BEFORE THE WAITANGI TRIBUNAL WAI 2358

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the National Fresh Water and Geothermal Resources Inquiry

BRIEF OF EVIDENCE OF DR PENELOPE RIDINGS

3 July 2012

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Introduction

1. I am Director of the Legal Division and International Legal Adviser of the Ministry of Foreign Affairs and Trade and am responsible for providing advice to Government on international law. I am duly authorised to give this brief on behalf of the Ministry.

2. From 2004 to 2007 I was the Ministry's International Trade Law Adviser. In that position I was directly involved in the negotiation of New Zealand's free trade agreements and in advising on the interpretation of trade and investment law. I also led New Zealand's involvement in WTO dispute settlement over that period.

Overview

3. This brief of evidence considers the question of whether New Zealand's commitments under free trade agreements and bilateral investment treaties constrain the Crown's ability to provide redress to claimants if shares in State-Owned Enterprises (SOEs) are held by overseas investors.

4. I have read the brief of evidence from Dr Jane Kelsey dated 22 June 2012. I understand her to be alleging that if the Crown adopted measures in redress for claimants that adversely affected the value of shares held by overseas investors, New Zealand would be subject to claims under its international investment commitments and "penalised" for any failure to comply.[1] Dr Kelsey infers that the Crown would thereby be prevented, or at least deterred, from adopting such redress.[2] Dr Kelsey is also critical of the expert arbitral tribunal procedure provided by some of the New Zealand's investment treaties.

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1 See Dr Kelsey's brief of evidence at [2.1], [4.3] & [5.1] (Wai 2358, #A76).

2 Above n 1, identifying possible Crown redress as follows (at 2.2-2.3) (Wai 2358, #A76):

> "The kind of commercial redress referred to in this evidence includes the vesting of ownership rights in claimants by way of shareholding or other entitlements, such as revenue or profit share arrangements, or a requirement for investment through a particular legal form that entails iwi representation or participation, such as a co-ownership model.
>
> The non-commercial redress referred to in this evidence includes the transfer of regulatory authority over policy, regulatory or administrative matters, consistent with tino rangatiratanga and katialkitanga, and/or new obligations, considerations, and criteria for such decisions, in accordance with the Crown's obligations of active protection."

5. In summary:

5.1 I agree with Dr Kelsey that some of New Zealand's investment commitments are potentially relevant if Crown actions diminished the value of overseas investors' shareholdings.

5.2 However, I do not agree with the characterisation of trade and investment obligations by Dr Kelsey, nor her views as to the extent of the risk faced in this regard. As Dr Kelsey notes in part, the trade and investment commitments are only engaged by discriminatory or otherwise unreasonable actions that substantially reduce the value of an investment.[3] Statements in Dr Kelsey's evidence such as that:[4]

> "... investors could seek compensation if the Crown adopted measures ... that adversely affects the value of their investments ..."

must be read in the context that, as Dr Kelsey acknowledges, the provision of compensation is subject to a high threshold: a loss of value alone will not generally suffice.

5.3 As I set out below, the threshold for finding government actions to be impermissible is demonstrably high, and in respect of New Zealand, is further addressed through the various protections included in trade and investment agreements, including – as Dr Kelsey again notes – specific clauses negotiated in many agreements enabling the Government to take action to comply with the Treaty of Waitangi.

5.4 There is no evidence that the threat of legal action would have a chilling effect on government decisions, as claimed by Dr Kelsey.[5] Neither is it the case that New Zealand's

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3 See, for example, above n 1, [4.5](v), p 32, 9 and [8.4] referring to "unreasonable or discriminatory" or "arbitrary and unjustified discrimination" (Wai 2358, #A76).

4 Above n 1, [9.5] (Wai 2358, #A76).

5 Above n 1, [6.12] (Wai 2358, #A76).

commitments under free trade and investment treaties constrain the Crown's ability to take appropriate steps to provide necessary redress, for four reasons:

5.4.1 The overall structure of international investment agreements accords New Zealand considerable scope to take regulatory and other steps, such as those described by Dr Kelsey as possible forms of redress;

5.4.2 As Dr Kelsey notes, New Zealand has specifically negotiated a range of additional and relevant exceptions and safeguards, including but not limited to specific Treaty of Waitangi clauses in most recently concluded agreements;

5.4.3 Foreign investors who hold shares in State-Owned Enterprises are unlikely to be in the position of being able to demonstrate that any redress provided to claimants is actionable under New Zealand's free trade and investment agreements; and

5.4.4 It would be in the national interest to defend any investment claim vigorously, to ensure that the process followed is robust and, where possible, open, and to involve stakeholders in the defence of any claim.

New Zealand's obligations under its trade and investment agreements.

6. As Dr Kelsey notes in paragraphs 3.2 and 3.3 of her brief of evidence, New Zealand is party to a range of trade and investment agreements that provide various protections for some foreign investors.

7. I agree with Dr Kelsey that the obligations contained in these agreements are potentially relevant to the provision of the kinds of Crown redress that Dr Kelsey describes. I also agree with Dr Kelsey that the reservations to the obligations of national treatment and market

access, as referred to in section 7 of her brief of evidence, would apply to protect the Crown against any claim in respect of these obligations in the current context.

8. However, I disagree with the way in which some of the investment obligations in paragraph 4.5 and the Annexes are characterised in her brief, and with the claim that they constrain the Crown from providing necessary redress to claimants. In particular, I consider that the omission of important qualifiers to the obligations of national treatment and most favoured nation treatment, the high threshold and possibility of compensation in the event of expropriation, and a failure to properly interpret the minimum standard of treatment mean that Dr Kelsey's concerns are overstated.

National Treatment and Most Favoured Nation Treatment

9. Dr Kelsey's characterisation of "national treatment" and "most favoured nation" obligations in paragraphs 4.5 (i) and 4.5 (vi) omit the important qualification that the comparison is between investors in *like circumstances.*

10. In determining whether overseas investors were receiving treatment that was less favourable in effect than other investors (either New Zealand investors in the case of national treatment, or overseas investors from another country in the case of most favoured nation treatment), it is important to ensure that the appropriate comparator is found. The comparison is not between *any investor*, but one in *like circumstances.*

11. This is an long-established protection for states in international investment law.[6] Its effect here, for example, is that the Crown's ability

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6 See T Weiler and I Laird "Standards of Treatment" P Muchlinski, F Ortino, C Schreuer (eds), *The Oxford Handbook of International Investment Law,* Oxford University Press 2008, p 291 & 294:

> "..the Pope & Talbot tribunal articulated a simple and compelling analysis for Article 1102 [the national treatment provision in the North American Free Trade Agreement], which is equally applicable to Article 1103 [most favoured nation]. This analysis, which appears to have been followed consistently by other tribunals, contains three basic elements: (1) identification of the relevant subjects for comparison; (2) consideration of the relative treatment each comparator receives; and (3) consideration of whether any factors exist that justify any deviation in the treatment. [...]
>
> ...Once a prima facie breach of a non-discrimination provision has been established, the burden shifts to the respondent government to explain why the difference in treatment is justified. If the government can prove that the treatment was different because the comparators were not truly in like circumstances, it will have justified the measure."

to provide effective redress to claimants is not constrained where the same treatment is accorded to all investors, whether they be New Zealand investors or foreign investors. Put another way, Crown measures would raise issues under these protections only if those measures targeted only foreign investors.

Expropriation

12. Under international law, expropriation is an inherent power of the state. The effect of international investment agreements is, as Dr Kelsey acknowledges, that New Zealand and other states may expropriate the property of overses investors, but if they do so, they are subject to certain limitations, such as the requirement to provide compensation.

13. Expropriation can be direct or indirect. Direct expropriation is usually effected through a formal compulsory acquisition. For example, it is defined in paragraph 2 of Annex 13 to the China-New Zealand Free Trade Agreement as occurring "when a state takes an investor's property outright, including by nationalisation, compulsion of law or seizure". This may be what Dr Kelsey is referring to in paragraph 2.2 of her evidence where she suggests that redress could be provided through the Government compulsorily taking ownership rights from foreign investors and vesting these in Maori.

14. Indirect expropriation, on the other hand, may occur when measures short of an actual taking result in the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor.[7] This may be what Dr Kelsey is referring to in paragraph 2.3 of her brief where she suggests that the Crown may issue a new regulation on the use of freshwater or geothermal resources in order to meet any obligations to claimants, and this may affect the use and enjoyment of the foreign investors in their investment.

15. It should be noted that not all government regulatory activity or changes in law that causes difficulty for an investor will constitute unjustifiable

7 P Muchlinski, F Ortino, C Schreuer (eds), The Oxford Handbook of International Investment Law, Oxford University Press 2008, pp 421 – 422.

expropriation. As noted in by Professor Andrew Newcombe and Dr Lluís Paradell in their *Law and Practice of Investment Treaties: Standards of Treatment*:[8]

> "In the majority of cases, host state regulatory activity has been found not to be expropriatory for the simple reason that it does not result in a substantial deprivation of the investment – the factual predicate for a claim of expropriation simply does not exist. .... *Although regulatory measures designed to protect the environment, health, safety or ensure fair compensation frequently impose regulatory and compliance costs on an investment, these will not normally reach the threshold of a substantial deprivation.*" [emphasis added]

16. This principle can be seen expressly in the text of some international investment agreements. For example, in the China- New Zealand Free Trade Agreement:

16.1 The agreement states that indirect expropriation occurs "when a state takes an investor's property in a *manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property*, although the means used fall short of [direct expropriation]" [emphasis added];[9] and

16.2 Where measures are taken in exercise of a state's regulatory powers "as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment", this will generally not constitute indirect expropriation.[10]

17. It follows that, as acknowledged by Dr Kelsey in paragraph 4.5(iii) of her brief, the Government is not prohibited from expropriating a foreign investor's investment under its trade and investment agreements, but that if it does so, expropriation must be carried out in accordance with certain requirements. If prompt, adequate and effective compensation is

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8 A Newcombe, L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International (2009), p357.

