MAY IT PLEASE THE TRIBUNAL:

1. On 18 November 2015 the Presiding Officer, His Honour Judge Doogan, convened a teleconference to discuss the issues for inquiry, expert evidence and timetabling of the inquiry. Following the teleconference, Judge Doogan directed that parties file memoranda on or before 4pm, Friday 27 November 2015, in accordance with the his earlier direction of 30 October 2015 and directed that a number of further matters also be addressed including the commissioning of Ms Amokura Kawharu as an expert witness for the Tribunal.[1]

2. The Crown files this memorandum in accordance with those directions.

3. On 30 October 2015, Judge Doogan, directed that, as soon as practicable following the release of the text of the Trans-Pacific Partnership (TPP), Dr Ridings and Professor Kelsey, experts for the Crown and claimants respectively, meet and endeavour to agree upon:[2]

   3.1 Suitable examples or case studies that would facilitate a focused inquiry based on the two issues identified previously by the Tribunal;[3] and

   3.2 Identification of any further issues or an agreed refinement of the Tribunal issues for inquiry.

4. His Honour further directed that, following that process, parties file memoranda:[4]

   4.1 Recording the views of the experts on issues/case studies;

   4.2 Noting any requested changes or refinements of the issues identified;

   4.3 Setting out an agreed and indicative timetable and confirming anticipated hearing timeline.

1 Wai 2522, #2.5.17 at [8]-[9].
2 Wai 2522, #2.5.15 at [26].
3 Wai 2522, #2.5.9 at [74], set out in at paragraph 8 of this memorandum.
4 Wai 2522, #2.5.15 at [27].

5. Due to timing and availability constraints, experts for claimants and the Crown have not met to discuss the issues prior to the preparation of this memorandum.

6. At 10 am 27 November 2015, a joint memorandum was filed by claimant Counsel seeking leave to file memoranda including case studies by 5 pm Monday 30 November 2015. The Crown sets out preliminary submissions in relation to case studies in this memorandum. Given that claimants' case study proposals will now not be available until Monday, and given that government agencies relevant to the case studies proposed earlier are assessing those proposals and developing refinements or alternatives to suggest to the Tribunal and parties. The Crown seeks leave to file further submissions by 5 pm Wednesday 2 December 2015 with detailed comments on proposed scenarios.

Procedural planning

7. During the judicial teleconference on 18 November 2015 the Tribunal indicated that it would conduct a single-stage inquiry with a provisional hearing set down for 14-18 March 2016. The Tribunal indicated that, if the parties were unable to reach agreement on scope and issues, the Tribunal would make final determinations as to those matters following receipt of submissions on 27 November 2015.

8. The Crown notes that agreement has not been reached between the parties on procedural matters.

Scope

9. In its decision on urgency the Tribunal held that an urgent inquiry should be granted for the following specific issues: [5]

   9.1 Whether or not the Treaty of Waitangi exception clause ('the Treaty clause') is indeed the effective protection of Maori interests that it is said to be; and

   9.2 What Maori engagement and input is now required over steps needed to ratify the TPP (including by way of legislation and/or changes to Government policies that may affect Maori).

5 Wai 2522, #2.5.9 at [74].

10. On 20 November 2015 the Crown filed a memorandum updating the Tribunal on in the Ministry of Foreign Affairs and Trade program for TPP engagement and signature.

11. The provisional hearing timing (March) is realistic but still constitutes a truncated inquiry timeline under conditions of urgency. The Tribunal has noted that the TPP is complex and wide ranging and is aware that there is a direct correlation between breadth, timing and the robustness of any inquiry. As previously submitted, the Crown considers that the Tribunal's statement of issues rightly focuses the inquiry on particular Treaty issues which could benefit from the expertise of the Tribunal and could usefully inform the process between now and ratification.[6]

12. Addressing those matters robustly will be a considerable undertaking given that a proper understanding of the effect and operation of the Treaty clause will include understanding the interface of the clause with other measures such as general exclusions and the operations of the dispute resolution mechanisms (including both state-to-state and investor-state measures). The Crown accordingly submits that the scope proposed by the Tribunal should be confirmed without further amendment.

Statement of Issues

13. In response to the Tribunal's question: "whether or not the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be" the Crown proposes that the following legal questions will need to be addressed:

    13.1 What is the precise meaning of the Treaty of Waitangi clause?

    13.2 What is the precise meaning of the chapeau to the Treaty of Waitangi clause? How is the chapeau likely to be interpreted by an international arbitral tribunal?

    13.3 What is the legal effect of the Treaty of Waitangi clause? How would it operate with respect to international investment disputes?

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6 Wai 2522, #3.1.69.

13.4 What is the scope of the investment disputes to which the Treaty of Waitangi clause might apply?

13.5 What is the scope of other exceptions that are applicable to the TPP investment chapter? How do these other exceptions relate to the Treaty of Waitangi clause?

13.6 What, if any, procedural or other rules for ISDS affect the manner in which the Treaty of Waitangi clause is considered by an arbitral tribunal?

13.7 What awards may be given by tribunals under ISDS and under State-to-State dispute settlement?

13.8 What differences, if any, are there between the scope and implementation of ISDS and State-to-State dispute settlement with regards to the Treaty of Waitangi?

14. The second issue is straightforward on its face: "What Maori engagement and input is now required over steps needed to ratify the TPP (including by way of legislation and/or changes to Government policies that may affect Maori."

Case Studies

15. The Crown considers that this inquiry can properly be conducted by reference to the above statement of legal issues and these issues should remain the Tribunal's primary focus.

