which is a clause in the CPTPP (de Beer, 2015; CPTPP 2020; H. Kindred, personal communication, February 24, 2020). ISDS outlines protections for investors in countries party to the agreement (Pavey & Williams, 2003). If an investor believes their assets are threated in another country, they can sue that government for breaching the ISDS provision (Pavey & Williams, 2003). For this reason, while including provinces in negotiations is not obligatory as the Executive body has the authority to negotiate and sign international treaties, it is in the federal government's best interest to include provinces in negotiations (H. Kindred, personal communication, February 24, 2020). This fact was highlighted in negotiations for the Canada-European Union (EU) Comprehensive and Economic Trade Agreement (CETA), where the EU requested that Canada's provinces be present at negotiations, in order to ensure Canada was able to uphold its obligations under the deal (de Beer, 2015). Canada was obliged to fulfill this request, as the EU is a larger power and thus can dictate the terms of a negotiation.

In CETA negotiations, provincial authorities helped create the negotiating mandate, and were in the room as part of the Canadian delegation for most of the early negotiations (Kukucha, 2016). In the later stages of debates as negotiations became more specific, provinces were briefed and consulted with daily, yet only representatives with expert knowledge or crucial concerns about an issue would be invited in the room for debates on that topic (Kukucha, 2016). This protocol was not followed in the TPP negotiations, where provincial representatives would be briefed after

meetings and sometimes attended meetings and ministerial conferences but were not present 'in the room' when negotiations were taking place (Kukucha, 2016). Kukucha (2016) also notes that the cost of getting large Canadian delegations to overseas meetings was a complication in including provinces in meaningful debates. This demonstrates how without an obligation for the government to meaningfully include provinces in negotiations, even if it is in their best interest to do so, it rarely occurs unless a larger power demands that it happens.

Result 3: New Zealand negotiated a 'Treaty of Waitangi Exception' in the TPP

> *". . . nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori. . ." (CPTPP, 2020, p. 29-9)*

In TPP negotiations, the Executive body tried to act as 'one voice' for New Zealand and make decisions that were in the 'best interest' of Māori (Waitangi Tribunal, 2015). To achieve this, during global negotiations New Zealand argued that a Treaty of Waitangi Exception must be included in the agreement text, and it was successful in having this clause implemented (Office of the Minister for Trade and Export Growth, 2020). The clause is included as an exception to the agreement (Article 29.6) and works to protect the rights and interests of Māori (CPTPP, 2020). It notes that the TPP shall not prevent New Zealand from according

> "more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi" (See Appendix B) (CPTPP, 2020, p. 29-9).

Scholars have argued that this exception will be insufficient in protecting Māori under the TPP (Kawharu, 2016; Jones et al., 2020). Kawharu (2016) notes that the exception is vague as is unclear what "more favourable treatment to Māori" means, and who the comparator in this case is. Do Māori get more favourable treatment than foreign investors regarding business matters and ISDS, or do they get more favourable treatment compared to everyone (Kawharu, 2016)? Further,

it is unclear what the exception means in stating that the Treaty of Waitangi "shall not be subject to the dispute settlement provisions" (CPTPP, 2020, p. 29-9). Does this protection prevent New Zealand from being sued by foreign investors in the case they breach the ISDS provision to protect Māori (Kawharu, 2016)? These unanswered questions demonstrate the lack of clarity regarding the Treaty Exception and suggest that it may prove inadequate in protecting Māori. The Tribunal suggests that the Crown engage in conversation with Māori about the effectiveness of the current Treaty Exception, and whether it can be re-drafted for future trade agreements (Waitangi Tribunal, 2016). Perhaps if New Zealand had either an international or domestic obligation for meaningful protections to be included in agreement exceptions, this exception would be less vague.

4.2 Public Participation in TPP Negotiations

Result 4: Canada failed to engage in meaningful and inclusive consultations.

> *"First [N]ations have not been involved in any of the [consultation] process and they should have been involved because [the TPP] involves [Indigenous] lands, resources, people's intellectual property, and the environment, all things that protect [Indigenous] peoples" – Pamela Palmater, Ryerson University (SCIT, 2017).*

Public involvement in treaty negotiations most commonly occurs through consultation processes (McHugh, 1991; Reynolds, 2018). The Canadian government claimed they conducted numerous consultations with a diverse range of stakeholders across the country (Gombay, 2017; SCIT, 2017; Parliament of Canada, 2020). According to the report drafted by the Standing Committee on International Trade (2017), between 2012-2017, both before and after the initial TPP agreement was signed in February 2016, provinces and territories were consulted at hearings, open mic sessions, and through opportunities to provide written submissions to Global Affairs Canada (GAC). (See Appendix C for detailed table on consultations which took place. See appendix D for statements of stakeholders involved in consultations).

In evaluating the consultations which took place and the statements from involved stakeholders, it is evident that while Canada may have informed and consulted with the public, the consultation process was not as comprehensive as it could have been. For one, the Standing Committee hearings were only conducted in Canada's provinces and not territories, and only in 13 out of the country's 289 cities (SCIT, 2017; Parliament of Canada, 2020; World Population Review, 2020). This indicates that there was a significant portion of Canadians who may not have had access to these hearings. Further, it seems that many of the consultations were merely calls for written submissions to GAC (Palmater, 2016; Christopher et al., 2017). Some of these consultations were not widely advertised and used a format which may not be accessible to all people (Palmater, 2016). Industries and companies affected by the TPP appear to have been more involved in the negotiations than other stakeholders (SCIT, 2017; Parliament of Canada, 2020). And even so, industry members note that they felt consultations were not meaningful (SCIT, 2017; Parliament of Canada, 2020). In 2015, the organization OpenMedia Canada initiated a Let's Talk TPP online crowd-sourcing tool to connect citizens with members of GAC and foster stronger dialogue between stakeholders amidst the secrecy of events (Christopher et al., 2017). 27,996 Canadians used the tool, and their submissions were included in the government's consultation record and draft report presented to the House of Commons (Christopher et al., 2017). While this campaign aided in bringing citizens into this secret conversation, the fact that civil society had to step in to make up for a governmental task highlights the government's failure in meaningfully engaging citizens in these debates.

It can be observed that Indigenous groups were not meaningfully consulted or included in the process of TPP negotiations (Palmater, 2016; Christopher et al., 2017; SCIT, 2017; Parliament of Canada, 2020). There were few consultations or discussions with Indigenous groups, and many

of the 'consultations' used the format of written submissions (Palmater, 2016; Christopher et al., 2017, Government of Canada, 2019b). Written submission consultation is not a conversation between Indigenous groups and governments, but a situation where Indigenous peoples state their views, and the government chooses whether to consider these submissions, or even read them. Further, written submission consultations exclude those who prefer to give oral accounts of their views, or who may not have access to the resources needed to engage in this consultation format.