9 Annex 13, Expropriation, paragraph 2 (Wai 2358, #A31, p 941).

10 Annex 13, Expropriation, paragraph 5 (Wai 2358, #A31, p 941).

paid (and the other criteria are met), then there is no breach of the expropriation obligations.[11]

Minimum Standard of Treatment

18. I disagree with Dr Kelsey's characterisation of the minimum standard of treatment obligation in paragraph 4.5(iv). She claims that this should be "broadly interpreted to mean the Crown must not impair an investor's 'legitimate expectations' of a stable and predictable business environment by new regulatory or taxation measures". However, this is not the "key economic interest" that the obligation protects.[12] It also does not properly reflect the relevant terms of New Zealand's obligations and the relevant cases.

19. New Zealand's practice has been to define the minimum standard of treatment, which includes fair and equitable treatment and full protection and security, by reference to customary international law. This is an important protection for the government in reserving its rights to regulate and establishes a high standard.

20. Although arbitral tribunals have identified a number of elements which may encompass the minimum standard of treatment, most focus on due diligence and due process,[13] rather than the "legitimate expectations" and "stable regulatory environment" characteristics espoused by Dr Kelsey. The threshold for breach, as recently set out in *Glamis Gold Ltd* v *United States*, is high:[14]

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11 Annex 13, Expropriation (Wai 2358, #A31, p 941).

12 In paragraph 7 of Annex D (Wai 2358, #A76(d), p 31), Dr Kelsey cites *Williams and Kawharu on Arbitration* (Lexis Nexis 2011), page 813, in support. However, and contrary to the inference drawn by Dr Kelsey, the relevant excerpt reads:

> "The cases are not yet agreed as to the scope of what has come to be recognised as a legitimate expectations analysis. In this context, several cases have emphasised the obligation of a state to provide a stable, consistent, transparent and predictable legal and business environment. Conversely, it has been recognised that a fair and equitable treatment clause cannot have the same effect as a stabilisation clause in a concession agreement – freezing the regulatory environment which is applied as at the date of the investment."

13 See the OECD Working Paper on International Investment Number 2004/3, *Fair and Equitable Treatment Standard in International Investment Law*, September 2004, page 40.

14 *Glamis Gold Ltd v United States*, Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 380 (2009).

> ... to violate the customary international law minimum standard of treatment ... an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach ...

21. Although not all tribunals have followed the *Glamis* approach, those that interpret the obligation more liberally, such as *Merill & Ring Forestry v Canada*[15] or *Chemtura Corporation v Canada*[16], do not expand the obligation to the same extent as Dr Kelsey. Even where legitimate expectations are considered by a Tribunal to be covered by the standard of fair and equitable treatment, it has been acknowledged that investors must anticipate some regulatory or legislative changes over time but that any such changes should be implemented in good faith and in a non-abusive manner and should avoid using public policy arguments to disguise arbitrary or discriminatory measures.[17]

22. I consider that in providing any redress to claimants, the minimum standard of treatment does not prevent the Crown from changing any relevant regulations. However it if it does so, it must act in good faith, and in accordance with the law, follow due process and not deny overseas investors justice through the Courts or administrative procedures to challenge such measures. As these protections exist in New Zealand's domestic law, I consider the risk suggested by Dr Kelsey is overstated.

Measures to protect the Crown's ability to regulate

23. When negotiating its trade and investment agreements, New Zealand seeks to ensure that the Government's power to regulate for legitimate public policy objectives is not unduly constrained. In addition to the protections contained in the obligations themselves and outlined above, such as the reference to customary international law in the minimum

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15 *Merrill & Ring Forestry LP v Canada*, Award, Ad Hoc – UNCITRAL Arbitration Rules; IIC 427 (2010).

16 *Chemtura corporation v Canada*, Award, Ad hoc – UNCITRAL Arbitration Rules; IIC 451 (2010).

17 United Nations Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements II, *Fair and Equitable Treatment*, United Nations, New York and Geneva, 2012, page 77.

standard of treatment obligation and the inclusion of an expropriation annex, a variety of other mechanisms are sought to preserve the Crown's ability to regulate.

24. In addition to the Treaty of Waitangi exception dealt with in section 8 and Annex E of Dr Kelsey's brief, trade and investment agreements include a range of other exceptions.[18] These include exceptions to the application of the obligations in the agreement to permit measures necessary for the protection of human, animal or plant life or health, or taxation measures, or measures necessary for the protection of New Zealand's essential security interests.

25. In some cases, more than one exception may be applicable, and the Crown would not have to rely solely on the Treaty of Waitangi exception. For example, exceptions for measures necessary to protect plant life or health may be relevant in relation to the example given by Dr Kelsey in Annex D, paragraph 4(i) of her brief of evidence regarding regulation to "restrict the flow of rivers, or the geothermal draw, available for power generation so as to protect taonga" in order to provide redress to claimants.

26. In addition, some of New Zealand's trade and investment agreements take what is called a "negative list" approach, which means that the obligations they contain apply to all measures and sectors except for those which are specifically reserved against.[19] A negative list approach allows New Zealand to continue to apply existing measures which are inconsistent with some of the treaty provisions[20] and to take future

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18 See for example, Chapter 17 of the Malaysia-New Zealand FTA (Wai 2358, #A33, p 121), Chapter 17 China-New Zealand FTA (Wai 2358, #A31, p 115), Chapter 15 ASEAN-Australia-New Zealand FTA (Wai 2358, #A32, p 196), Articles 71, 73, 74, 75, 76, 78 of the New Zealand-Singapore Closer Economic Parynership (CEP) (Wai 2358, #A28, pp 38-41), Chapter 15 of New Zealand-Thailand Closer Economic Partnership (CEP) (Wai 2358, #A30, p 20), and Articles 19 – 24 of the Protocol on Investment to the Australia New Zealand Closer Economic Relations Trade Agreement.

19 Negative list agreements are P4 (Brunei, Chile and Singapore), Hong Kong and the Investment Protocol with Australia. This is in contrast to a positive list approach adopted in some of New Zealand's earlier agreements, such as the China-New Zealand FTA, where the obligations only apply to those measures and sectors which are specifically included.

20 Reservations can only be made to the national treatment, most-favoured-nation treatment, senior management and boards of directors, performance requirements, local presence and market access articles (where included), and not to expropriation or minimum standard of treatment.

measures in certain defined policy areas which would otherwise breach New Zealand's international obligations. As noted in Annexes B and C of Dr Kelsey's brief, there are reservations in relation to water and State Owned Enterprises which may be relevant to the current Claim.[21]

27. In any case, these exceptions and reservations will only be relevant if there is a prima facie breach of an obligation in respect of investment. And for the reasons set out above, I consider that the risk of such a breach is significantly reduced when the obligations are characterised properly.

Ad hoc Arbitral Tribunals[22]

28. Investor-State dispute settlement (ISDS) describes a mechanism which provides a right of action for foreign investors to pursue a claim that a State has breached an investment obligation in an investment agreement or investment chapter of an FTA in binding international arbitration by appointed expert arbitrators. This has emerged as a common feature of modern investment agreements. New Zealand has agreed to this approach in recent FTAs with China, ASEAN countries and Malaysia.[23]

29. The procedure for hearing any ISDS claim will be governed by the rules set out in the treaty, as well as the background arbitral rules. As noted by Dr Kelsey in para 5.5 of her brief of evidence, the main arbitral rules are the rules of the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).

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21 See for example New Zealand's Schedule to the Trans-Pacific Strategic Economic Partnership Agreement, IV-NZ-2, IV-NZ-4, and IV-NZ-8.

22 This section deals primarily with ISDS. I note however that Dr Kelsey raises the possibility of State-State dispute settlement in paragraph 5.3 of her brief. I will not deal with this in substance, but simply note that her assertion that if successfully challenged, the Government would be required to withdraw the measure is not a complete representation of the options. The Government may be able to amend the measure, or the way it is implemented rather than withdraw it completely. There is also the possibility of maintaining a non-conforming measure, if a settlement can be reached with the other Party (with compensation paid).

23 Note that, consistent with the integrated nature of our economies, there is no dispute settlement procedures included in New Zealand's international trade and investment agreements with Australia. In addition, ISDS is only available to investors under the New Zealand-Thailand Closer Economic Partnership and New Zealand-Singapore Closer Economic Partnership with the consent of the investor's own State.

30. I agree with Dr Kelsey's comment that there is no *stare decisis* in ad hoc international arbitral tribunals established to hear international investment disputes.[24] Nevertheless there is a wide body of international investment law. Ad hoc tribunals typically take the approach that they should pay due regard to earlier decisions of international tribunals.[25]

31. Dr Kelsey cites a number of illustrative disputes in an attempt to demonstrate that challenges by foreign investors may impact on domestic policy and regulatory decisions.[26] I consider that these examples are not generally applicable or of particular relevance here. Rather they largely reflect the context of the specific facts of each case.

31.1 In *Chevron Oil* v *The Government of Ecuador* the bilateral investment treaty at issue included a provision that "each party shall provide effective means of asserting claims and enforcing rights with respect to investment".[27] New Zealand has no such clause in its free trade or investment agreements. The case is therefore not of general application.[28]

31.2 Regarding *Philip Morris* v *Uruguay,* I would note that New Zealand has included "denial of benefits clauses" in its international trade and investment agreements to ensure that investors have sufficient connection to New Zealand in the form of "substantive business operations".[29]

31.3 *Piero Foresti, Laura de Carli & Others* v *The Republic of South Africa* is characterised by Dr Kelsey as a "successful" arbitration by European-based investors against South Africa. In fact the case was dismissed "with prejudice" with the investors having

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24 Above n 1 [5.5] (Wai 2358, #A76).