16. If hypothetical scenarios are to be used, the Crown proposes that they be used to demonstrate and test the effect of the TPP as a whole on the set of facts. The Treaty of Waitangi exception does not operate in isolation from other relevant provisions and exceptions in the TPP. Furthermore, the TPP, including the Treaty of Waitangi exception clause, does not operate in isolation from New Zealand's domestic law, including provisions which require the principles of the Treaty of Waitangi to be taken into account.

17. The use of any hypotheticals would also be greatly assisted by ensuring those hypotheticals:

17.1 contain 'agreed facts';

17.2 are sufficiently well defined that the issue of relevance to the inquiry can be addressed in directly;

17.3 are consistent with current Tribunal jurisprudence;

17.4 involve situations that would actually trigger the use of the Treaty clause; and

17.5 have some realistic nexus to current or likely Crown action (in order for the findings of the Tribunal to have practical benefit).

18. Immediately prior to the judicial teleconference on 18 November 2015, the claimants proposed three scenarios relating to energy and resource extraction, costs of and access to medicines, and natural resources (freshwater).[7]

19. The Crown understands that the claimants may propose that these or similar case studies be proceeded with and, as set out in the introduction seeks leave to file submissions on these proposals on Wednesday 2 December 2015. This would enable relevant Crown agencies to consider the case studies and contribute to their refinement or to offer alternatives. The following preliminary submissions are made in advance of the claimants final proposals being received.

20. On the assumption that the claimants do propose the same scenarios, the Crown submits that Scenario 1 (fracking) as currently written may be of limited utility for illustrating the legal application of the Treaty of Waitangi exception as it requires further factual certainty, currently fails to provide adequate recognition of the relevant domestic legal and regulatory contexts, and may not trigger the Treaty clause. If the claimants wish to continue with this scenario, the Crown would propose some refinements to ensure that it is useful.

21. Scenario 2 (access to and cost of pharmaceuticals) is unlikely to trigger the operation of the Treaty clause and in the scenario as written, the TPP would have no impact on PHARMAC's assessment. There are also many factors that affect PHARMAC's ability to fund pharmaceuticals not only the rules in a Free

[7] Wai 2522, #3.1.81 and 3.1.81(a).

Trade Agreement (e.g. exchange rate fluctuations). A full discussion of such factors and whether they constitute a breach of the Treaty of Waitangi would involve expanding the proceedings well beyond the scope already set down by the Tribunal.

22. Scenario 3 relating to freshwater issues was accompanied by submissions on behalf of the New Zealand Maori Council and built on earlier submissions made in person during judicial conferences.

23. As the Tribunal is aware, the Waitangi Tribunal inquiry into National Freshwater and Geothermal Resources Inquiry (Wai 2358) issued its Stage 1 report in 2012. The Waitangi Tribunal found in the first stage of its that inquiry that Māori at 1840 had rights and interests in specific water bodies for which the closest English law equivalent was 'ownership', and that such rights were confirmed, guaranteed and protected by the Treaty. It said those rights were generally exclusively to control the access to and use of fresh water. Those rights have been modified by the Treaty to the extent that the Treaty provided for: the sharing of the water resource with all New Zealanders; conferred on the Crown responsibility for government of the nation as a whole, which requires the balancing of many interests; and provided for Maori and settlers to benefit from the development of their respective property interests.

24. The Tribunal has stated that stage two of the freshwater inquiry will consider whether the rights found to exist in stage one are adequately recognised and provided for in current and proposed laws and policies, including in relation to the fresh water reforms.

25. Stage two of those proceedings are currently adjourned to 22 February 2016, partly to enable the Crown and the Iwi Leaders Group to undertake good faith negotiations in relation to addressing iwi/hapū rights and interests in freshwater. Those negotiations are currently well underway with the Crown providing regular updates to the Waitangi Tribunal. . The adjournment was directed by the presiding officer of the inquiry after considering submissions by all parties, including submissions from the New Zealand Maori Council that raised similar issues as those being raised through proposed Scenario 3 and in accompanying New Zealand Maori Council submissions. Utilising this scenario as a case study runs a real risk of cutting across the adjournment decision

already made by the Water and Geothermal Resources Tribunal and inserting Stage 2 of that inquiry into the TPP inquiry.

26. The Crown further submits that the claimants' Scenario 3 is highly unlikely to trigger the Treaty of Waitangi exception or the investor-state dispute settlement provisions in the TPP because of the following provision in New Zealand's Annex II: Non-conforming measures to the TPP chapter on the Cross Border Trade in Services:

> New Zealand reserves the right to adopt or maintain any measure with respect to water, including the allocation, collection, treatment and distribution of drinking water. This reservation does not apply to the wholesale trade and retail of bottled mineral, aerated and natural water.

27. This provision allows New Zealand to adopt measures with respect to water that do not offer foreign investors of other TPP Parties the same rights as New Zealanders, including Maori, with respect to the obligations concerning:

27.1 National Treatment (Articles 9.4 and 10.3);

27.2 Local Presence (Article 10.6);

27.3 Senior Management and Boards of Directors (Article 9.10)

28. In addition, the scenario is insufficiently developed to reflect current case law and Tribunal jurisprudence for example "interests in water" is so broad as to be unhelpful. The Water and Geothermal Resources Stage 1 report and discussions in front of that Tribunal ensure that any interests in water are clearly defined in relation to geographical scope, types of use, relationships with other interests, and so on.

29. The core issue of relevance to this inquiry being raised through this proposed scenario is whether the TPP will limit the Crown's ability to provide redress to meet its obligations to Maori and submits that testing this issue through other factual scenarios or through straight legal analysis may be more appropriate.

Brief for Expert Witness for the Tribunal

30. The Tribunal has indicated that it proposes to commission expert evidence from Ms Amokura Kawharu and has directed that counsel make submissions on the brief for Ms Kawharu. The Crown wishes to confirm that it does not oppose the Tribunal commissioning her as an expert witness.