Through grey literature analysis, it was discovered that Canada's duty to consult becomes more difficult to operationalize in the case of international treaties. This is seen in the case Hupacasath First Nation v. Canada, where Hupacasath took the federal government to court for failing to consult them in negotiations for an investment treaty with China (2015). Hupacasath argued that the potential impacts of the investment treaty on Aboriginal rights, lands, and resources triggered Canada's duty to consult (Hupacasath First Nation v. Canada, 2015). However, the court ruled that since there was no proven link between the agreement and potential harm to Hupacasath First Nation rights and interests, the court ruled in favour of the government (Hupacasath First Nation v. Canada, 2015). This reasoning is stated in s. 99 of the case:

> *S 99: "If a decision or an event prompted by an agreement affecting Aboriginal rights were in prospect, a duty to consult might then arise depending on whether it causes a possibility of harm. But nothing is in prospect at this time, nothing can be defined, nor can we even say that anything problematic might ever arise. At this time, all we can do is imagine decisions or events and impacts from them that might or might not happen as a result of the Agreement. However, the duty to consult is triggered not by imaginings but by tangibilities."* (Hupacasath First Nation v. Canada, 2015).

This section from Hupacasath First Nation v. Canada describes the flaws of the duty to consult, as in cases where potential harm to Indigenous rights is not obvious, it may not be triggered (2015). It is also important to note that Indigenous peoples only have a veto over a decision if they have proven Aboriginal title (Sanderson & Willms, 2019). If Aboriginal title is

asserted but not proven, or if it cannot be applied in the case of trade agreements when impacts to lands are uncertain, while the government has a duty to consult, they get to decide the extent of consultations (Sanderson & Willms, 2019). As noted by Sanderson & Willms (2019), the ability of the government to decide the extent of consultations is problematic due to conflict of interest. It is in the government's best interest to consult less if they seek a quick and smooth path to a development or agreement (Sanderson & Willms, 2019). In the case of the TPP, the duty to consult was triggered as the government understood that the agreement 'may' impact Indigenous lands, resources, and intellectual property (Palmater, 2016; Gombay, 2017). However, this inherent conflict of interest was seen here, as a weak and hasty consultation process ensued, suggesting the Canadian government wanted the agreement to be ratified as quickly as possible (Sanderson & Willms, 2019).

The lack of consent from Indigenous groups in the process of international treaty creation is dangerous, especially when considering ISDS provisions (UN General Assembly, 2015). Since ISDS gives corporations the opportunity to sue governments if they feel their assets are threatened, the fear of being sued may lead governments to accept corporate developments even if they may harm Indigenous lands, resources, and sovereignty (Pavey & Williams, 2003). This process is referred to as 'regulatory chill', where governments become hesitant to protect domestic interests, for fear of being sued by investors (Pavey & Williams, 2003). The UN Special Rapporteur for Indigenous Rights has argued that ISDS provisions are in direct conflict with the Canadian government's commitment to upholding UNDRIP, as regulatory chill may discourage Canada from obtaining the free, prior, and informed consent of Indigenous peoples before pursuing an action which may affect them (UN General Assembly, 2015). Considering this, it can be argued that Canada's failure to meaningfully include Indigenous groups in a negotiation which has

significant impacts on their rights is a breach of Canada's duty to respect Indigenous rights and to uphold UNDRIP (United Nations, 2008). It is also a failed commitment to rebuilding relationships with Indigenous peoples (Liberal Party of Canada, 2019).

Result 5: New Zealand failed to meaningfully engage with the public, and with Māori during TPP negotiations

> *"The TPP has been negotiated without meaningful discussion with the New Zealand public. The Government's approach has been to tell us not to worry about it because they'll decide what is important" – Dr. Carwyn Jones (Jones, 2016).*

In New Zealand, the TPP negotiations were highly secretive, and the government has been criticized for failing to meaningfully consult with stakeholders, including Māori ("Native Affairs, 2015; "Protestors demand", 2015; Jones, 2016; Kawharu, 2016). The New Zealand government outlines one of their negotiating goals as

> **"**ensure that tangible benefits are delivered for Māori and that the Crown's obligations under the Treaty of Waitangi are in no way compromised" (NZMAFT, 2020a).

However, this goal is not seen in practice as while consultations did occur before the signing of the TPP in 2016, they may not have been meaningful as the draft text had not been released, and thus the conversations likely lacked transparency (See Appendix E for list of main consultations) ("Native Affairs", 2015; Waitangi Tribunal, 2016; NZMFAT, 2018; Jones et al., 2020). This is problematic as while input from stakeholders, including Māori, is considered before the agreement is ratified, this input may not have much influence at a stage where the agreement text could no longer be renegotiated ("Native Affairs", 2015). In looking at the table of consultations (Appendix E), this is evident, as consultations which occurred in 2017 during negotiations for the CPTPP, after the main TPP agreement text had been signed, used the format of 'information sessions' rather than seeking to gather public feedback (NZMFAT, 2018).

New Zealand has a ‘Strategy for Engagement with Māori on International Treaties’ which notes that the Ministry of Foreign Affairs and Trade (MFAT) will give Māori an emailed report on current international treaties every six months (Waitangi Tribunal, 2016; Jones et al., 2020). Yet Māori representatives failed to be updated about the TPP between 2012-2014, and some representatives did not receive emails (Waitangi Tribunal, 2016). This demonstrates the government’s lack of diligence in engaging Māori in conversation. Further, claimants of an urgent hearing to the Waitangi Tribunal argue that while the Crown engaged with some Māori representatives such as the Federation of Māori Authorities (FOMA), others such as Ngāti Hine people were left out of conversations (Waitangi Tribunal, 2016).

In looking at the government’s failure to meaningfully engage Māori in TPP negotiations, it can be concluded that the government did not meet its obligations to Māori under the Treaty of Waitangi. These obligations include acting in ‘good faith’ towards Māori and their interests, fulfilling the principle of ‘partnership’, and consulting Māori on issues that may affect them (McHugh, 1991; Waitangi Tribunal, 2015). In 2011, the Waitangi Tribunal led an investigation into the obligations of both the Crown and Māori when negotiating international agreements (Waitangi Tribunal, 2015). Their findings (WAI262 claim), suggest that while the Crown has the authority to negotiate agreements on behalf of New Zealand, they have the obligation to inform Māori of these events (Waitangi Tribunal, 2015). Māori must identify and communicate their interests and protections they seek, and the Crown must work to protect these interests (Waitangi Tribunal, 2015). Because of the secretive nature of the TPP, Māori claimants argue that they were robbed of the opportunity to make their interests, and desired protections known to the Crown, as they were unaware of what was contained in the agreement text (Waitangi Tribunal, 2016).