25 *Chemtura Corporation* v *Canada*, Award, Ad hoc – UNCITRAL Arbitration Rules; IIC 451 (2010) [109].

26 Above n 1 [6.1-6.16] (Wai 2358, #A76).

27 *Chevron Corp (USA) and Texaco Petroleum Company (USA)* v *The Republic of Ecuador* (UNCITRAL, PCA Case No 34877 Partial Award of the Merits, 30 March 2010 at [241].

28 *Williams and Kawharn on Arbitration*, (Lexis Nexis) 2011, p 818.

29 See for example, Art 9.9 Thailand CEP, Art 149 China-NZ FTA (Wai 2358, #A31, p 89), Art 11 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 25), Art 10.14 Malaysia-NZ FTA (Wai 2358, #A33, p 87).

to pay a portion of the South Africa Government's costs. In part this was due to the failure to advise the Government's lawyers of the solicitation of a bribe by one of the latter's senior counsel. While the Government alleged that the case was brought as a "mere tactical device", this was rejected by the investors and not given any weight by the tribunal.[30]

31.4 The case of *Vattenfall* v *Federal Republic of Germany* was settled without any admission of liability and with each Party bearing its own legal costs. The settlement included the issuance to Vattenfall of a modified water use permit and a release from the requirement to set up district heating pipelines and to build and operate a discharge cooler.[31] There is no suggestion that damages were paid in the settlement.

32. As these cases illustrate, decisions by arbitral tribunals in investment disputes are heavily influenced by the text of the particular free trade or investment agreement, and by the specific facts of each case.

33. For example, in the context of shares in State Enterprises, the Public Finance (Mixed Ownership Model) Amendment Act restricts non-government shareholding to 10% per person. In general, claims can only be made for loss or damage suffered by the investor (ie in relation to the value of the shares) and not for loss or damage suffered by the company in which they have invested. Even where investors can make claims on behalf of the company, this is only where they "own or control" the company. I consider that a 10% shareholding would be insufficient to meet this threshold, particularly in the context where the Government maintains a 51% shareholding.

30 *Foresti and ors* v *South Africa*, Award, ICSID Case No ARB(AF)/07/01; IIC 445 (2010), 3 August 2010 at [90, 112].

31 *Vattenfall AB, Vattenfall Europe AG and Vatternfall Europe Generation AG* v *Germany*, Final Award, ICSID Cawe No ARB/09/06, IIC 492 (2011), 11 May 2011.

Procedural Matters

34. In para 5.12 of her brief, Dr Kelsey contends that disputes can be initiated by investors, "irrespective of the strength of their legal argument". I would note that while ISDS provides a means for investors to protect their investments, there are also a number of procedural mechanisms which provide protections for the State and seek to discourage unmeritorious claims. For example:

34.1 In order to come within the scope of the ISDS provisions, an investor must show that it has suffered loss or damage, and that this is caused by the actions of the State;

34.2 Statutes of limitations provisions ensure that any claims have to be brought within a certain period from the date of the events giving rise to the claim;[32]

34.3 Requirements that investors should first seek to resolve disputes through consultations before they can proceed to international arbitration;[33]

34.4 Requirements that investors must observe a specified "cooling off" period before being able to submit a claim to arbitration;[34]

34.5 Procedures to deal with claims that are manifestly without merit (ie unfounded), in addition to the background rules[35] (see for example ICSID Arbitration Rule 41);

34.6 Procedures to provide for consolidation of claims to prevent the Government from defending parallel claims on the same issue;[36] and

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32 See for example, Art 154 China-NZ FTA (Wai 2358, #A31, p 91), Art 22 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 168), Art 10.22 Malaysia-NZ FTA (Wai 2358, #A33, p 92).

33 See for example, Art 9.16 Thailand CEP, Art 34 Singapore CEP (Wai 2358, #A28, p 19), Art 19 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 165), Art 152 China-NZ FTA (Wai 2358, #A31, p 90), Art 10.20 Malaysia-NZ FTA (Wai 2358, #A33, p 90).

34 See for example, Art 9.15 Thailand CEP, Art 34 Singapore CEP (Wai 2358, #A28, p 19), Art 20 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 166), Art 153 China-NZ FTA (Wai 2358, #A31, p 90), Art 10.21 Malaysia-NZ FTA (Wai 2358, #A33, p 91).

35 See for example, Art 154 China-NZ FTA (Wai 2358, #A31, p 91), Art 25 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 171), Art 10.24 Malaysia-NZ FTA (Wai 2358, #A33, pp 92-93).

34.7 Awards are limited to monetary damage and interest (rather than restitution of property or specific performance): there are no punitive damages.[37]

35. Dr Kelsey deals also at some length with transparency and confidentiality of ISDS proceedings in paragraphs 5.14 to 5.16. New Zealand's practice in forums, such as the WTO, has been to favour transparency. Even where this is not legally required of the Government, its practice has been to publish documentation on its website, and to support open hearings.[38] This helps build trust in the system, and allows other Parties, and the public, to gain knowledge and awareness of the issues.

36. Furthermore, it is possible to talk about general trends in the international investment context, where increasingly there is a move towards greater transparency. For example, the Parties to the ICSID Convention revised the ICSID Arbitration rules in 2006 to allow written submissions from persons or entities that are not parties to the dispute,[39] to allow the Tribunal discretion to allow such persons or entities to attend and observe hearings,[40] and for the mandatory release of the legal reasoning of all awards heard under the ICSID rules.[41] In relation to the UNCITRAL Arbitral Rules, UNCITRAL's Working Group II has been negotiating new provisions on transparency since 2010 which deal with participation of non-disputing entities and persons, release of documents, and open hearings.[42]

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36 See for example, Art 156 China-NZ FTA (Wai 2358, #A31, 91), Art 24 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 171), Art 10.27 Malaysia-NZ FTA (Wai 2358, #A33, p 94).

37 See for example, Art 158 China-NZ FTA (Wai 2358, #A31, p 92), Art 28 ASEAN-Aust-NZ FTA (Wai 2358, #A32, p 174), Art 10.29 Malaysia-NZ FTA (Wai 2358, #A33, pp 94-95).

38 For example in the recent WTO dispute with Australia over apples, New Zealand published its submissions and statements on the MFAT website (www.mfat.govt.nz), and further documentation, such as the award, is available through the WTO website (www.wto.org).

39 See ICSID Arbitration Rule 37(2).

40 See ICSID Arbitration Rule 32(2).

41 See ICSID Arbitration Rule 48(4).

42 See http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

37. In regards to Dr Kelsey's comments in paragraph 5.15 and 5.16 concerning claimants' rights of participation in the Crown's defence of a hearing, and the application of confidentiality provisions in regards to domestic stakeholders, there is nothing in the agreements that prevents their participation in the conduct of the arbitration, where considered appropriate by the Crown, and provided stakeholders agree to any necessary terms of that participation.

38. Our experience in the WTO has demonstrated the usefulness of involving relevant stakeholders in the preparation of a case in order to present the most robust defence possible. Furthermore, while the Crown may be prevented from releasing certain sensitive information to the public due to confidentiality requirements in the treaty, this would not necessarily prevent the Crown from sharing it with relevant stakeholders for the preparation of its case, where appropriate, and subject to restrictions on the subsequent use of that information.

Conclusions on the overall implications of New Zealand's investment obligations for this claim

39. New Zealand has entered into a number of trade and investment agreements which contain obligations on the Crown in relation to foreign investors. Some of these also provide a right for foreign investors to pursue disputes directly in binding international arbitration in order to protect their investments.

40. Nevertheless, there are certain inherent safeguards which are contained in the texts of the trade and investment agreements which protect the Crown's right to make reasonable and non-discriminatory regulation for legitimate public purposes, including in order to provide any redress to claimants. In particular, if compensation is paid, and due process followed, the risks of successful suit by overseas investors would be minimal.

41. Not every Government measure that adversely affects the value of an investor's investment will be expropriation, only those that substantially deprive the investor of the use and enjoyment of its investment. Even

then, the Government may expropriate, but must meet certain conditions (including the payment of compensation) in order to do so.

42. Nor do the investors have any right to a static legal framework under the minimum standard of treatment. The Crown must treat investors with good faith and in a reasonable and non-discriminatory manner. However this does not prevent the introduction of new regulatory or taxation measures.

43. In addition to these protections in the drafting of the obligations themselves, a variety of reservations and exceptions provide further flexibility for the Crown to regulate in the public interest, in the event that a prima facie breach of New Zealand's obligations is found. In particular, New Zealand has included exceptions for measures which provide more favourable treatment to Maori pursuant to the Treaty of Waitangi, as well as for measures necessary to protect the environment, or New Zealand's national security interests. Specific reservations are included in New Zealand's agreements which take a negative list approach in respect of State Owned Enterprises, Water and Public Utilities, which provide further policy flexibility specific to the present Claim.

44. Finally, investment dispute procedures do not prevent the participation of stakeholders in the organisation of the Crown's case, or the sharing of confidential information with any such stakeholders for the preparation of that case. Further, procedural requirements do aim to dissuade investors from bringing unmeritorious claims.

3 July 2012

Dr Penelope Ridings

HAMES, Callum (LGL/TLU)

From: TE MATA, Tessa (LGL/TLU)
Sent: Wednesday, 16 December 2015 4:10 p.m.
To: RIDINGS, Penelope (LGL)
Subject: FW: Regulatory protections 5/5

Hello Penny

This is one of five email chains between MFAT and Crown Law re issues of relevance to the consideration of the Treaty of Waitangi exception.