31. The Crown notes that the scope of the inquiry has not yet been finalised and that it may be possible that, depending on determinations as to scope, further expert evidence may be required.

Matters relevant to commissioning Tribunal witnesses

32. The Tribunal may wish to take the following matters into account in relation to the commissioning of expert witnesses for this inquiry:

32.1 Tribunal commissioned expert witness(es) could usefully assist the Panel to understand the general architecture, content of and terminology used in the TPP but, prior to the evidence of experts commissioned by parties, should not provide preliminary opinions on matters to be addressed in the inquiry;

32.2 the experts commissioned by parties would provide affidavits setting out their analysis of the issues and the agreed scenarios. In the current circumstance, given that both Dr Ridings and Professor Kelsey have given extensive thought and preparation to these matters, it is anticipated that this evidence could be prepared within a relatively short timeframe;

32.3 after receiving the initial affidavits of the expert witnesses, the Tribunal witness(es) would meet with the parties' own expert witnesses; and

32.4 the Tribunal witness would then provide her analysis.

32.5 All expert witnesses (those commissioned by the Tribunal or by parties) provide oral testimony at the Tribunal hearings if required (including by way of cross-examination) whose evidence would be scrutinised in the same way as other expert evidence.

33. Normal procedural measures to be observed including:

    33.1 all experts to abide by the High Court Rules' Code of Conduct for expert witnesses as set out in Schedule 4 of the Judicature Act 1908.

    33.2 the Tribunal may provide its commissioned expert witness(es) with any documents it considers relevant to the proceedings, provided the same documents are provided to (or known to be in the possession of) Crown and claimants' counsel.

Ms Kawharu

34. The Crown confirms that it does not oppose the Tribunal commissioning her as a witness.

35. Some mention has been made that Ms Kawharu may have previously advised the Ministry of Foreign Affairs and Trade on the TPP or the Korean FTA Treaty exceptions clause (by claimant counsel in good faith discussions considering potential suitable experts). For the purposes of clarification, the Ministry of Foreign Affairs and Trade have instructed counsel that:

    35.1 Ms Kawharu has not advised the MFAT on TPP, or on the Korean FTA (as suggested);

    35.2 Even if Ms Kawharu has advised MFAT on other matters in the past, MFAT do not see this as giving rise to a conflict of interest that would affect the Crown's willingness to accept her as a witness commissioned by the Tribunal.

Timetable

36. The Tribunal has provisionally set a hearing date for this inquiry for 14-18 March 2016 and has directed parties to make submissions concerning timetabling.

37. The Crown notes that it is uncertain whether amended statements of claim are to be filed, and whether the Tribunal wishes a Crown statement of response. The proposed timetable below is premised on the assumption the truncated

Tribunal timeframe warrants proceeding directly to substantive evidence preparation and exchange once the Tribunal confirms the scope and issues.

38. Subject to the Tribunal's determination as to scope (estimated early December) and to the resolution of interlocutory issues should they arise, the Crown proposes the following provisional timetable that would enable a process that expedites the preparation of expert evidence on the Treaty clause and parallel to the development of any further evidence required to address other matters determined to be in scope:

38.1 Tribunal issues direction finalising scope and issues (early December);

38.2 Tribunal commissions expert (early December);

38.3 Expert witnesses commissioned by parties file affidavits with evidence on Treaty clause (16 December);

38.4 Expert witnesses commissioned by parties and Tribunal-commissioned witness meet to enable the expert witnesses to reach agreement on any of the matters covered in their affidavits (18 December);

38.5 Further Claimant Evidence – 10 February 2016;

38.6 Further Crown Evidence – 24 February 2016;

38.7 Tribunal-commissioned expert witness review on Treaty clause issues to be filed and circulated to all parties – 24 February 2016;

38.8 Further affidavit(s) (joint or separate) from the expert witnesses setting out where they agree and/or disagree – 20 January 2016;

38.9 Claimant Opening Submissions – 2 March 2016;

38.10 Crown Opening Submissions – 9 March 2016;

38.11 Hearing – 14 – 18 March 2016;

38.12 Claimant Closing Submissions – 1 April 2016 (2 weeks);

38.13 Crown Closing Submissions – 15 April 2016 (2 weeks).

39. The key interlocutory issue that could impact on the proposed timetable is disclosure. The Tribunal (David Cochrane) considered these issues briefly with the Solicitor General at judicial conference on 28 October 2015. The Crown's view (as above) is that the inquiry should focus on legal arguments about the effect of the words in the text and relevant case law. Under this approach, discovery of documents is not necessary. This approach is also consistent with how an international tribunal would approach the Treaty clause questions.

Further matters

Legal verification

40. An officials'-level meeting will be held in early December in Wellington, New Zealand to continue the technical legal review work (known as 'legal verification') that is required before the Agreement can be signed.

27 November 2015

R Ennor / G Gillies
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel

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

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Persons:
Michael Heron, QC / Rachael Ennor
Email: Michael.Heron@crownlaw.govt.nz, Rachael.Ennor@crownlaw.govt.nz

CONTENTS

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

[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.

[3] 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.

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 H. 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.

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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 (CA).

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 II "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].

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.

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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.

investor seeks to pursue international arbitration, the investor must waive claims under domestic law.