Further, Māori who were excluded from debates could not make their interests known to the government (See Appendix E) (Waitangi Tribunal, 2016).

Result 6: The New Zealand public was very active in opposing the TPP

August 2015	Protestor Group called 'Show Us Your Text' storm MFAT headquarters, demanding 1000 English, and 1000 Māori versions of the text be publicly released and given to libraries across New Zealand ("Protestors demand", 2015).
February 2016	TPP Protestors march in the streets of Auckland and Waitangi (Trevett, 2016a).
February 2016	Māori ban Prime Minister John Key from speaking in Waitangi on Waitangi Day (Young, 2016).
March 8, 2018	Thousands of New Zealanders stand outside the Beehive (Parliament) in opposition to the signing of the CPTPP in Chile (Hailes, 2018).
March 2018	Organization *It's Our Future* submits a petition to the New Zealand government, asking the government not to sign nor ratify the agreement, and to consider amending the treaty implementation process (Hailes, 2018).

Figure 2: Table of key events showing citizen involvement in TPP debates

The New Zealand public was very active in having their voices heard during TPP negotiations. They persisted despite the government's secrecy, and failure to meaningfully engage MPs, citizens, and Māori in negotiations ("Native Affairs", 2015; Hailes, 2018). The organization, *It's Our Future* made recommendations to the government for a more detailed review of the CPTPP, and an improved treaty-making process (Hailes, 2018). They requested that the government halt negotiations until an agreement with Māori was reached on how their rights would be protected under the agreement (Hailes, 2018). Further, they suggested the government require a two-thirds majority vote in Parliament for passing trade or investment treaties, and that any international agreement pass through the Waitangi Tribunal for review before the agreement is signed (Hailes, 2018). Despite these recommendations, and the numerous protests and petitions,

no changes in government decisions, nor treaty-making policies ensued (NZFAT, 2020a.). The New Zealand government's failure to acknowledge this citizen-led opposition suggests that it was ignoring public opinion, which it can get away with in the absence of obligations to include the public in negotiations.

4.3 Ratification and Surrounding Debates

Result 7: Māori claimants in New Zealand filed a Waitangi Tribunal claim for an urgent hearing

In July of 2015, five Māori claimants filed a claim to the Waitangi Tribunal asking for an urgent hearing, and for the New Zealand government to halt TPP negotiations (See Appendix F) (Trevett, 2016c; Waitangi Tribunal, 2016). The Waitangi Tribunal (2016) determined that since negotiations were near conclusion, it was too late to stop negotiations, and an urgent hearing would be warranted after the agreement was signed, but before ratification. In March of 2016, the urgent hearings began and continued throughout the week (Trevett, 2016b). The Tribunal concluded that that while the TPP did not breach the principles established in the Treaty of Waitangi, the Crown could have engaged more thoroughly and meaningfully with Māori throughout the negotiation process (Waitangi Tribunal, 2016). The Waitangi Tribunal (2016) noted that the Crown did not provide adequate opportunities for Māori to voice their interests under the TPP, as given the secrecy of negotiations, consultations were not fully informed. The Tribunal's (2016) recommendations to the Crown were the following:

- The Crown must engage in further conversation with Māori regarding the efficacy of the current Treaty Exception, and whether it should be re-written.
- The Crown should implement regulations to follow in the case that New Zealand is party to an ISDS claim, and the Treaty Exception is invoked.
- Further engagement between the Crown and Māori must take place in the lead-up to ratification of the TPP.

The fact that an urgent hearing was not granted until after TPP negotiations concluded is problematic. While the Tribunal (2016) argued that the claim was lodged too late for negotiations to be halted, how could this claim have been made earlier if the negotiations were secretive? By the time the urgent hearing took place, any recommendations made to the Crown had little weight, as the TPP text could not be renegotiated ("Native affairs", 2015). While the hearing may have been beneficial in ensuring more meaningful engagement between the Crown and Māori leading up to the agreement's ratification, ultimately many Māori concerns with the TPP text would not be addressed ("Native affairs", 2015).

Result 8: Ratification processes in both Canada and New Zealand are exclusive

The TPP agreement must be ratified before it comes into force (CPTPP, 2020). As outlined in the CPTPP text, the agreement will come into force 60 days after the first six member countries have ratified the agreement (CPTPP, 2020). The agreement was signed in March of 2018, and in December 2018, the CPTPP came into force for the first six countries to ratify, including: Mexico, Japan, Singapore, Australia, Canada, and New Zealand (Government of Canada, 2019a). Media critics have noted that being one of the first six to ratify the agreement gives these countries

> "an economic head-start on carving out market share ahead of the remaining five countries who were in the agreement" (The Canadian Press, 2018).

As will be soon discussed, it seems that this factor contributed to weak public engagement due to a rushed ratification process in both Canada and New Zealand.

Ratification in Canada

In 2008, Canada passed the 'Policy on Tabling Treaties in Parliament', which works to ensure all treaties pass through the House of Commons for critical analysis before Canada is bound to them (GAC, 2014). After international treaties are signed, they must be tabled in Parliament for

21 days, during which time MPs can discuss the treaty, pose questions, and decide whether legislation is needed before the treaty can be ratified (GAC, 2014). In June 2018, three months after Canada signed the CPTPP along with the 11 other member states, Bill C-79, the legislation that must be implemented for Canada to ratify the agreement, was brought to the House of Commons (Government of Canada, 2018b). Since ratification of the CPTPP required the implementation of new legislation, the CPTPP text was tabled in Parliament for 21 days for questions and debate (Government of Canada, 2018b). After the 21-day period, the Executive government considers whether to implement any recommendations made during the tabling period, before ratification (GAC, 2014). By October 2018, the bill had received Royal Assent, and the CPTPP was ratified in Canada (Government of Canada, 2018b).

While this policy is an attempt for greater transparency between the Executive and Parliament, it is inadequate. For one, the Executive government is not required to follow Parliament's recommendations and has full authority to implement the bill as it is (H. Kindred, personal communication, February 24, 2020). Further, in the case that ratification is an urgent matter, an exception to the tabling process may be warranted (GAC, 2014). If the Executive body gets approval from the Prime Minister to ratify the agreement without first tabling it in Parliament, although unlikely, Canada may be bound by a treaty without any process for transparent analysis of the terms of the agreement (GAC, 2014). Even if an international treaty is tabled and debated in the House of Commons, the Executive body of government still has the power to ratify the agreement, regardless of issues brought forth in the tabling process (Kindred et al., 2014).