CLU have confirmed that these are legally privileged so can be disclosed to you to assist you in your work.

Cheers

Tessa Te Mata
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From: TE MATA, Tessa (LGL/TLU)
Sent: Wednesday, 21 October 2015 6:54 p.m.
To: 'Rachael Ennor'
Cc: EPPS, Tracey (LGL/TLU)
Subject: RE: Regulatory protections

Hello Rachael

Subject to anything Tracey may add the following also preserve the space for regulation of health and environment. BTW I was not clear if you meant with respect to investment only or across the whole agreement so I've listed provisions for both.

- The obligations in the investment chapter of TPP are to be read in the context of the broader Agreement, including the Preambular language noting "the Parties' recognition of the inherent right of governments to regulate; and resolve to preserve the flexibility of the Parties to protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, and public morals." *(I haven't double checked the language against the preamble that you have)*
- Investment chapter: performance requirements: Article 9.9(3)(d)
- Investment chapter: expropriation Annex 9-B para 3(b)
- Investment chapter: footnotes 9 and 10 on page 4.

- Exceptions chapter: Article 29.1 (the "general exception" for measures necessary to protect human, animal or plant life or health).
- The whole Environment chapter: esp Articles: 20.3(4)(5). Also 20.3(6) but that is aspirational rather than binding.

- We have annex II reservations for investment (these are what we call carve outs from our services commitments in a "negative list"** that aren't tied to particular pieces of legislation containing discriminatory measures) that allow NZ to take any measures in respect of:
    - Social services established for a public purpose, including health, income security and insurance, public education, public housing and social welfare.
    - Water, including the allocation, collection, treatment and distribution of drinking water.
    - Nationality or residency in relation to animal welfare and the preservation of plant, animal and human life and health.
    - Public health or social policy purposes with respect to wholesale and retail trade services of tobacco products and alcoholic beverages.
- Obligations in the procurement chapter don't apply to procurement of public health services.

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** A negative list is a form of scheduling services commitments in an FTA that assumes that the entire universe of services is subject to the FTA's services and investment obligations UNLESS you exclude them by listing them in country-specific schedules. There are two lists per country:

- Annex I Non-Conforming Measures – pieces of legislation ("measures") that contain provisions that are inconsistent with the FTA's services and investment obligations but are measures that the country wishes to maintain.
- Annex II Reservations – reserves the right to maintain any existing measures or adopt any new measures with respect to the listed areas e.g. "public health". Those measures don't have to be authorised by particular pieces of legislation or be linked to particular service sectors. The reservation applies horizontally.

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From: Rachael Ennor [mailto:Rachael.Ennor@crownlaw.govt.nz]
Sent: Wednesday, 21 October 2015 6:12 p.m.
To: TE MATA, Tessa (LGL/TLU)
Subject: Regulatory protections

Hi there

Fact sheet states "Provisions in TPP safeguard New Zealand's ability to make policy in important areas like **health, environment**, taxation policy and national security."

You've pointed me to:

- Exceptions chapter: Article 29.1 does **not** apply to investment. Articles 29.2 to 29.6 **do** apply to the investment chapter.
- Investment Article 9.15 "nothing in the agreement can be construed as limiting regulating investment activity in a manner sensitive to environmental, health or other regulatory objectives provided its done on a non-discriminatory basis."

Is there anything else that preserves space for regulation of health and environment?

Thanks

BEFORE THE WAITANGI TRIBUNAL

WAI 1427
WAI 2522
WAI 2523
WAI 2530
WAI 2531
WAI 2532
WAI 2533
WAI 2535

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF applications for urgent hearings concerning the Trans-Pacific Partnership Agreement by the applicants for Wai 1427, 2522, 2523, 2530, 2531, 2532, 2533 and 2535

AFFIDAVIT OF PENELOPE JANE RIDINGS

SWORN ON 19 JANUARY 2016

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I, **Penelope Jane Ridings**, of Coromandel, barrister, swear:

INTRODUCTION

1. I currently practise as a barrister sole specialising in public international law, in particular international trade and investment, international fisheries law and oceans and environment. I am the contributing author of the International Arbitration Chapter of Green and Hunt on Arbitration Law and Practice in New Zealand published by Thomson Reuters and currently a panellist in a dispute settlement panel established under rules of the World Trade Organisation (WTO).

2. I commenced practice as a barrister in 2015 after a 27 year legal and diplomatic career at the Ministry of Foreign Affairs and Trade ("MFAT" or "the Ministry"). During my time at the Ministry, I held a number of positions including:

   2.1 International Legal Adviser and head of the Legal Division of the Ministry (2011 to 2015);

   2.2 Ambassador to Poland, Estonia, Latvia and Lithuania (2008 to 2011);

   2.3 International Trade Law Adviser and head of the Trade Law Unit of the Ministry (2004 to 2007);

   2.4 High Commissioner to Samoa (2001 to 2004); and

   2.5 Deputy Director (Oceans and Environment) of the Legal Division (1998 to 2001).

3. My responsibilities as the Ministry's International Trade Law Adviser included:

   3.1 Leading the Ministry's work on the legal aspects of the negotiation of international trade agreements, including free trade agreements (FTAs). I was the Legal Counsel, which is New Zealand's chief legal adviser for the Trans-Pacific Strategic Economic Partnership Agreement (P4) (which was of course the forerunner to the Trans-Pacific Partnership ("the TPP" or "the Agreement"); and the Thailand – New Zealand Closer Economic Partnership

Agreement. More recently I was the Legal Counsel for the Republic of Korea – New Zealand Free Trade Agreement.

3.2 The provision of legal advice on the development of the National Interest Analysis ("NIA") which typically accompany the release of the agreed texts of an international trade agreement which are then considered by the Foreign Affairs, Defence and Trade Select Committee ("FADTC").

3.3 The provision of legal advice on the development of any domestic legislation needed to implement New Zealand's obligations under its international trade agreements;

3.4 The provision of legal advice on the compatibility of proposed domestic legislative or policy measures with New Zealand's international trade law obligations.

3.5 The representation of New Zealand in state-to-state dispute settlement under the auspices of the World Trade Organisation ("WTO"), notably *Australia – Apples* (Consultations) and *United States – Lamb Safeguards*, as well as a number of WTO cases in which New Zealand was a third party.

4. I also have extensive experience of international negotiations in other contexts including leading New Zealand's delegations in negotiations, meetings and working groups in the following areas:

4.1 Ad Hoc Informal Working Group on Marine Biodiversity Beyond National Jurisdiction;

4.2 Assembly of States Parties to the International Criminal Court;

4.3 United Nations Food and Agriculture Organisation's Port State Measures Agreement; and

4.4 Western and Central Pacific Fisheries Convention.

5. In addition to the examples of dispute settlement in the WTO mentioned above, including representing New Zealand before the WTO Appellate Body, I have also represented New Zealand in other state-to-state dispute settlement fora notably before the International Court of Justice *in Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* and before the International Tribunal for the Law of the Sea in its *Advisory Opinion of the Sub-Regional Fisheries Commission.*

6. I hold a BA, LLB (Hons) and a Masters of Jurisprudence (with Distinction) from the University of Auckland University and a PhD in Political Science from the University of Hawaii, specialising in Pacific development studies.

7. I was admitted as Member of the New Zealand Order of Merit in 2015 for Services to the State.

SUMMARY OF EVIDENCE

8. I make this affidavit in order to assist the Tribunal in its substantive consideration of the adequacy of the "Treaty of Waitangi exception clause" which is included in Article 29.4 of the TPP. It responds to paragraph 32 of the Memorandum Directions of Judge Doogan dated 11 December 2015 and covers the following matters:

8.1 The precise meaning of the Treaty of Waitangi exception;

8.2 The meaning of the chapeau to the Treaty of Waitangi exception;

8.3 The legal effect of the Treaty of Waitangi clause in dispute settlement proceedings, particularly the interpretation of paragraph 2 of the clause;

8.4 The scope of investment disputes to which the Treaty of Waitangi clause might apply;

8.5 The scope of other exceptions in the TPP text;

8.6 Relevant procedural rules for investment arbitral tribunals;

8.7 The awards that may be given under investor-State dispute settlement (ISDS) and State-to-State dispute settlement proceedings;

8.8 The scope of ISDS and State-to-State dispute settlement with regard to the Treaty of Waitangi; and

8.9 A brief review of the case studies suggested by the claimants.

9. Save as where otherwise stated, the content of this affidavit is within my knowledge or based on information that came to my attention during the course of my work at the Ministry. I have knowledge of TPP as members of my Division in the Ministry worked as legal advisers on TPP during the negotiations. I did not deal with the detail of the negotiations, although I occasionally peer reviewed some of the advice provided by the TPP Legal Counsel. I have read the code of conduct for expert witnesses in the High Court Rules and agree to abide by it.

10. I conclude below the following in respect of the Treaty of Waitangi clause:

10.1 There is a significant body of decisions of international tribunals which provide support for my interpretation of the Treaty of Waitangi clause and which protect a Government's right to regulate to protect legitimate public policy interests, which in this case would include protecting Māori interests.

10.2 The Treaty of Waitangi exception provides protection for Māori to enable more favourable treatment to be given to Māori. It permits measures that would otherwise be inconsistent with the substantive obligations of TPP.

10.3 The clause is self-judging in that it is for New Zealand to determine what measures it deems necessary to accord more favourable treatment to Māori. There are domestic and international mechanisms which are intended to ensure that Māori are engaged in decisions on what is required for the Crown to meet its obligations under the Treaty of Waitangi.

10.4 To be covered by the exception the measures adopted by New Zealand should be directed towards providing Māori with more favourable treatment. In other

words, there should be a link between the measure and the rationale for the measure.