Investments

53. The definition of investments in the TPP is every kind of asset owned or controlled by an investor that has the characteristics of an investment, together with an illustrative list of investments.[42]

54. The scope of the Investment Chapter applies to measures adopted by a Party relating to investors of another Party and "covered investments".[43] A "covered investment" is an investment in existence at the time of entry into force of the Agreement, or established, acquired or expanded after this date.[44]

55. The definition of investment has a broad asset-based coverage. However, a claim under ISDS must relate to an "investment". In the arbitral tribunal decision *Apotex v United States of America* the tribunal found that a Canadian pharmaceutical company that intended to sell drug products to the US market and sought regulatory approval for this from the US Federal Drug Agency had failed to establish that it had made an investment in the United States.[45] The tribunal found that its "investment interests" amounted to no more than the ordinary conduct of a business for the export and sale of goods and simply supported its Canadian-based manufacturing and exporting operations.[46]

Investors

56. An investor of a Party is a national or an enterprise of a Party that attempts to make, is making, or has made an investment in the territory of another Party.[47] An "enterprise" is any entity constituted or organized under applicable law and includes any corporation,

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42 TPP, Article 9.1.

43 TPP, Article 9.2.

44 TPP, Article 9.1.

45 *Apotex Inc v Government of the United States of America (Apotex)*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013. A true copy of this award is annexed to my affidavit as Exhibit T.

46 *Apotex* at [235].

47 TPP, Article 9.1.

trust, partnership, sole proprietorship, partnership, association or similar organization.[48] An "enterprise of a Party" is any enterprise constituted or organized under the laws of a Party and carrying out business activities there.[49] It also includes branches located in that territory.

57. In general, international investment agreements, including investment chapters in FTAs, are designed to protect foreign investors, who may be natural or legal persons. This has the natural corollary that investors that are not foreign to the host country, are not given protection under an international investment agreement. For this reason TPP has a "denial of benefits" clause which enables the country hosting the investment to deny the benefits of the treaty provisions to investors that are enterprises incorporated in a Party but under the control of investors of a non-Party or the denying Party and which have no substantial business activities in any Party other than the denying Party.[50] The purpose is to prevent "treaty shopping", where an investor establishes a presence in a country in order to take advantage of the benefits of an international investment agreement. It also confines the obligation to protect foreign investors to those that are legitimately entitled to such protection. The recent decision, although not yet public, in the *Philip Morris v Australia* arbitration relating to tobacco plain packaging appears to be a case where a tribunal has not permitted a company to restructure its holdings in order to take advantage of the provisions of a particular bilateral investment treaty.[51]

Substantive obligations

58. The main substantive obligations on a State with respect to foreign investors are:

58.1 to provide treatment no less favourable than that provided to nationals in like circumstances ("national treatment");

48 TPP, Article 1.3.

49 TPP, Article 9.1.

50 TPP, Article 9.14.

51 *Philip Morris Ltd v Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12. See joint media release from the Australian Ministers of Foreign Affairs and Trade and Investment, 18 December 2015, from http://foreignminister.gov.au/releases, a true copy of which is annexed to my affidavit as Exhibit U.

58.2 to provide treatment of foreign investors no less favourable to foreign investors from third countries in like circumstances ("most-favoured-nation" treatment or "MFN");

58.3 to provide a minimum standard of treatment for investors, including fair and equitable treatment; and

58.4 to protect investors from expropriation unless for a public purpose, on a non-discriminatory basis, with prompt, adequate and effective compensation and in accordance with due process.

59. The vast majority of international investment arbitration claims are based on an alleged breach of one or more of these obligations. While there are other substantive obligations, such as a prohibition on performance requirements, requirements relating to transfers, requirements with respect to senior management and boards of directors and compensation for losses arising from armed conflict, these are not the focus of most investment disputes.

60. It should also be recalled that all of the obligations discussed are contained in TPP. This is explained in the following sections on the four main substantive obligations.

National treatment

61. The "national treatment" obligation in TPP requires treatment of investors and investments to be no less favourable than that accorded to domestic investors and investments in like circumstances.[52] A footnote explains that whether treatment is accorded "in like circumstances" may be determined by looking at all the circumstances including whether the treatment distinguishes between investors and investments based on legitimate public welfare objectives.[53]

[52] TPP, Article 9.4.

[53] TPP, Article 9.4, footnote 14.

62. The negotiating Parties to TPP have also prepared a "Drafters' Note" on the interpretation of "in like circumstances" which serves to define in greater detail what is meant by this phrase.[54] The purpose of the Note is to confirm the shared intent of the Parties to ensure that tribunals follow the approach set out in the Note.

63. The Drafters' Note contains a number of clarifications regarding the interpretation of "in like circumstances":

63.1 the claimant bears the burden of proving that the respondent has failed to provide no less favourable treatment than that accorded in like circumstances to its own investors and their investments or to investors from third countries or their investments;

63.2 the national treatment and MFN obligations do not prohibit all measures that result in differential treatment, rather they seek to ensure that they are not treated less favourably based on nationality; and

63.3 whether treatment is "no less favourable" depends on the totality of the circumstances, including whether the treatment distinguishes between investors and investments based on legitimate public welfare objectives.

64. It appears from the text of the Drafters' Note that factors to be taken into account in the assessment of like circumstances would include whether the different treatment was plausibly connected to a legitimate policy goal, and was neither applied in a discriminatory manner, nor as a disguised barrier to equal opportunity, and had a reasonable nexus to rational government policies and was not based on nationality.