Ratification in New Zealand

In New Zealand, the situation is similar. Before ratification, New Zealand must present international treaties to the House of Representatives and conduct a national interest analysis to understand whether the treaty is in New Zealand's best interest (NZMFAT, 2019). After the analysis is reviewed by the Foreign Affairs, Defence and Trade Select Committee and they have made a report, or after the House has sat for 15 days, legislation can then be implemented (Waitangi Tribunal, 2016). The CPTPP was ratified by New Zealand on October 25th, 2018, after necessary legislation was passed by Parliament (NZFAT, 2020a.). It should be noted that like Canada, the Executive government negotiating the agreement has no obligation to implement recommendations from Parliament before ratification (Waitangi Tribunal, 2016). This includes recommendations to new legislation or to an agreement that can be passed without new legislation (Waitangi Tribunal, 2016). However, the treaty-making process has become more transparent over time, as unlike in negotiations for the CER, where there was no requirement for Parliament to see the draft of the agreement text, with the TPP, MPs must have some input before ratification (Andre et al., 2003; NZMFAT, 2019).

The problem with the ratification process in Canada and New Zealand is that while reviewing the agreement in Parliament ensures greater transparency before ratification, there is no mechanism for the public or Parliament to hold the Executive government accountable to acting within the nation's best interest (GAC, 2014; Waitangi Tribunal, 2016). While it is in the Executive government's interest to ensure they are cooperating with Parliament and public opinion to avoid backlash, they have full authority to negotiate and implement agreements according to their terms (H. Kindred, personal communication, February 24, 2020). Like the consultation process, this may result in the Executive bodies achieving the 'bare minimum' of adhering to recommendations, or

creating an image that they have been open and receptive to ideas from the public or Parliament, but in reality they take few recommendations or changes into account.

An example of this 'bare minimum' can be seen in analyzing evidence from the Standing Committee on International Trade's meeting notes. During the meeting of September 20th, 2018, one of the committee members protested that they had not been given sufficient time to make amendments to Bill C-79 to be presented to the House of Commons (Parliament of Canada, 2018). While a committee rule states that members should have 48 hours' notice to prepare amendments for a 'clause-by-clause' study of the bill, the members had only been given 30 hours' notice to prepare their amendments (Parliament of Canada, 2018). This incident is significant as it not only indicates that the lead-up to the CPTPP's ratification may have been rushed for politicians reviewing the agreement and legislative bills, but it shows how MPs and CIIT committee members have little power in making recommendations for the agreement and subsequent legislation. The fact that even the committee members conducting reviews of legislation did not have adequate time to make amendments to the bill shows that the ratification process lacked transparency and was exclusive of secondary views and recommendations (Parliament of Canada, 2018).

5.0 Discussion

In the presence of weak domestic and international obligations for inclusive international treaty-making, it seems that Canada and New Zealand minimally engaged domestic stakeholders in TPP negotiations as they were not legally obliged to do so. As noted by Putnam (1988), international negotiations are challenging because of the complexity of two-level games, where a wide range of often opposing stakeholder interests at the domestic level must be balanced with the interests of various actors at the international level. Whenever governments negotiate international

treaties, they would prefer to have a simpler two-level game to avoid breaking promises to stakeholders, or to avoid public backlash (Putnam, 1988). The actions of Canada and New Zealand in the TPP negotiations provide evidence to suggest that these countries were looking to ease the complexity of two-level games by eliminating the domestic tier of the game as much as possible. Several factors influenced the ability of the Canadian and New Zealand governments to prioritize games at the international level over the domestic. These include: Weak domestic and international obligations for inclusive negotiations, government structures and the power of stakeholders, and meagre protocols for a comprehensive ratification process.

5.1 Weak Domestic and International Obligations

The lack of legal obligations for the Executive negotiating bodies to be completely transparent with Parliaments and with the public, meant all stakeholders in Canada and New Zealand were minimally included in negotiations ("Native Affairs, 2015; Christopher et al., 2017). It is much easier for governments to balance the needs of a small negotiating Executive against complex, international interests, than to try to adhere to a wide array of domestic needs from a diversity of stakeholders (H. Kindred, personal communication, February 24, 2020). Without the legal obligations to enforce governments to include all domestic stakeholder views at the international level, there is likely little incentive for them to do so, especially if other nations are not bound by this same obligation. In Canada, this apathy towards domestic concerns is evident in analyzing how a large part of consultation was conducted online by OpenMedia Canada, to make up for a lack of government engagement (Christopher et al., 2017). In New Zealand, while the public was very engaged in TPP debates, the government took no action to respond to public opinions ("Protestors demand", 2015; Trevett, 2016a; Haile, 2018). It seems that weak obligations

to inclusive treaty-making allowed both countries to prioritize being party to a large-scale trade agreement no matter the consequences, over addressing domestic concerns.

While the two countries did not aim to actively exclude Indigenous peoples from negotiations, the most marginalized groups in society, including Indigenous peoples are often the first to be left out of large-scale decisions ("Native Affairs", 2015; Palmater, 2016; Amnesty International, 2020). In Canada, the fact that Aboriginal title has no power over trade agreements, coupled with the government's inherent conflict of interest in carrying out the duty to consult, allows the government to do the 'bare minimum' in engaging Indigenous peoples in international treaty-making. (Sanderson & Willms, 2019). Similarly in New Zealand, the Waitangi Tribunal states that in the case of international treaty-making, New Zealand should act in "good faith" towards Māori where it is "reasonable and practicable" to do so (Waitangi Tribunal, 2015, p.12). The level of protection given to Māori interests only extends so far as it does not interfere with other important domestic and international interests. (Waitangi Tribunal, 2015). The way domestic laws are drafted to exclude Indigenous peoples in Canada and New Zealand allows these countries to further reduce the domestic tier of the two-level game by being able to completely 'cut loose' a key stakeholder group from the process.

In countries where legal systems are designed to favour international interests and achievements over domestic concerns, new legal mechanisms are needed to balance this uneven game. To ensure future decisions are made with the consent of Indigenous peoples, the most obvious recommendation would be for both Canada and New Zealand to write UNDRIP into their domestic laws. However, given the presence of international obligations such as the Vienna Convention on the Law of Treaties, or ISDS clauses which can overrule domestic obligations, in this case including UNDRIP in domestic law would be ineffective (United Nations, 1980; Pavey

& Williams, 2003). Countries would continue to be sued for breaching international obligations if they did so on the grounds of upholding UNDRIP (United Nations, 1980; Pavey & Williams, 2003).