10.5 The chapeau to the Treaty of Waitangi exception is an expression of the principle of good faith. Arbitrary or unjustified discrimination can be looked at subjectively, according to whether it was done capriciously and in willful disregard of due process; or objectively, according to whether there is a rational connection between the measure and its objective and whether it was based in law and adopted in accordance with due process. A measure which met these standards would fall within the exception.

10.6 The threshold for a finding of arbitrary or unjustified discrimination is high. Actions which achieve a legitimate public purpose and are undertaken in accordance with due process would not fall within the chapeau to the exception.

10.7 Under paragraph 2 of the Treaty of Waitangi clause, the interpretation of the Treaty of Waitangi, including the nature of the rights and obligations under it, is not subject to either ISDS or State-to-State dispute settlement. This enhances the efficacy of the exception because the interpretation of the Treaty is outside the mandate of tribunals. What is subject to dispute settlement is the good faith application of the exception as articulated in the chapeau to the Treaty of Waitangi clause.

10.8 The exception operates in conjunction with other reservations and exceptions that are set out in the TPP text. Where these reservations and exceptions apply, there would be no need to rely upon the Treaty of Waitangi exception.

10.9 The substantive investment obligations in TPP contain clarifying footnotes and a Drafters' Note which set out the intention of the Parties as to the meaning of the obligations. In effect the right to regulate is included as an element of the substantive obligations of the investment chapter. These interpretative notes operate as constraints on overly broad interpretations of the substantive obligations by arbitral tribunals.

10.10 TPP contains a number of procedural and other rules relating to ISDS which would affect the manner in which ISDS claims may be considered by an arbitral tribunal. These provisions increase the control of the Parties over arbitral proceedings, increase transparency of arbitral proceedings, and encourage enhanced confidence in the decisions of arbitral tribunals.

10.11 An ISDS arbitral tribunal cannot issue an injunction or require New Zealand to change its law or policy. Awards are limited to the payment of monetary damages for losses suffered.

10.12 In the unlikely event an arbitral tribunal goes beyond its mandate and makes an award that is contrary to New Zealand public policy, the New Zealand High Court may set aside or refuse to recognise or enforce the award. This is a strong safeguard against egregious decisions of an arbitral tribunal in an investment dispute.

MEANING OF THE TREATY OF WAITANGI CLAUSE

11. The Treaty of Waitangi clause in TPP[1] reads:

Article 29.6: Treaty of Waitangi

(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

[1] True copies of the following chapters of the TPP are exhibited to my affidavit as Exhibit A: 9 "Investment" (including "Annexes 9-A to 9-L" and "Annexes I and II Cross-Border Trade in Services and Investment Non-Conforming Measures – New Zealand"), 28 "Dispute Settlement" and 29 "Exceptions and General Provisions". The entire agreement is available at: www.tpp.mfat.govt.nz/text. As noted on the exhibit, the final text of the agreement is still subject to legal verification. As Chapter 9 includes an "Article 9.6 bis", it is possible that the numbers of the chapter will be reordered following legal verification.

measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

12. The clause contains the following central elements:

12.1 a provision enabling New Zealand to adopt measures it deems necessary to accord more favourable treatment to Māori. including in fulfilment of obligations under the Treaty of Waitangi;

12.2 a proviso in the chapeau that such measures are not to be 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"; and

12.3 a provision regarding the manner in which the Treaty of Waitangi may be addressed under dispute settlement procedures which excludes the interpretation of the Treaty of Waitangi from dispute settlement, but not whether the measure is consistent with the chapeau.

13. I deal with each of these three elements in turn to ascertain their proper meaning in accordance with the customary international law rules of interpretation. The applicable law for the interpretation of treaties is international law. The Vienna Convention on the Law of Treaties 1969 provides the international law rules which international dispute settlement tribunals consistently use to interpret international agreements.[2]

14. There are 114 States, including New Zealand, which are parties to the Vienna Convention. The Convention and the rules of interpretation are regarded as "customary international law" which is a general practice of States followed from a sense of legal obligation. The rules of interpretation are contained in Articles 31 and 32 of the Vienna Convention[3] and comprise the following:

14.1 The fundamental rule is set out in Article 31(1) according to which treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be

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2 A true copy of section 3, "interpretation of treaties", together with the cover page and preamble, of the Vienna Convention on the Law of Treaties is annexed to my affidavit as Exhibit B.

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given to the terms of the treaty in their context and in the light of its object and purpose".

14.2 The context of a treaty includes its preamble as well as instruments, such as Agreed Minutes or Drafters' Notes, made between the parties in connection with the conclusion of the treaty (Article 31(2)). Subsequent agreements between the parties on the interpretation of the treaty are also taken into account together with the context (Article 31(3)).

14.3 Article 32 of the Vienna Convention provides for recourse to supplementary means of interpretation including the preparatory work of the conclusion of the treaty in order to confirm the meaning of the treaty or to determine the meaning when there is ambiguity. Such preparatory work (known as *travaux preparatoires*) could include the various drafts leading to the conclusion of a treaty. However, any such *travaux preparatoires* are of limited relevance where the meaning of the treaty is clear.

15. In the interpretation of the Treaty of Waitangi clause consideration will also be given to how similar words have been interpreted by international dispute settlement tribunals.

15.1 There is no doctrine of stare decisis or binding precedent in international investment arbitration law. This is consistent with the general approach of public international law that decisions are binding only as between the parties to a dispute.

15.2 This is provided for in Article 59 of the Statute of the International Court of Justice (ICJ) which states that decisions of the Court have no binding force except between the parties and in respect of the particular case.[4] This and other similar provisions are based upon the premise at international law that the consent of States is required for the initiation of binding dispute settlement and that therefore only those consenting States are bound by the decision. This is consistent with the consensual nature of international relations and the

[4] True copies of Articles 38 and 59 of the Statute of the International Court of Justice are annexed to my affidavit as Exhibit C.

fact that agreements between States, which vary considerably in their content, are entered into voluntarily.

15.3 Nevertheless, under Article 38(1)(d) of the Statute of the ICJ, judicial decisions are a subsidiary means for the determination of the rules of law.[5]

15.4 Therefore, while international courts and arbitral tribunals are not bound to follow the decision of a previous tribunal, most will rely on previous decisions to support their legal reasoning. Previous decisions are taken into account as examples of how similar issues have been resolved in earlier cases in an attempt to ensure consistency.

15.5 This is demonstrated by the increase in citations of earlier decisions by investment arbitral tribunals.[6] A review of such investment arbitral decisions will also show the extent to which they rely on the decisions of earlier tribunals.

15.6 It follows that despite the absence of a doctrine of stare decisis, there is a de facto system of precedent whereby tribunals consider and adopt the reasoning of previous tribunals.[7]

16. I note, however, that international investment agreements vary considerably in their precise wording. A decision of a previous tribunal may therefore be relevant, but may not necessarily be exactly on point. The text and the context of a particular treaty will be of most relevance for the interpretation of the treaty. For this reason, the decisions of past arbitral tribunals do not always provide an accurate guide for how another tribunal may decide a case with a similar fact situation. It is therefore important to undertake a comparison of the legal terms and their context in order to draw appropriate conclusions.

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5 True copies of Articles 38 and 59 of the Statute of the International Court of Justice are annexed to my affidavit as Exhibit C.

6 Jeffrey P Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence (2007) 24(2) J. Int'l Arb. 129-158. A true copy of this article is annexed to my affidavit as Exhibit D.

7 Christoph Schreuer and Mathew Weiniger, "A Doctrine of Precedent?" in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008) 1188-1206 at 1196. A true copy of this article is annexed to my affidavit as Exhibit E.

17. The importance of both the international law rules of interpretation and the terms of the particular agreement under which a dispute has been brought is clear from the law which governs decision making by a dispute settlement tribunal. Arbitral tribunals are bound by the rules under which they are constituted. Those rules generally provide for decisions to be made consistent with international law, including the international law rules of interpretation, and the terms of the agreement itself. By way of example, Article 9.24.1 (Governing Law) of the TPP Investment Chapter provides that an investment tribunal shall decide the issues in dispute in accordance with the TPP Agreement and applicable rules of international law.[8]

Adoption of measures to accord more favourable treatment to Māori

18. Paragraph 1 of the Treaty of Waitangi clause provides that *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. Each of these elements needs to be analysed in order to interpret the provision as a whole.

Nothing in this Agreement shall preclude…

19. The use of the introductory words "nothing in this Agreement shall preclude" means that the provision is an exception to the Agreement which permits measures which would otherwise be inconsistent with the provisions of the Agreement.

19.1 This interpretation is reinforced by the placement of the clause in Chapter 29 entitled "Exceptions". It is an exception to *all the substantive obligations* contained in the Agreement.

[8] Footnote 34 to Article 9.24.1 provides for greater certainty that this is without prejudice to any consideration of the domestic law of the responding State party when it is relevant to the claim as a matter of fact.

19.2 This is consistent with the way in which the WTO Appellate Body has interpreted similar words in Article XX of the General Agreement on Tariffs and Trade 1994 (the GATT 1994).[9]

19.3 The relevant text in Article XX of the GATT 1994 reads: "nothing in this Agreement shall be construed to prevent the adoption .... by any contracting party of measures". The words "nothing in this Agreement" was interpreted by the WTO Appellate Body in *US – Gasoline* to encompass exceptions from all the obligations in the GATT.[10]

...the adoption by New Zealand of measures it deems necessary

20. It is for New Zealand to adopt the measures it deems necessary to accord more favourable treatment to Māori. This is consistent with the nature of international law as a body of rules which primarily guides States, and international agreements as agreements between States and under which States exercise rights.[11] It is also consistent with the position at international law that New Zealand is a State and operates as a single entity on the international plane. On the international stage, and in international dispute settlement, it is New Zealand as a State that is recognised as representing the Government and people of New Zealand.