65. Such a Drafters' Note is rare in the negotiation of international agreements and appears to be deliberately designed to be accorded weight by an arbitral investment tribunal under Article 31(2)(a) of the Vienna Convention on the Law of Treaties, which as I have indicated earlier, sets out the customary international law rules of interpretation and

[54] A true copy of the "Drafters' Note" is annexed to my affidavit as Exhibit V and can also be found at www.tpp.mfat.govt.nz/text.

which arbitral tribunals use as the basis for their interpretation of international investment agreements.[55]

66. Parties may also reserve for themselves additional policy space to implement measures which would otherwise breach the national treatment obligation. In TPP the national treatment (and MFN) obligations are subject to reservations set out in Annexes to the FTA based on a negative list of "non-conforming measures". New Zealand has a range of non-conforming measures according to which New Zealand reserves the discretion to implement measures which would otherwise be contrary to the national treatment or the MFN obligation. These include:

66.1 public law enforcement and correctional services;

66.2 social services such as childcare, health, public education, public housing, public training, public utilities which are provided exclusive rights by central government for the purposes of affordability or availability, and social welfare;

66.3 the sale of State-owned enterprises including Electricity Corporation, KiwiRail Holdings Ltd, Solid Energy, Landcorp Farming Ltd, NZ Post, and Transpower;

66.1 water, including the allocation, collection, treatment and distribution of drinking water;

66.2 protected areas set up for heritage management, public recreation and scenery preservation purposes; foreshore and seabed, territorial sea, the Exclusive Economic Zone, or the continental shelf, including maritime concessions in the continental shelf;

66.3 publicly funded research and development; and

66.4 cultural heritage of national value.

[55] Article 31(2)(a) provides for any agreement made between the parties in connection with the conclusion of the treaty to be regarded as "context" for the interpretation of the treaty in addition to its text, Preamble and Annexes.

67. These "non-conforming measures" are contained in Schedules to Annex I and Annex II to the TPP Agreement. The preceding paragraph has highlighted the main relevant non-conforming measures for the sake of brevity.

68. Where a measure falls within the ambit of a non-conforming measure, it would be protected by the relevant Schedule. In these circumstances it would not be necessary to rely on the Treaty of Waitangi exception.

Most-favoured-nation treatment

69. The MFN obligation requires that foreign investors be treated no less favourably than other investors of third countries "in like circumstances" with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[56] The same "Drafter's Note" regarding the interpretation of "in like circumstances" also applies to the MFN obligation.

70. Investors have in the past used the obligation to provide MFN treatment to acquire greater rights under the provisions of another investment agreement than those in the agreement under which the claim is brought.

70.1 In *Maffezini* v *Spain*, the investor used the MFN clause of the Bilateral Investment Treaty between Argentina and Spain to gain more beneficial procedural rights under the dispute settlement provisions of the bilateral investment treaty between Spain and Chile, which allowed the investor to bring a claim without needing to go through the required 18 month waiting period.[57] Subsequent arbitral tribunals were divided over whether or not to follow the *Maffezini* case.[58]

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[56] TPP, Article 9.5. Note that the reference to "establishment" must be read in light of the other provisions of the Agreement relating to the ability to bring investment claims. See for a description of the key elements of MFN: International Law Commission, Most-favoured-nation clause (Part Two), Final Report of the Study Group 2015 at www.legal.un.org/ilc. A true copy of this report is annexed to my affidavit as Exhibit W

[57] *Emilio Agustin Maffezini* v *Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7, 25 January 2000. A true copy of this report is annexed to my affidavit as Exhibit X.

[58] See for a description of the various arbitral tribunal decisions following *Maffezini* International Law Commission, Most-favoured-nation clause (Part Two) Final Report of the Study Group 2015 [91-140].

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70.2 In order to provide greater clarity over the application of the MFN clause to procedural rights, parties began to include in their agreements what is known as the "*Maffezini* exception" whereby the MFN clause does not extend to more beneficial procedural rights or dispute settlement procedures provided under another investment agreement.

70.3 This is expressed in TPP as a clarification that the MFN treatment does not encompass international dispute resolution procedures or mechanisms.[59]

70.4 This is designed to prevent the circumvention of dispute settlement provisions in one agreement through recourse to the MFN clause and higher protections in another investment agreement.

71. Reservations can be made to the MFN obligation, like the national treatment obligation, and this permits a Party to implement measures which would otherwise be a breach of the MFN obligation. There are also specific exceptions to the MFN obligation according to which New Zealand reserves the right to adopt or maintain any measure that accords differential treatment under a bilateral or multilateral agreement in force or signed prior to the entry into force of TPP, an agreement in force or signed after the entry into force of TPP involving aviation, maritime and fisheries matters, or as part of a process of wider economic integration or liberalisation under the Australia-New Zealand Closer Economic Relations or the Pacific Agreement on Closer Economic Relations (PACER).

72. This means that the New Zealand-Hong Kong Agreement on the Promotion and Protection of Investments, which is the only investment agreement to which New Zealand is a party and which includes comprehensive ISDS and does not include the Treaty of Waitangi clause, could not be used by TPP Parties in order to acquire greater rights than exist under TPP.

Minimum standard of treatment: Fair and equitable treatment

[59] Article 9.5.3.

73. The obligation to provide fair and equitable treatment to investors and investments, a minimum standard of treatment under international law, is at the heart of a large proportion of ISDS claims.

73.1 The minimum standard of treatment is a norm of customary international law which provides a set of principles which States must respect when dealing with foreign nationals and their property.

73.2 It encompasses "fair and equitable treatment" and "full protection and security". Both of these concepts are existing obligations owed by States in respect of foreign investment under customary international law.[60] Customary international law standards are developed through the practice of States that is followed on the basis that it is binding on States.

73.3 It follows that as the minimum standard of treatment is binding at international law, it is not something that can be reserved against. Nevertheless, negotiators have sought to clarify the meaning of the substantive obligation to provide the minimum standard of treatment that is required at international law, including fair and equitable treatment.

74. The standard of fair and equitable treatment has received considerable attention from arbitral tribunals and academics alike. The classical statement of fair and equitable treatment is that espoused in the *Neer* case, that conduct "should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[61] However subsequent tribunals have recognised that the standard has evolved since *Neer*. The arbitral tribunal in *Waste Management*, after reviewing the previous NAFTA cases on fair and equitable treatment, considered that:[62]

> ...the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is

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60 For a review of "fair and equitable treatment" see OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03 (OECD Publishing) a true copy of which is annexed to my affidavit as Exhibit Y.