Further, nations will likely not change their systems towards inclusive decision-making without buy-in from other nation-states. If Canada had a law requiring all impacted stakeholders to be included in international negotiations, and other countries did not have this same law, Canada would be disadvantaged on the global stage for having to follow it. It would take much longer for Canada to negotiate and ratify treaties, and pushback from stakeholders may prevent Canada from achieving a cohesive position. Therefore, the complexity of adhering to obligations, and achieving interests at the international level may incentivize governments to focus on international interests over domestic needs. Considering this, while it may seem a plausible solution to improve the treaty-making process through domestic law, perhaps more stringent international obligations, or more effective incentives are necessary to construct a norm of inclusive international decision-making. For example, if nations were taxed by the UN for breaching UNDRIP, nations would be incentivized to adhere to it and discouraged from negotiating clauses such as ISDS which threatens it (UN General Assembly, 2015).

While Indigenous peoples were heavily excluded from the TPP negotiations in both Canada and New Zealand, it appears that the elimination of the domestic tier of the two-level game was more challenging for New Zealand. Although New Zealand is a small state, they have a large, cohesive Māori population and a significant Parliamentary representation of Māori (Cywink, 2017; Maoate-Cox & Smith, 2018; H. Kindred, personal communication, February 25, 2020). Further, legal structures such as the Waitangi Tribunal (2016) which works specifically to protect Māori interests provides a means for Māori to hold the government accountable to upholding their rights.

These factors help balance the two-level game between the domestic interests of Māori and international interests. Since Māori have a strong influence on the national government because of their power in numbers and as a collective, it seems their interests are as influential as those of a large business or interest group. The impact of this power was evident in TPP negotiations, seen in how New Zealand was the only country out of the 11 party to the agreement to include an exception to protect Indigenous interests (CPTPP, 2020). While the Māori are not monolithic, together their diverse interests become a significant part of New Zealand interests and thus an important goal for New Zealand to negotiate in the international realm. This access to power for Māori means their interests are not as marginalized as Indigenous interests are in Canada (Cywink, 2017).

The Canadian Indigenous population is a smaller percentage of the national population than in New Zealand, and there are more bands of Indigenous groups spread across a larger territory (Cywink, 2017). Further, there is not one tribunal in Canada which hears Indigenous claims, but multiple tribunals disaggregated by province and by issue (Lambrecht, 2013). As a result, the legal power of Indigenous interests becomes less cohesive, more widespread, and thus weaker in influencing the government. It seems that these factors allow Indigenous interests in Canada to be more easily marginalized, making it easier for Canada to eliminate the domestic tier from the two-level game. Despite the differences in Indigenous demographics in these countries, it has been noted that Canada should look to New Zealand to understand how to better protect Indigenous rights in future trade agreements (Cywink, 2017; Meloney, 2018). Canada has tried to progress in this regard, as in the recently renegotiated NAFTA agreement, Canada proposed an Indigenous peoples' chapter be included to protect Indigenous peoples in Canada, the United States, and in Mexico under the agreement (Schwartz, 2017). The chapter would work to protect

Indigenous intellectual property, resources, and lands, especially if ISDS disputes arise (Schwartz, 2017). Unfortunately, this chapter was not included in the final NAFTA text, as the United States did not accept this clause (Barrera, 2018).

This highlights Canada's challenge with relative losses as a middle power (Kim, 2018). Since Canada has less leveraging power than the United States, they are unlikely to achieve an agreement clause that the United States has no interest in. While Canada could threaten to pull out of the agreement if the United States does not comply, there is a risk that the United States would accept that, being a larger power. Thus, the loss of being excluded from an economy-enhancing agreement with their largest trading partner is much worse than the relative loss of losing an Indigenous peoples' chapter (Statistics Canada, 2018). Since international negotiations are not one-time events but part of larger, iterative games between states, the risk of a damaged relationship with the United States if Canada causes them to lose face would not justify the push for more progressive trade deals for Canada (Putnam, 1988).

5.2 Government Structures and the Power of Stakeholders

As noted in the results and analysis, in Canada, provinces were not adequately included in negotiations (SCIT, 2017; Parliament of Canada, 2020). However, provinces did have a seat at the negotiating table in the case of CETA, as the EU demanded that they be included (Kukucha, 2016). Similar to what occurred in the case of NAFTA, as a middle power in this negotiation Canada was forced to comply with the EU, a larger, more hegemonic power (Kukucha, 2016). This demonstrates the influence of hegemonic states in shaping the future of international treaty-making. If a large power such as the EU demands Canadian provinces have a seat at the table, they will be. If the United States shuts down a proposed Indigenous peoples' chapter in NAFTA, it will

not be included in the agreement. Therefore it seems that a movement towards more inclusive international treaty-making must either be led by powerful states, or small states and middle powers must band together against the large powers to have more influence in reshaping this exclusive process.

It also should be noted that including a greater team of stakeholders at the negotiating table is easier to do in a bilateral agreement such as CETA, than in a large multilateral agreement such as the TPP. It was challenging in terms of cost, as well as efficacy of debate to involve provinces in CETA negotiations, and this would be even more challenging in multilateral negotiations (Kukucha, 2016). Thus, being such a large agreement, it is likely that TPP member states sought to abandon domestic inclusivity in order to make for a quicker negotiation process. Considering this, if large-scale global treaty-making is to continue in the future while avoiding democratic deficit, countries must rethink how to include smaller scale negotiations between domestic stakeholders as a key step in this larger process.

While New Zealand does not share Canada's challenge of negotiating an agreement across provincial jurisdictions, New Zealand must be mindful of including Māori in negotiations, to uphold the principle of partnership with Māori (McHugh, 1991). The fulfillment of partnership is aided by the fact that there are seven Māori electorates in Parliament, as well as MPs filling other elected seats who identify as Māori (New Zealand Parliament, 2020). New Zealand has a Parliament more representative of their population's politics than Canada due to their 'mixed member proportional' (MMP) voting system (Electoral Commission New Zealand, 2020). In this system, the proportion of seats allocated to each party is representative of the percentage of votes for that party, making the system more reflective of citizen votes than the 'first-past-the-post' system in Canada, where seats in the House of Commons are not representative of the overall vote

(The Canadian Press, 2015; Electoral Commission of New Zealand, 2020). It seems that New Zealand's MMP voting system has contributed to greater representation of Māori in the House of Representatives. In 2017, 29 out of the 120 seats (24%) in the House of Representatives were represented by Māori MPs (Maoate-Cox & Smith, 2018). Currently in Canada, only 10 out of 338 (3%) seats in the House of Commons are represented by Indigenous peoples (Deer, 2019). When looking at the inclusivity of decision-making with regards to Indigenous groups, New Zealand does better than Canada here.