21. There are also domestic and international mechanisms which are intended to ensure that Māori are engaged in decisions on what is required for the Crown to meet its obligations under the Treaty of Waitangi. Domestically such processes include the Waitangi Tribunal, treaty settlement processes, Parliament, court proceedings, and legislation requiring decision-makers to take into account the principles of the Treaty of Waitangi.[12] Internationally such processes include the complaints mechanisms under the Convention on the Elimination of All Forms of Racial Discrimination and under the

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9 *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, 29 April 1996, p. 24. A true copy of this report is annexed to my affidavit as Exhibit F.

10 *US – Gasoline*, p. 24.

11 Robert Jennings & Arthur Watts (ed), Oppenheim's International Law, Vol 1 Peace (9th ed) (Oxford University Press, Oxford, 2008), pp 14-16. A true copy of pages 14 to 17 and the title page of this book is annexed to my affidavit as Exhibit G.

12 See for example section 8 of the RMA, which provides that "In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

International Convention on Civil and Political Rights, which enable persons to bring complaints to the attention of the United Nations human rights bodies.

22. The fact that under the Treaty of Waitangi clause it is New Zealand that decides whether measures are necessary to accord more favourable treatment to Māori is consistent with the notion that at international law it is New Zealand that is the party to the dispute settlement proceedings. However, the domestic processes in which Māori would be engaged in the process of developing the measures which provided more favourable treatment to Māori would take place well before any dispute settlement proceedings.

23. According to the ordinary meaning of the words, the Treaty of Waitangi clause is "self-judging". The inclusion of the words "it deems necessary" means that it is for New Zealand to determine the measures which it deems or considers necessary to accord more favourable treatment to Māori. This is a subjective standard according to what New Zealand deems necessary. I do not consider that it is for an arbitral tribunal to determine whether such measures are "necessary" according to some objective standard.

23.1 This interpretation is supported by the reasoning of the International Court of Justice in the *Nicaragua* case. In that case the Court considered claims for violation of a treaty between Nicaragua and the United States which permitted a party to take measures "necessary to protect its essential security interests". It contrasted this provision with Article XXI of the GATT 1994 which permits a State to take measures "it considers necessary for the protection of its essential security interests". The Court describes the latter provision as "self-judging", and took the view that the former was to be interpreted objectively.[13]

23.2 While Article XXI of the GATT 1994 uses the phrase "it considers necessary" and the Treaty of Waitangi exception uses the phrase "it deems necessary" there is no substantive difference between the two phrases. Both clearly

[13] *Military and Paramilitary Activities (Nicaragua v United States)* 1986 I.C.J. Reports, 14 at [116-117]. A true copy of the title pages, headnote and pages 115 to 117 of this judgment are annexed to my affidavit as Exhibit 11. The full judgment is available at: www.icj-cij.org.

indicate that the clause is self-judging. They are to be contrasted with clauses, such as that interpreted in the *Nicaragua* case, which do not contain any such qualifying language.

23.3 I do not expect, therefore, that arbitral tribunals will seek to substitute their judgement for the judgement of New Zealand as to what measures it deems necessary to accord more favourable treatment to Māori. However, a tribunal would have the competence to consider whether the exception had been applied in good faith. This is dealt with later in this affidavit in relation to the chapeau to the Treaty of Waitangi clause.[14]

...to accord more favourable treatment to Māori...

24. The treatment that may be accorded to Māori is "more favourable" treatment. The reference to "more favourable" treatment provides a counterpoint to the use of the phrase "no less favourable" treatment in the substantive obligations in international investment agreements of "national treatment" and "most-favoured-treatment".

24.1 Both these obligations are relative standards which means that a comparative test is applied which looks at the treatment accorded to foreign investors compared to national or other foreign investors respectively.[15]

24.2 However, there are other substantive obligations, such as expropriation, which do not require a comparator with whom to compare the more favourable treatment to Māori. In such circumstances the "more favourable treatment" could be treatment that is more favourable than what has been provided in the past.

24.3 In my view it is the nature of the substantive obligations being claimed by an investor that would determine the comparator, and whether there was a comparator. As the Treaty of Waitangi clause is *sui generis*, I know of no arbitral decisions that have interpreted a similar reference to "more favourable

[14] See paragraphs 44 to 50.

[15] UNCTAD, Most-Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements (United Nations, New York 2010) 23-24. A true copy of the title pages, preface, table of contents, abbreviations, executive summary and pages 1 to 36 this report is annexed to my affidavit as Exhibit I.

treatment". It is therefore possible that an arbitral tribunal would seek to find a basis for the interpretation of "more favourable treatment" in a comparative test which looks at the treatment provided to Māori compared to foreign investors or New Zealand investors.

24.4 For the exception to apply, the treatment accorded to Māori would have to be "more favourable" treatment. Treatment that was different between Māori and others, but not more favourable to Māori, would not need to engage the exception.

24.5 The word "Māori" is not defined. It is likely, therefore, that a tribunal would interpret the term, as an indigenous term, in light of New Zealand law and practice. The term would probably be given a broad meaning consistent with New Zealand law and practice, and apply to Māori individuals or organisations.

24.6 In my view, given the self-judging nature of the clause, it would be for New Zealand to determine the Māori individuals or organisations to which more favourable treatment would be accorded.

25. This means that in order to be covered by the exception, the measures adopted by New Zealand should be directed towards providing *Māori* with more favourable treatment. In other words, there should be a link between the measure, and the rationale for the measure, namely to provide more favourable treatment to Māori. If the key rationale for the measure was to provide more favourable treatment to Māori, the exception would be applicable even if non-Māori also received some benefit from the measure. Conversely, if Māori were only incidentally affected by a measure designed to fulfil a general public policy purpose, the exception may not be applicable.

26. While the Treaty of Waitangi exception allows New Zealand to adopt measures that are more favourable to Māori, TPP does not prevent the Crown from developing and implementing policy measures of general application that are informed by Māori interests but do not favour Māori. For example, there are other provisions in TPP which would enable New Zealand to take measures to protect human health and the

environment and which reserve regulatory space in these and other areas. I examine these in further detail later in this affidavit.[16]

27. The allegation has been raised that entering into TPP could constrain the Crown's ability to provide redress to Māori due to the broad extent of the new substantive obligations that would be assumed under TPP.

28. However, while TPP has more negotiating partners and more chapters than New Zealand's other FTAs, and includes additional substantive obligations, it is not dissimilar to New Zealand's other bilateral and regional FTAs, particularly with respect to trade in goods, trade in services and investment obligations.

28.1 TPP includes chapters that are additional to New Zealand's FTAs because of the importance attached to certain issues by the negotiating parties. These chapters do not impose significant additional obligations that are not contained in general in New Zealand's other bilateral and regional FTAs.

28.2 TPP includes chapters on State-Owned Enterprises and Regulated Monopolies, Small and Medium Enterprises, and Regulatory Coherence. (The State-Owned Enterprises Chapter imposes additional disciplines to prevent abuse of monopoly power. The Small and Medium Enterprises (SME) Chapter promotes information sharing on SMEs and the Regulatory Coherence Chapter promotes best practice in regulatory practices.) It includes a more substantive Transparency Chapter, which in TPP also includes Anti-Corruption. TPP is also more explicit in its coverage of Financial Services, Telecommunications and Electronic Commerce, each of which have a stand-alone chapter, rather than being subsumed under the services or other chapters which generally have covered these disciplines in other FTAs.

29. The Intellectual Property Chapter does contain additional obligations not present in other FTAs including in respect of traditional knowledge and plant varieties. However sufficient flexibility to protect Māori interests is included within the Chapter itself without the need to rely upon the Treaty of Waitangi exception. In particular there is a

[16] See paragraphs 98 to 103.

New Zealand specific Annex 18-A which addresses the obligation to accede to the International Convention for the Protection of New Varieties of Plants (UPOV) 1991 or to adopt a *sui generis* plant variety rights system that gives effect to the UPOV. The Annex includes an UPOV-specific variant of the Treaty of Waitangi clause which permits measures to protect indigenous plant species in fulfilment of obligations under the Treaty of Waitangi, provided they are not used as a means of arbitrary or unjustified discrimination, and limits access to dispute settlement proceedings over the consistency of such measures with the obligation to accede to UPOV or adopt a *sui generis* plant variety rights system. This provides the flexibility necessary to protect Māori interests.

30. It has also been alleged that investor-State dispute settlement in TPP would constrain the Crown's ability to provide redress to Māori because of the "chilling effect" of potential investment arbitral claims. I see the notion of a "chilling effect" as being a result of an assessment of the risk of investment disputes being brought, and being successfully brought, against a Government. The potential for arbitral claims under investor-State dispute settlement (ISDS) already exists as a result of New Zealand's existing FTAs. TPP would not fundamentally alter the assessment of risk of an investment claim being brought, although the risk profile may increase since investors from the United States are statistically the highest users of ISDS. While TPP does expand the scope of some investment rights, it also clarifies the nature of those rights and sets parameters around the bringing of investment claims. This will assist in the assessment of the risk of successful investment claims under TPP. I examine the clarifications contained in TPP later in this affidavit.[17]

...in respect of matters covered by this Agreement...

31. The measures which accord more favourable treatment may be "in respect of matters covered by this Agreement". This is a broad characterisation: the exception covers all areas of the Agreement where more favourable treatment may be provided to Māori in circumstances where such a measure would otherwise be a breach of an obligation under the Agreement.

[17] See paragraphs 69 to 90.

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...including in fulfilment of its obligations under the Treaty of Waitangi

32. The measures that may be adopted by New Zealand to provide more favourable treatment to Māori are those that New Zealand deems necessary "including in fulfilment of its obligations under the Treaty of Waitangi".