61 *L. F. H Neer and Pauline Neer* v *United Mexican States*, Reports of International Arbitral Awards, Vol IV, (1926) 60-66. A true copy of this award is annexed to my affidavit as Exhibit Z.

62 *Waste Management, Inc.* v *The United Mexican States*, ICSID Case No. ARB(AF)/00/3 [98]. A true copy of the award is annexed to my affidavit as Exhibit AA.

arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.

75. In the past, however, tribunals have not always adopted a consistent approach to the interpretation of fair and equitable treatment.[63] The arbitral tribunal in *Metalclad* v *Mexico*,[64] which was then followed by *Pope and Talbot* v *Canada*,[65] and *SD Myers* v *Canada*,[66] all cases under the North American Free Trade Agreement (NAFTA), interpreted fair and equitable treatment as additional to the customary international law standard of minimum standard of treatment. Furthermore, the tribunal in *Metalclad* made a determination that there had been a breach of fair and equitable treatment based in part on principles in NAFTA relating to transparency,[67] while a majority of the tribunal in *SD Myers* v *Canada* held that having breached NAFTA's provision on national treatment, Canada had also breached the minimum standard of treatment.[68]

76. The interpretations of the tribunals were broader than the NAFTA parties had intended. As a result, in 2001 the NAFTA parties, Canada, Mexico and the United States, issued an interpretative note which clarified the relevant obligation under NAFTA:

a. that the obligation is the customary international law minimum standard of treatment to be afforded to investment of investors of the Parties;

b. that the concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that required by the customary international law minimum standard of treatment; and

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63 See OECD (2004) and UNCTAD, "Fair and Equitable Treatment" (UNCTAD Series on issues in international investment agreements, United Nations, 1999), pp 1-19, and UNCTAD, "Fair and Equitable Treatment: A Sequel" (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012) for a review of the jurisprudence on fair and equitable treatment. A true copy of the introductory pages and pages 1 to 19 of the 1999 UNCTAD report and a true copy of the 2012 report are annexed to my affidavit as Exhibits BB and CC.

64 *Metalclad Corporation* v *United Mexican States*, ICSID Case No. ARB(AF)/97/1. A true copy of this award is annexed to my affidavit as Exhibit EE.

65 *Pope and Talbot* v *Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001. A true copy of this award is annexed to my affidavit as Exhibit DD.

66 *SD Myers Inc* v *Government of Canada*, Partial Award 13 November 2000. A true copy of the contents page, chapter I "preface" and Chapters V to XII is annexed to my affidavit as Exhibit FF.

67 *Metalclad*, at [76].

68 *SD Myers v Canada*, at [266].

c. a determination that there has been a breach of another provision of NAFTA or another international agreement does not establish that there has been a breach of this standard.[69]

77. The TPP text on minimum standard of treatment follows the NAFTA Interpretative Note, and also provides further clarification regarding the obligation of minimum standard of treatment.[70]

77.1 Article 9.6.2 provides that the concepts of fair and equitable treatment and full protection and security do not create *additional substantive rights*; and it describes fair and equitable treatment as including the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process of law.

77.2 Article 9.6.4 further clarifies that "the mere fact that a Party takes or fails to take action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result".

77.3 This considerably narrows the circumstances in which a Party might be held by a tribunal to the "legitimate expectations" of an investor.

78. Article 9.6 is to be interpreted in accordance with Annex 9-A (Customary International Law). This sets out the shared understanding of the Parties that "customary international law" generally and as specifically referenced in Article 9.6 "results from a general and consistent practice of States that they follow from a sense of legal obligation" and the customary international law minimum standard of treatment of aliens refers to "all customary international law principles that protect the economic rights and interests of aliens". In this way the negotiating parties have sought to provide guidance to arbitral tribunals on the scope of the customary international law principle so as to prevent it being expanded beyond that intended by the parties. I wish to

[69] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, (July 31, 2001), § B. A true copy of this note is annexed to my affidavit as Exhibit GG.

[70] TPP, Article 9.6 and Annex 9-A.

emphasise that the minimum standard of treatment owed to investors is a requirement under customary international law, which is part of the common law of New Zealand.

79. Article 9.22.7 of TPP also makes it clear that the burden is on an investor claiming a breach of the minimum standard of treatment to prove all elements of its claim.

80. The fair and equitable treatment obligation is a substantive obligation that is not subject to reservations in Annexes to TPP. In contrast, the Treaty of Waitangi exception, as it applies to all substantive obligations in the Agreement, is applicable to the fair and equitable treatment obligation.

80.1 A potential claimant might seek to claim a breach of the fair and equitable treatment standard had arisen as a result of a measure which accorded more favourable treatment to Māori.

80.2 The burden of demonstrating this breach would lie with the investor.

80.3 If the measure followed due process and did not breach the standard of treatment set out in the *Waste Management* case, it would be unlikely to be found to breach the fair and equitable treatment standard.

80.4 In any case, the Treaty of Waitangi exception would operate as an additional defence that could be claimed before a tribunal.

80.5 If a measure was found to be arbitrary and unjustified discrimination so that the Treaty of Waitangi exception did not apply, there would need to be a determination by a tribunal that the standard of fair and equitable treatment had also been breached.

80.6 The prohibition on arbitrary or discriminatory treatment is often found in bilateral investment treaties together with a fair and equitable treatment standard. While some arbitral tribunals have treated the two standards

separately, others have viewed arbitrary and discriminatory treatment as part of fair and equitable treatment.[71]

80.7 If a measure fails to meet the chapeau to the Treaty of Waitangi exception, it may also be found to breach the standard of fair and equitable treatment, but this is not necessarily the case.