However, the fact that New Zealand includes Māori MPs in the House of Representatives does not ensure that Māori views are meaningfully addressed in trade negotiations. If the Executive does not have to include the views and suggestions of Parliament when ratifying and implementing the agreement, there is no way to ensure that Māori views are properly incorporated into the negotiating mandate (Waitangi Tribunal, 2016). This became evident in how while New Zealand negotiated a Treaty of Waitangi Exception to protect Māori interests, scholars have argued that this exception does not outline clear protections for Māori (See Appendix B) ("Native Affairs", 2015; Waitangi Tribunal, 2016; Kawharu, 2016). The Crown failed to review whether the Treaty Exception, originally designed in 2001 for an FTA with Singapore, would be applicable to the TPP (Waitangi Tribunal, 2016).

New Zealand's failure to negotiate a comprehensive exception on behalf of Māori once again demonstrates the influence of powerful actors in dictating a negotiation's inclusivity in the domestic realm. For a small state like New Zealand negotiating with more powerful states, it would be much easier to advocate for an exception that had been accepted by other nations before, and was already in operation, than to renegotiate an exception unique to the TPP. More powerful states may be unwilling to accept a more meaningful clause for Māori if they feel their interests as

investors are threatened. As a result, there is the risk that New Zealand might be worse off if the Treaty Exception gets weakened in the process or is not included in the final agreement at all (V. Vitalis, personal communication, April 29, 2019). Like Canada's challenge with two-level games as a middle power, two-level games are challenging for a small state like New Zealand which has less leveraging power to get what it wants and must comply with the desires of other nations. Further proof of this is seen in how New Zealand did not want an ISDS clause to be included in the final agreement, but the clause is still present (CPTPP, 2020; Office of the Minister for Trade and Export Growth, 2020).

For small and middle powers with constrained influence in international negotiations, it is increasingly important that treaty-making is inclusive, to avoid potential harm for domestic stakeholders. The Organization *It's Our Future's* recommendation for a two-thirds majority vote in Parliament for passing international treaties may work towards ensuring Māori views are included in international decision-making by giving greater authority to MPs, many of whom identify as Māori (Maoate-Cox, 2018). However, this protocol may not work in making international decision-making more inclusive of Indigenous voices in Canada, where Indigenous peoples are poorly represented in the House of Commons (Deer, 2019). For Canada, either a revised voting and parliamentary system, or else more drastic changes to the treaty-making process are needed to ensure Indigenous peoples are partners in international decision-making (The Canadian Press, 2015).

5.3 Weak Public Involvement in Ratification

Minimal obligations for public and parliamentary involvement in ratifying treaties weakens the ability for countries to hold the Executive accountable to acting within the best interest of

stakeholders. In both Canada and New Zealand, the events which took place leading up to, and during the ratification processes of the TPP tell a similar story to the exclusive, secretive events which occurred during negotiations. After reviewing the weak consultation processes during TPP negotiations, and the fact that the Canadian and New Zealand governments did little to respond to citizen feedback, public outcry, or legal cases, it can be inferred that a quick ratification process was desired by both governments (Waitangi Tribunal, 2016; Christopher et al., 2017; Hailes, 2018). This inference is supported in reviewing the government of Canada website, which states:

> "As one of the first six countries to ratify the CPTPP, Canada has the ability to select the pace of tariff eliminations between Canada and subsequent countries that ratify the Agreement" (Government of Canada, 2019a).

Considering this, it seems that the economic benefits of being one of the first six countries to ratify the agreement influenced Canada and New Zealand to undergo secretive, exclusive, and fast-paced negotiations and ratification.

It may be argued that the Canadian and New Zealand governments' actions in ratification were transparent in how they followed existing regulations for reviewing treaties in Parliament (GAC, 2014; NZMFAT, 2019). However, a lack of protocols for ratification to be inclusive of public and governmental opinion meant that both ratifications were exclusive and rushed (GAC, 2014; Hailes, 2018; Parliament of Canada, 2018; NZMFAT, 2019). In New Zealand, while the Waitangi Tribunal heard from five Māori claimants during an urgent hearing, the hearing, which occurred after the conclusion of negotiations, had little influence on the government's decisions during ratification as the TPP text could not be renegotiated at this point ("Native Affairs", 2015; Waitangi Tribunal, 2016). Perhaps the secrecy of negotiations was a deliberate move to stall any legal action such as an urgent Tribunal hearing, from preventing the course of ratification. It seems that New Zealand chose to be secretive about negotiations in order to once again ease the challenge

of two-level games by reducing involvement at the domestic level (Putnam, 1988). If the public knew less about negotiations and had less vested interest in debates, New Zealand would be able to prioritize fulfilling international interests instead of spending time appealing to domestic concerns, and thus have a quicker ratification process.

In Canada, despite the policy on tabling treaties in Parliament which works to give politicians the opportunity to provide feedback on international treaties, the process is still very exclusive (GAC, 2014; Kindred et al., 2014). An example of this is seen in the Standing Committee on International Trade meeting notes, which show that politicians were not given adequate time to make recommendations about the treaty in the House (Parliament of Canada, 2018). The fact that committee members experienced a rushed timeframe to submit proposals indicates that Canada wanted to get the deal ratified quickly (Parliament of Canada, 2018). The government can get away with doing the 'bare minimum' to ensure transparency, as there are no regulations which encourage the Executive negotiating body to be thorough in their review, and to consider recommendations, so long as the treaty is tabled in the House of Commons (H. Kindred, personal communication, February 24, 2020). Like New Zealand, it seems that for Canada, adhering to the 'bare minimum' in the ratification process was another way for the government to eliminate the domestic tier of the two-level game by reducing the amount of stakeholders to include in the ratification process.

5.4 Concluding Remarks

To reshape international treaty-making to be more inclusive of domestic stakeholders, new obligations at both the domestic and international levels are needed. While the creation of laws for meaningful consultation or for the inclusion of UNDRIP in the Canadian and New Zealand constitutions seems plausible, these laws may be overruled by international obligations and

agreement clauses which trump the weight of domestic law (United Nations, 1980; Pavey & Williams, 2003). Evidently, more stringent international obligations which enforce greater domestic inclusion in treaty-making are required. For example, these obligations could be enforced through the WTO or the UN if these institutions began penalizing nations who breach this obligation. Or else, hegemonic powers or a collective of smaller powers must begin advocating for a global norm of domestic participation in international treaty-making.

At the domestic level, countries should work towards improving legal structures for hearing citizen interests in negotiations, to make two-level games easier without eliminating the domestic tier of the game. For example, perhaps Canada could implement a tribunal similar to the Waitangi Tribunal, for hearing Indigenous claims in the international realm. This tribunal could provide recommendations for the Canadian government for how to best negotiate international treaties while representing Indigenous interests (McHugh, 1991). However, as seen in the case of New Zealand, these interests are not always adequately represented (Waitangi Tribunal, 2016). If Indigenous peoples are to be included as partners to the Crown in international decision-making, perhaps Canada and New Zealand should include a team of Indigenous representatives within their Executive negotiating bodies. This could work towards ensuring Indigenous interests are represented at the highest level and would aid in constructing a global norm of giving greater power to critical domestic stakeholders in international negotiations.