32.1 The use of the word "including" means that the measures do not need to be *required* to fulfil obligations under the Treaty of Waitangi. What is determinative is that measures are adopted by New Zealand which give more favourable treatment to Māori. It is the treatment that triggers the exception and such treatment must be more favourable to Māori.

32.2 The word "including" was added to the chapeau during negotiations of the New Zealand-Singapore Closer Economic Partnership Agreement in recognition of the "closing the gaps" policy of the Government of the day.[18]

CHAPEAU TO THE TREATY OF WAITANGI CLAUSE

33. The chapeau to the Treaty of Waitangi clause reads: "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..."

33.1 The chapeau to the Treaty of Waitangi clause is an expression of the principle of good faith. While New Zealand has the right to invoke the Treaty of Waitangi exception, as with any right under international law, it must be exercised in good faith so as not to frustrate or defeat the legal obligations of the holder of the right under the substantive provisions.

33.2 The WTO Appellate Body has interpreted a similar, but not identical, chapeau to Article XX of the GATT 1994 as meaning that the right must be exercised "reasonably". In *US – Gasoline*, the WTO Appellate Body considered that the particular exceptions must be applied "reasonably" with due regard both to the

[18] See submission released under the Official Information Act a true copy of which is annexed to my affidavit as Exhibit J.

legal duties of the party claiming the exception and the legal rights of the other parties.[19]

33.3 In a subsequent case the WTO Appellate Body referred more explicitly to the chapeau to Article XX as an expression of the principle of good faith and went on to state that the principle prohibits the abusive exercise of a State's rights and ensures that the treaty obligation is exercised bona fide, ie reasonably.[20]

33.4 While the WTO Appellate Body referred to what is in effect a caveat of "reasonableness" as part of the principle of good faith which would condition the exercise of the right to adopt measures that are more favourable to Māori, the purpose of this, as with Article XX of the GATT 1994, is to prevent abuse of the exception.[21]

34. The chapeau provides that measures which accord more favourable treatment to Māori are not to be 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*. This contains the elements that there must be discrimination, that the discrimination must be arbitrary or unjustified, that it must be against persons of the other Party, or it must be a disguised restriction on trade in goods, trade in services and investment.

Discrimination

35. Treatment that is more favourable to Māori may mean that other persons are treated less favourably. The question is the extent to which such difference in treatment would fall within the meaning of "discrimination".

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19 *US – Gasoline*, Appellate Body Report, p. 22; *United States – Import Prohibition of Certain Shrimp and Shrimp Products* AB-1998-4, Appellate Body Report, 8 October 1998, [158]. A true copy of Section I "introduction" and Section VI "appraising section 609 under Article XX of the GATT 1994" of this report is annexed to my affidavit as Exhibit K. As many arbitral awards are often lengthy and contain an exposition of the procedural history and the arguments of the parties, I have annexed the parts of the award that contain the decision. The full awards can be obtained from www.wto.org (WTO cases) and www.italaw.com (arbitration awards).

20 *US – Shrimp*, Appellate Body Report [158].

21 *Brazil – Measures Affecting Imports of Retreaded Tyres* AB-2007-4 Appellate Body Report, 3 December 2007 [227]. A true copy of Section I "introduction", Section III "issues raised in this appeal" Section IV "background and measure at issue", Section V "the panel's analysis of the necessity of the import ban", Section VI "appraising section 609 under Article XX of the GATT 1994", Section VI "the panel's interpretation and application of the chapeau of article XX of the GATT 1994", Section VII "the European Communities' claims that the MERCOSUR exemption is inconsistent with article I:1 and article XIII:1 of the GATT 1994" and Section VIII "findings and conclusions" of this report are annexed to my affidavit as Exhibit L. *US – Shrimp*, Appellate Body Report [156]; *US – Gasoline*, Appellate Body Report, p. 22.

35.1 The WTO Appellate Body has interpreted the standard of discrimination in Article XX of the GATT 1994 as meaning something more than treatment which would otherwise be a breach of a substantive provision of the agreement.[22]

35.2 This could be used to suggest that "discrimination" is more than difference in treatment. In the case of most-favoured-nation treatment, for example, an assessment of a breach of this obligation requires not only the establishment of a difference in treatment between two foreign investors, but there must be a competitive disadvantage stemming from this difference in treatment.[23]

35.3 An analogy in domestic human rights law which may be an indication of the intention of the parties in using the term "discrimination" and therefore relevant for the interpretation of the exception, is that discrimination is differential treatment which gives rise to a material disadvantage.[24]

35.4 In any case the standard to be applied is not mere "discrimination" but *arbitrary* or *unjustified* discrimination.

Arbitrary or unjustified discrimination

36. The discrimination brought about as a result of measures more favourable to Māori must be "arbitrary" or "unjustified" in character.

36.1 According to the ordinary meaning of the word, "arbitrary" is something "based on the mere opinion or preference as opposed to the real nature of things; capricious, unpredictable, inconsistent".[25]

36.2 The term "unjustifiable" is "not justifiable, indefensible"[26] and the term "justifiable" is defined as "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible".[27]

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22 *US – Gasoline*, p. 23.

23 UNCTAD, 2010, p. 24.

24 *Ministry of Health v Atkinson*, [2012] NZLR 456 (C.A).

25 *The Shorter Oxford English Dictionary*, 4th ed, L. Brown (ed), (Oxford University Press, 1993), Vol 1 at 106.

36.3 The International Court of Justice in the *ELSI* case adopted essentially a subjective test and defined arbitrariness as a violation of 'the rule of law' and as a wilful disregard of due process of law, which shocks, or at least surprises, a sense of judicial propriety.[28]

36.4 The arbitral tribunal in *Noble Ventures v Romania* drew on the International Court of Justice in interpreting the phrase "arbitrary or discriminatory measures".[29] *National Grid v Argentina,* in interpreting a prohibition on "unreasonable or discriminatory" treatment, reviewed the previous cases on the interpretation of "arbitrary" discrimination and concluded that the terms 'arbitrary' or 'unreasonable' were substantially the same in the sense of something done capriciously, without reason.[30]

36.5 Arbitrary or unjustifiable has been seen by the WTO Appellate Body as the absence of basic fairness or due process.[31]

36.6 It follows that if a tribunal adopted a subjective test, "arbitrary or unjustified" discrimination would be interpreted as discrimination which is done capriciously, in wilful disregard of due process and in a manner which shocks a sense of propriety.

37. Further guidance on the interpretation of "arbitrary and unjustified discrimination may be sought from the way in which the WTO Appellate Body has interpreted the chapeau to Article XX of the GATT 1994 which has the following proviso which is similar to that in the Treaty of Waitangi exception: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…"

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26 *The Shorter Oxford English Dictionary*, 4th ed, L. Brown (ed), (Oxford University Press, 1993), Vol 2 at 3493.

27 *The Shorter Oxford English Dictionary*, 4th ed, L. Brown (ed), (Oxford University Press, 1993), Vol 1 at 1466.

28 *Electronica Sicula SpA (ELSI) (United States of America v Italy)* ICJ Judgment, 20 July 1989, 15. A true copy of this judgment is annexed to my affidavit as Exhibit M.

29 *Noble Ventures Inc v Romania* ICSID Case No ARB/01/11, Award, 12 October 2005 [176]. A true copy of the table of contents, abbreviations, Section A "details of the parties", Section B "details of the arbitrators", an extract from Section C "short identification of the case" and Section H "considerations and conclusions of the tribunal" of this judgment is annexed to my affidavit as Exhibit N.

30 *National Grid v Argentina* UNCITRAL, Award, 3 November 2008 [197]. A true copy of the table of contents and Section H "factual background" and Section VI "breach of the treaty" of this award is annexed to my affidavit as Exhibit O.

31 Appellate Body Report, *US – Shrimp*, [181].

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38. The WTO Appellate Body has interpreted the chapeau as containing three elements: the application of the measure must result in discrimination, such discrimination must be arbitrary or unjustifiable in character, and the discrimination must occur between countries where the same conditions prevail.[32] The second element is directly applicable to the Treaty of Waitangi exception as equivalent words are used.

38.1 The objective test developed by the WTO Appellate Body for an assessment of "arbitrary or unjustifiable" discrimination involves an analysis that relates primarily to the cause of or the rationale for the discrimination.[33] The WTO Appellate Body in *Brazil – Retreaded Tyres* indicated that where the reasons for discrimination bear no "rational connection" to the objective of the measure, or goes against that objective, the measure would not meet the requirements of the chapeau.[34] This interpretation has been confirmed by the WTO Appellate Body in *EC – Seal Products*.[35]

38.2 A similar objective test has been used by some arbitral tribunals. The tribunal in *EDF (Services) Ltd v Romania* used a set of objective criteria to assess whether a measure was arbitrary or unreasonable, including whether it served a legitimate purpose, was based on legal standards not prejudice or personal preference, was taken for the reasons claimed, and was adopted in accordance with due process.[36] Leading investment law academics have advocated adopting a similar approach to interpreting arbitrary or unreasonable discrimination.[37]

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32 Appellate Body Report, *US – Shrimp* [150].

33 Appellate Body Report, *Brazil – Retreaded Tyres* [226].

34 Appellate Body Report, *Brazil – Retreaded Tyres* [227-231].

35 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products ("Seal Products")* Appellate Body Report, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, at [5.306]. A true copy of the table of contents, table of cases cited, table of panel exhibits cited, abbreviations, Section 1 "introduction", Section 3 "issues raised in these appeals", Section 4 "background and overview of the measure at issue", Section 5 "analysis of the appellate body", Section 6 "findings and conclusions in the appellate body report" of this report is annexed to my affidavit as Exhibit P. The full award was annexed to the affidavit of Martin Wilfred Harvey of 7 July 2015 as exhibit E.