80.8 If a measure breached the standard of fair and equitable treatment it would be inconsistent with customary international law, and therefore common law.

Expropriation

81. Expropriation is the governmental taking of property for which compensation is payable. Expropriation may be direct, or indirect. TPP includes a prohibition against expropriation other than where it is for a public purpose, non-discriminatory, on payment of prompt, adequate and effective compensation, and in accordance with due process of law.[72]

82. TPP also clarifies that decisions by a Government not to issue, renew or maintain a subsidy or grant in the absence of a specific commitment to do so, does not in and of itself constitute an expropriation.[73] The rules on expropriation also do not apply the issuance, revocation or limitation of intellectual property rights where this is consistent with the Intellectual Property Chapter and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[74]

83. The expropriation provision is subject to an Expropriation Annex 9-B, which provides further explanation as to what is meant by direct and indirect expropriation.

83.1 Whether a government action is indirect expropriation requires a fact-based inquiry which takes into account factors such as the economic impact and character of the government action, and the extent to which it interferes with

71 Christoph Schreuer, n.37, pp 189-192.

72 TPP, Article 9.7.

73 TPP, Article 9.7.6.

74 TPP, Article 9.7.5.

distinct, reasonable investment-backed expectations, such as whether the government has provided binding written assurances, and the character of the government action.[75]

83.2 Whether an investor's investment-backed expectations are reasonable depends on factors such as whether the government provided the investor with binding written assurances and the extent of governmental regulation in the sector.[76]

83.3 The Annex is in part modelled on the US 2012 Model BIT Annex B(4)(a) and the factors taken into account by the US Supreme Court in determining the test for regulatory takings under the US Constitution.[77]

84. The Expropriation Annex in TPP also clarifies that non-discriminatory regulatory actions taken by a Party to protect legitimate public policy objectives, such as public health, safety and the environment, are not indirect expropriation except in rare circumstances.[78] Such regulatory actions to protect public health specifically include actions relating to the regulation, pricing, supply, and reimbursement of pharmaceuticals including biologics.[79]

85. As with the fair and equitable treatment obligation, the requirements relating to expropriation are substantive obligations that not able to be reserved against in Schedules to the Annexes to the Agreement. The Treaty of Waitangi exception would, however, be applicable.

85.1 A potential claimant might seek to claim a breach of the requirements relating to expropriation arising from a result of a measure which accorded more favourable treatment to Māori.

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75 TPP, Annex 9-B, paragraph 3(a).

76 TPP, Annex 9-B, footnote 37.

77 The US Supreme Court in *Penn Central Transportation Co v New York City*, 438 US 104, 124 (1978) which took into account the economic impact of the government action, the extent to which is interferes with distinct, reasonable investment-backed expectations, and the character of the government action. See Martin Weiss, Shayerah Akhtar, Brandon Murrill and Daniel Sheed, "International Investment Agreements (IIAs): Frequently Asked Questions" (Congressional Research Service, May 15 2015) 12 at www.fas.org. A true copy of this note is annexed to my affidavit as Exhibit HH.

78 Annex 9-B, paragraph 3(b).

79 Annex 9-B, footnote 37.

85.2 The tribunal would inquire into the facts and circumstances of the case and factors such as the economic impact and character of the government action.

85.3 If the measure was for a legitimate public purpose and did not breach a written undertaking to the investor, it would be unlikely to be found to breach the expropriation requirements.

85.4 In any case, the Treaty of Waitangi exception would operate as an additional defence that could be claimed before a tribunal.

Investment authorisations

86. TPP provides for the possibility of claims being brought for breach of an investment authorisation. Such rights are not included in New Zealand's other FTAs.

87. An investment authorisation is an authorisation granted by a foreign investment authority to an investor of another Party.[80]

87.1 In New Zealand's case the foreign investment authority is the Minister of Finance, the Minister of Fisheries or the Minister for Land Information, who grant approvals under the Overseas Investment Act 2005.[81] Only investment authorisations granted by the foreign investment authority are covered by the term "investment authorisation".

87.2 It does not cover actions taken by a Party to enforce general laws, such as competition, environmental, health or other regulatory laws.[82]

87.3 Neither can a claimant submit to arbitration claims, in respect of decisions under the New Zealand Overseas Investment Act 2005, for breach of an investment authorisation by enforcing conditions or requirements under which the investment authorisation was granted.[83]

[80] TPP, Article 9.1.

[81] TPP, Article 9.1, footnote 11.

[82] TPP, Article 9.1, footnote 10.

[83] TPP, Article 9.18, footnote 31.

88. A further clarification is included in Annex 9-H of TPP. That provides in the case of New Zealand:

> A decision under New Zealand's Overseas Investment Act 2005 to grant consent, or to decline to grant consent, to an overseas investment transaction that requires prior consent under that Act shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement).

89. This therefore preserves the New Zealand past practice whereby decisions to admit an investment into New Zealand territory under the Overseas Investment Act, is not subject to dispute settlement under ISDS. Such decisions include investments in significant business assets, sensitive land, and fisheries.

90. Nevertheless, the investor-State dispute settlement mechanism otherwise applies to the pre-establishment phase of investment. This means that a claim may be brought for breach of obligations in the period prior to an investment actually being made and where an investor is taking concrete steps to make an investment.

Investment agreements

91. The text of TPP provides for investment agreements to be included within the scope of possible investor-State dispute settlement claims, although it also restricts the circumstances in which such claims may be brought.

92. An investment agreement is defined in the text of the TPP as a *written agreement* concluded *after the entry into force of TPP* at the *central level of government* with an investor that creates *binding obligations under domestic law* and on which the investor relies in establishing or acquiring an investment, and which *grants rights* with respect to natural resources, or to supply public services in areas such as power generation, water treatment or distribution or telecommunications, or to undertake construction projects.[84]

[84] TPP, Article 9.1.