6.0 Conclusion

The negotiation and ratification processes for the Trans-Pacific Partnership (TPP) were quite undemocratic in both Canada and New Zealand. The voices of politicians, industries, businesses, civil society, organizations, provinces, the public and Indigenous groups were all

ignored to some degree ("Native Affairs", 2015; Waitangi Tribunal, 2016; Christopher et al., 2017; Parliament of Canada, 2020). While Indigenous peoples and Māori were not specifically targeted in this exclusion, since they are often some of the most marginalized groups in Canadian and New Zealand societies because of the colonial histories in these countries, their voices are heard the least ("Native Affairs", 2015; Palmater, 2016; O'Sullivan, 2017; Amnesty International, 2020).). In acknowledging the research gap of how Indigenous peoples participate in international decision-making, this thesis set out to process trace the events which occurred in Canada and in New Zealand during TPP negotiations, and to understand why the events played out in the way they did. This was done by analyzing the domestic and international obligations of nations in negotiations, and theoretical causal mechanisms such as two-level games which constrain a nation's desire and ability to include domestic stakeholders within them.

The exclusive nature of the negotiation processes was likely a result of Canada and New Zealand working to eliminate the domestic tier of the two-level game in the TPP negotiations (Putnam, 1988). It seems that minimal domestic and international obligations for inclusive international decision-making, as well as weak protocols for public involvement in ratification made it easier for these countries to reduce the domestic level of the game while focusing on international interests. Differing government structures and demographics in the two countries meant that Māori had more power than Indigenous peoples in Canada and could have their interests better represented at the international level (The Canadian Press, 2015; Cywink, 2017; Maoate-Cox, 2018). However, since hegemonic powers often decide the level of domestic inclusivity in negotiations, both countries were constrained in protecting domestic interests due to their limited influence as middle and small powers (Kukucha, 2016; Schwartz, 2017). Given the highly complex process of incorporating domestic interests into international negotiations, government efforts to

eliminate the domestic tier of two-level games is understandable (Putnam, 1988). However, this process should not be excused as it is highly dangerous if it leads to democratic deficit (The Law Commission, 1997). If Canada and New Zealand truly wish to work towards a stated goal of 'reconciliation' and working towards rebuilding relations with Indigenous peoples, their international treaty-making processes must be transformed to ensure Indigenous peoples are partners to the Crown in decision-making.

It must be noted that some progress has been made over time, as international treaty-making in both Canada and New Zealand seems to be becoming more inclusive. In New Zealand, much more consultation occurs now than the very exclusive decision-making which occurred in the era of the CER, and the Treaty of Waitangi Exception has been included in several agreements since 2001 (Andre, 2003; Waitangi Tribunal, 2016). While consultations and the Treaty Exception are inadequate for effective protection of Māori interests, scholars, critics, and organizations are calling on the government to improve the treaty-making process (Kawharu, 2016; Hailes, 2018; Jones et al., 2020). In Canada, recent CETA negotiations included provinces at the negotiating table, and an Indigenous peoples' chapter was advocated for in NAFTA renegotiations (Kukucha, 2016; Schwartz, 2017). While the Trudeau government's goal of a 'Progressive Trade Agenda' seems presently insincere due to a lack of legal substance, it provides a framework for citizens and politicians to hold the Canadian government accountable to more inclusive decision-making moving forward (Government of Canada, 2018a). Additionally, there is hope for progression towards more inclusive international treaty-making, as more research in this area is being done. A book titled "Indigenous Peoples and International Trade" (Borrows & Schwartz, 2020) will be published in June of 2020. While this resource would have benefitted this thesis, it will prove useful in future research for a deeper understanding of these topics.

Despite this progress, more transformative work must be done to reshape international treaty-making in Canada and in New Zealand. For New Zealand, the recommendation of requiring a two-thirds majority vote in Parliament for ratifying an international treaty could distribute power away from the Executive and towards Parliament, where Māori interests are more heavily represented (Hailes, 2018; Maoate-Cox, 2018). Further, as recommended by the Waitangi Tribunal (2016), the government should implement a system to ensure stronger engagement between the Crown and Māori during international treaty creation. For example, Māori could be included on the Executive body, or a Māori Executive could work in close contact with the negotiating Executive at all stages of treaty-making.

For Canada, governmental and legal systems must be reshaped to represent Indigenous interests. For example, a MMP voting system could allow for specific Indigenous electorate seats, and thus stronger Indigenous representation in Parliament (The Canadian Press, 2015). This means Indigenous peoples could have a greater say in international treaty-making during the treaty tabling process, and even more so if Canada were to then require a two-thirds majority vote in Parliament for ratifying treaties. Further, a specific federal tribunal to handle Indigenous claims regarding international decisions would allow for more cohesive claims to be made against the government. Finally, both countries should advocate for a global norm of domestic inclusion in international treaty-making. Perhaps if Canada and New Zealand worked together with other powers to give UNDRIP greater legal weight in the international system, they could work towards creating a norm of making Indigenous interests a stronger priority not only in international treaty-making, but in all future decisions at both the domestic and international levels.

This thesis worked to begin illuminating the complexities of Indigenous inclusion in international treaty-making. However, more extensive research must be done to completely fill the

stated research gap, and to provide further recommendations for revised treaty-making processes in Canada and in New Zealand. Further research is also needed to understand how to effectively implement more binding obligations for domestic inclusion at the international level. Canada and New Zealand may claim to be prioritizing 'reconciliation' in decision-making, yet this cannot occur if Indigenous peoples and Māori are not treated as equals to the Crown in these processes. In addition to the critical goal of working towards decolonized societies, it is of utmost importance that countries recognize the immense value of Indigenous knowledge systems, especially in a time where the world is seeing increasing environmental threats (Bargh, 2007). Diversifying the knowledge systems used in decision-making at the international level can thus benefit actions for reconciliation, while creating opportunities to address the global crises of the present day in a just and meaningful way. If Canada and New Zealand truly wish to overcome the legacies of colonialism, they must recognize that transforming their treaty-making practices requires urgent action.

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Appendices

Appendix A: Section 35 of the Canadian Constitution Act, 1982:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

(Lambrecht, 2013).