36 *EDF (Services) Ltd v Romania*, ICSID Case No, ARB/05/13, Award, 8 October 2009 [303]. A true copy of the table of contents, table of abbreviations, Section II "factual background", Section IV "the Tribunal's analysis", Section V "costs" and Section VI "decision" of the award is annexed to my affidavit as Exhibit Q.

37 Christoph H Schreuer 'Protection Against Arbitrary or Discriminatory Measures' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 183-198. A true copy of this article is annexed to my affidavit as Exhibit R; Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg et al (ed),

38.3 It follows that - adopting an objective test of arbitrary or unjustified discrimination arising from a measure which accords more favourable treatment to Māori - where the measure is based in law such as a Treaty settlement, was taken in order to provide more favourable treatment to Māori and not for an ancillary reason, and was adopted in accordance with due process, it would be justified under the chapeau to the Treaty of Waitangi exception.

Against persons of the other Party

39. In the Treaty of Waitangi exception, the discrimination must be against *persons* of the other Parties. This is different from the comparable Article XX chapeau where the discrimination must be between *countries where the same conditions prevail.*

39.1 The comparator in terms of a discrimination analysis under the chapeau to the Treaty of Waitangi exception is therefore persons (natural or juridical) of another Party to the Agreement.

39.2 There is no comparable "likeness" analysis as in Article XX of the GATT 1994 where the comparator is countries *where the same conditions prevail.*

39.3 While there is no "likeness" comparison, the WTO jurisprudence on the interpretation of the chapeau in Article XX is still relevant as it addresses the second element to the chapeau, arbitrary or unjustifiable discrimination as examined in the previous sub-section.

39.4 In any case, the discrimination must be vis-à-vis *persons of the other Parties.* It is likely in any such analysis that a tribunal will take into account the treatment accorded to persons of the other Parties as well as Māori and non-Māori.

39.5 It follows that if persons of the other Parties are treated on equivalent terms to non-Māori, or where any differential treatment does not impact materially on

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International Investment Law: A Handbook (Hart Publishing Oxford 2015) 790-806 at [32]. A true copy of this article is annexed to my affidavit as Exhibit S.

persons of the other Parties, the measure is unlikely to constitute arbitrary or unjustified discrimination.

Or a disguised restriction on trade in goods, trade in services and investment

40. The Treaty of Waitangi clause refers to "arbitrary discrimination", "unjustified discrimination" and a "disguised restriction" on trade in goods, trade in services and investment. This wording is similar to the wording of Article XX of the GATT 1994 which has been interpreted by the WTO Appellate Body in the following terms:

> "Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[38]

41. It follows that these three terms have been seen as imparting meaning to each other, so that a "disguised restriction" would embrace "restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of" the Treaty of Waitangi exception. The purpose is to avoid abuse or the illegitimate use of an exception to the substantive rules in the Agreement.[39]

42. Furthermore, the ordinary meaning of the words, "disguised restriction" on trade in goods, trade in services and investment, would mean a restriction that was "concealed",

[38] Appellate Body Report, *US – Gasoline*, p. 25.

[39] Appellate Body Report, *US – Gasoline*, p. 25.

or taken under the guise of a legitimate measure. Where a measure has a legitimate objective and that legitimate objective is being pursued following due process and not capriciously, even though there may be a resulting restriction on trade in goods, trade in services or investment, it would not constitute a "disguised restriction" contrary to the terms of the chapeau.

43. To lower the standard so that any restriction on investment was interpreted as a "disguised restriction" on investment would render the Treaty of Waitangi exception devoid of any meaning. This would be contrary to the rules of international treaty interpretation that give effect to all the words of a treaty. As the WTO Appellate Body has stated:

> One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[40]

LEGAL EFFECT OF THE TREATY OF WAITANGI CLAUSE IN DISPUTE SETTLEMENT PROCEEDINGS

44. Paragraph 2 of the Treaty of Waitangi exception clause provides:

> 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.

45. The first sentence of the paragraph states clearly that the Parties agree that the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of the Agreement.

[40] Appellate Body Report, *US – Gasoline*, p. 23, drawing inter alia on the International Court of Justice in *Corfu Channel Case* 1949 ICJ Reports, p. 24.

46. There are two types of dispute settlement proceedings under the Agreement: Chapter 28 entitled "Dispute Settlement" which sets out the procedures for State-to-State dispute settlement and Section B of Chapter 9 entitled "Investor-State Dispute Settlement" which sets out the procedures for ISDS.

46.1 The words "dispute settlement" should be interpreted to cover both types of dispute settlement procedures.

46.2 This is reinforced by the context of the use of the term "dispute settlement" not only in the titles to the respective provisions, but also in other provisions of the TPP. For example, Article 9.21.6 provides for the Parties to give guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 to arbitrators selected to serve on investor-State dispute settlement tribunals under that Article. Further, Annex 9-H refers to certain decisions which are "not subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement)".

46.3 It follows that the interpretation of the Treaty of Waitangi, including the nature of the rights and obligations arising under the Treaty, is not subject to State-to-State or ISDS.

46.4 This enhances the efficacy of the Treaty of Waitangi exception because it means that the interpretation of the Treaty of Waitangi is not subject to a decision by an international arbitral tribunal. However, as part of its competence to enquire into whether the exception has been applied in good faith, a tribunal may seek evidence of the obligations under the Treaty of Waitangi. In such circumstances New Zealand's domestic law may be raised as a matter of fact before the tribunal.

47. The second sentence of paragraph 2 states specifically that State-to-State dispute settlement may otherwise apply to the Treaty of Waitangi exception. The third sentence adds a caveat that a State-to-State arbitral panel may only determine whether any measure under paragraph 1 is inconsistent with a Party's rights under the Agreement.

47.1 This means that the terms of reference of a Panel established under Article 28.7.1 would be to examine and determine legal complaints from a Party alleging a violation of that Party's rights under the Agreement.

47.2 As the chapeau relates to the right of a Party to ensure that its persons are not subject to arbitrary or unjustified discrimination, it follows that a State-to-State arbitral tribunal would be able to inquire into whether a measure which accorded more favourable treatment to Māori fell within the chapeau to the Treaty of Waitangi exception.

48. There is some ambiguity created by the absence of any specific reference to Investor-State dispute settlement in the second and third sentences of paragraph 2 of the exception. It is clear that an Investor-State arbitral tribunal is prevented by the first sentence of paragraph 2 from interpreting the Treaty of Waitangi because of the reference to the term "dispute settlement provisions", which is a general term applying to both ISDS and State-to-State dispute settlement. However, despite the absence of a specific reference to ISDS in the last two sentences of paragraph 2, it is reasonable to conclude that an investor-State arbitral tribunal would be able to consider the good faith application of the exception, and in particular whether the measures adopted by New Zealand fell within the chapeau to the exception. This would be consistent with the reference to "investment" in paragraph 1 of the Treaty of Waitangi exception.

49. The ability of a tribunal to examine the consistency of a measure with the chapeau to the Treaty of Waitangi exception is also consistent with the competence of a tribunal to inquire into whether a right has been exercised in good faith and with the nature of the chapeau as a proviso which prevents abuse of a broad exception from the substantive obligations under the Agreement. Nevertheless, it should be recalled that the threshold for arbitrary or unjustified discrimination is high and actions which achieve a legitimate public purpose and undertaken in accordance with due process and not arbitrarily would not fall within the chapeau to the exception.

50. There remains an issue of the burden of proof in international dispute settlement proceedings. The usual rule is that the party asserting a fact or making a claim bears the

initial burden of making a *prima facie* case relating to that fact or claim. The burden then shifts to the responding party to rebut that fact or claim.

50.1 The "burden" of demonstrating that a measure provisionally justified under the Treaty of Waitangi exception does not constitute an abuse of the exception would rest with New Zealand as the party invoking the exception.[41]

50.2 While this is expressed as a "burden" it means in essence that New Zealand would need to supply evidence necessary to support its argument that the measure which provided more favourable treatment to Māori was not arbitrary or unjustified discrimination or a disguised restriction on trade in goods, trade in services and investment.

50.3 This is unlikely to be a difficult burden to discharge. What is required is to make a *prima facie* case based on evidence presented.

SCOPE OF INVESTMENT DISPUTES TO WHICH THE TREATY OF WAITANGI CLAUSE MIGHT APPLY

51. For the Treaty of Waitangi clause to arise before an investor-State arbitral tribunal, there would first need to be an international investment dispute. A dispute arises where an investor claims that a State has breached a substantive obligation under the investment chapter, an investment authorisation or an investment agreement, and the claimant has suffered loss as a result of that breach. I will deal briefly with each of these, highlighting where TPP can be differentiated from New Zealand's existing FTAs. This will assist in clarifying the scope of investment disputes to which the Treaty of Waitangi clause might apply.

52. Before explaining the substantive obligations, it is necessary to explain the scope of investments and investors to which the dispute settlement provisions of TPP would apply. I deal here with the rules under the investment chapter, not under domestic law. An investor may well have rights under domestic law for breach of contract or conduct contrary to domestic legislation. These rights and potential claims stand independently of rights under investment provisions. However as will be explained later, once an

[41] Appellate Body Report, *US – Gasoline*, p. 22.

BEFORE THE WAITANGI TRIBUNAL

WAI 1427
WAI 2522
WAI 2523
WAI 2530
WAI 2531
WAI 2532
WAI 2533
WAI 2535

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF applications for urgent hearings concerning the Trans-Pacific Partnership Agreement by the applicants for Wai 1427, 2522, 2523, 2530, 2531, 2532, 2533 and 2535

CROWN MEMORANDUM REGARDING INQUIRY PLANNING

27 November 2015

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