Appendix B: Article 29.6 - Treaty of Waitangi Exception

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

(Waitangi Tribunal, 2016)

Appendix C: Table outlining consultations in Canada

Date	Consultation
2012-2015	Global Affairs Canada (GAC) consulted with provinces and territories, industries, researchers, businesses and unions, and civil society. There were interactions with 424 stakeholders, and 1094 written submissions (Parliament of Canada, 2020).
November 2015-2016	Federal government launches 'special group' consultations. During this time, government officials meet with Indigenous leaders four times (Gombay, 2017).
2015	OpenMedia Canada starts Let's Talk TPP campaign. 27,996 Canadians used the tool and provide feedback to the government (Christopher et al., 2017).
2015-2017	GAC consulted with provinces and territories, industries, researchers, Indigenous groups, businesses and unions, municipalities, and civil society. There were

	interactions with 576 stakeholders, and 41,084 written submissions (Parliament of Canada, 2020).
February 2016-2017	Standing Committee on International Trade held public hearings in 13 cities, across 10 provinces in Canada (Parliament of Canada, 2020).
March 2016-Janurary 2017	Committee calls for written submissions from the public to express their views on the TPP. 199 briefs, and 50,000 emails and letters sent in (Parliament of Canada, 2020).
September 2016	Meeting between Chrystia Freeland (International trade Minister), Carolyn Bennett (Minister of Indigenous and Northern Affairs), and Indigenous Groups. This meeting was not considered a consultation, but had a goal of gaining feedback from Indigenous groups on international trade agreements like the TPP. (Nahwegahbow, 2016).
2017	GAC puts out a call in the Canada Gazette for written submissions for Canadians to give input to whether new members should be allowed into the CPTPP (Government of Canada, 2019b).

Appendix D: Statements from Canadian stakeholders regarding consultations:

- Canadian Manufacturers & Exporters felt "fairly well consulted throughout the process" (Parliament of Canada, 2020).

- "There was absolutely plenty of consultation that went on, we felt that our voice was at least being heard . . . [but it] wasn't being listened to" - Ford Motor Company of Canada Limited (Parliament of Canada, 2020).

- "[D]uring TPP negotiations, a small representation of civil society, labour and small business were invited to advise at the negotiating rounds – yet judging from the TPP text, it is clear that while these groups may be invited to the table, it is only big business that is listened to". – Service Employees' International Union-West (Parliament of Canada, 2020).

- "An online consultation quietly advertised in the Canada Gazette in December 2011 was clearly targeted at business groups" – Pamela Palmater (2016)

- "First [N]ations have not been involved in any of the [consultation] process and they should have been involved because [the TPP] involves [Indigenous] lands, resources, people's intellectual property, and the environment, all things that protect [Indigenous] peoples." – Pamela Palmater, Ryerson University (Parliament of Canada, 2020)

- "It's not an issue of consultation. It's an issue of consent" - Chief Stacey Laforme of the Mississaugas of the New Credit First Nation (Meloney, 2018).

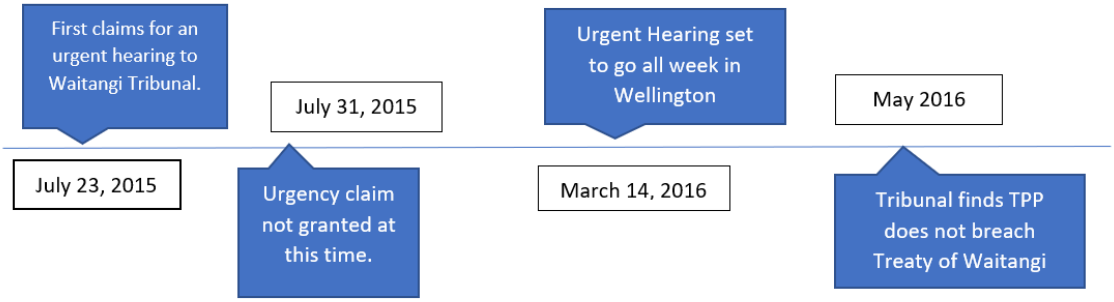
- ". . . as a First Nation's member, I feel I was not and still am not consulted on this insidious trade pact . . .I believe the TPP is an outright attack to my Inherent Rights. Canada can do better." – Cory, Dakota First Nation - Let's Talk TPP tool (Christopher et al., 2017)

Appendix E: Table outlining consultations in New Zealand

Date	Consultation
2011	Government creates online platform 'TPP Talk', yet the platform has no forum for the public to comment (Waitangi Tribunal, 2016).
2012-2015	NZ government sends out biannual updates to Māori representatives. Emails fail to be sent between 2012-2014. In 2015, some representatives do not get updates due to government's failure to record updated email addresses (Waitangi Tribunal, 2016).
August, November 2012	2 meetings between NZ government, and the Federation of Māori Authorities (FOMA) (Waitangi Tribunal, 2016).
2012-2015	Several public meetings between government and stakeholders across the country (NZMFAT, 2018).
March, June 2014	2 meetings between NZ government, and FOMA (Waitangi Tribunal, 2016).
2015	Government hosted several hui, yet they were poorly advertised and required registration without adequate time for participants to register (Waitangi Tribunal, 2016; NZMFAT, 2018; NZMFAT, 2020b).
2016	The New Zealand government conducted a number of hui in cities across the North and South Islands (NZMFAT, 2018).
January 27, 2016	Meeting between representatives of Iwi Chairs Forum, Minister of Trade, and Minister of Māori Development to discuss TPP (Waitangi Tribunal, 2016).
2017	Government hosts public meetings to provide information on the CPTPP and answer questions (NZMFAT, 2018).
December 2017- February 2018	Government officials hold trade policy consultation hui with Māori claimants (NZMFAT, 2018).

Note: The word 'hui' comes from the Māori language, and refers to public gatherings, which in the case of the TPP, involved Māori and non-Māori citizens engaging in conversations with the government (Native Council, 2020).

Appendix F: Timeline visual of Waitangi Tribunal hearings



(Trevett, 2016b; Trevett, 2016c; Waitangi Tribunal, 2016).

Appendix G: Interview questions

1. To your knowledge, what are the legal procedures for negotiating and implementing a trade agreement?

2. To your understanding, how are legal or constitutional government obligations, such as those outlined in domestic treaties and policies addressed in free trade negotiations? Are countries required by international law to uphold domestic obligations, such as those through treaties/constitutions, when negotiating agreements at the international level, and if so, what do the processes for doing so look like?

3. To my understanding from my initial research, the WTO has principles for nations to follow when conducting international trade. However, does the WTO have any enforced regulations where countries may face consequences if they fail to adhere to them?

4. What are the main constraints faced by nations when negotiating international agreements?

5. The Trans-Pacific Partnership (TPP) was a highly secretive negotiation. What are the rules in Canada for how transparent negotiating bodies must be, and how they inform the rest of the government, as well as citizens and organizations? Are secretive negotiations allowed?

6. Are there any specific resources you would recommend for understanding these processes further?

7. Is there anything that I have not asked you, which would be useful for me to know for this project?