93. In order to further narrow the scope of the term "investment agreement", the text includes three additional clarifying footnotes.

93.1 First, "authority at the central level of government" is defined for unitary states such as New Zealand, as an authority at the ministerial level of government, ie government departments or ministries, but not governmental agencies with a separate legal personality from government departments or ministries.[85]

93.2 Second, it does not include an investment agreement with respect to land, water or radio spectrum.[86]

93.3 Third, investment agreements do not cover correctional services, healthcare services, education services, childcare services, welfare services or other similar social services.[87]

93.4 These clarifications, separately and together, narrow the scope of claims which may be made for breach of an investment agreements.

94. An additional narrowing is provided by Annex 9-L of TPP. The Annex sets out that the submission of a claim for breach of an investment agreement to an arbitral tribunal under TPP would be barred if the investment agreement provided for an alternative dispute resolution procedure under one of the four main international arbitration rules.

94.1 This means in effect that the parties to an investment agreement may contract out of the TPP arbitral rules, and instead provide for arbitration under an alternative method of dispute settlement.

94.2 This is consistent with the decision of the tribunal in *SSG* v *Philippines*, which took a broad interpretation of the "umbrella" clause in that case, but nevertheless concluded that if the contract vests exclusive jurisdiction over disputes arising under its terms to another tribunal, such as a domestic court or

[85] TPP, Article 9.1, footnote 7.

[86] TPP, Article 9.1, footnote 8.

[87] TPP, Article 9.1, footnote 9.

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a contractual arbitral tribunal, then that tribunal has the primary jurisdiction to hear claims arising under the contract.[88]

95. The expansion of the scope of investment claims under TPP to breaches of investment agreements would only apply to future agreements concluded between an investor and a New Zealand government department. The nature of the investment agreements is limited and such agreements only apply to a limited kind of activities. The TPP dispute settlement provisions would only come into operation if there was no alternative dispute resolution procedure set out in the contractual agreement and the other requirements of Annex 9-L were met.

96. An investment agreement which creates binding obligations at domestic law would, depending on whether the agreement included an alternative dispute resolution mechanism, also be subject to and enforceable at domestic law. This is no different from the current situation regarding the enforceability of investment agreements. The possibility that potential claims for breaches of investment agreements may be subject to ISDS elevates a breach of the investment agreement at domestic law, to a treaty breach at international law. Whereas the Treaty of Waitangi exception could be raised as a defence to such a treaty breach, domestic law considerations would stand on their own. Likewise, where the investment agreement provided for an alternative dispute resolution mechanism, the Treaty of Waitangi exception would have no relevance.

Financial services

97. TPP includes a separate financial services chapter. In New Zealand's other FTAs, financial services have been included within the disciplines of the Services and the Investment Chapters.

97.1 The financial services chapter of TPP incorporates the key obligations of the investment chapter, including those relating to the minimum standard of treatment and expropriation. It also applies the ISDS provisions of the investment chapter to the financial services chapter.

[88] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/06 Decision on Jurisdiction 29 January 2004, [136-155] and [169-170]. A true copy of this judgment is annexed to my affidavit as Exhibit II.

97.2 This means that financial services suppliers may bring ISDS claims in respect of breach of these investment obligations.

97.3 It is noteworthy, however, that New Zealand's financial sector is dominated by Australian investors and the investor-State dispute settlement mechanism in TPP does not apply between New Zealand and Australia.[89]

97.4 This means that the treatment of investors and investments in the financial services sector is subject to the same obligations that apply to other investments. The earlier discussion on these obligations is relevant to consideration of financial services.

SCOPE OF OTHER EXCEPTIONS APPLICABLE TO THE TPP INVESTMENT CHAPTER

98. There are a number of other exceptions that are applicable to the TPP investment chapter. These are the non-conforming measures mentioned above in relation to national treatment and MFN, the exception for essential security interests, temporary safeguard measures, taxation exception, and the exception relating to tobacco control measures.

99. The security exception,[90] the temporary safeguard measure,[91] and taxation exception[92] allow a Party to TPP to take measures necessary for the protection of its essential security interests, in the event of serious balance of payments and external financial difficulties, and for taxation purposes respectively. Each of these is a specific exception and subject to certain constraints. The Treaty of Waitangi exception sits alongside these other exceptions in the Agreement. Where a measure falls within one of these exceptions, there would be no need to rely upon the Treaty of Waitangi exception.

100. In response to concerns over the potential for ISDS claims in respect of tobacco plain packaging, TPP permits a Party to deny the benefits of ISDS to claims challenging a

89 TPP Side letter between New Zealand and Australia a true copy of which is annexed to my affidavit as Exhibit JJ and which is available at www.tpp.mfat.govt.nz/text.

90 TPP, Article 29.2.

91 TPP, Article 29.3.

92 TPP, Article 29.4.

tobacco control measure.[93] This means that a tobacco control measure would be immune from challenge under ISDS.

101. The main point of difference between TPP and New Zealand's other FTAs is that the exceptions known as the "General Exceptions" do not apply to the investment chapter. General Exceptions are based on Article XX of the GATT 1994 and Article XIV of the General Agreement on Trade in Services (GATS), and relate to taking measures necessary to protect human health, and animal and plant life or health, provided that such measures are not arbitrary or discriminatory or a disguised restriction on trade.

102. This omission is unlikely to have a significant impact on the right of New Zealand to regulate to protect public health, safety and the environment because the policy space is preserved within the substantive obligations themselves.

102.1 The TPP text clarifies the substantive obligations of national treatment and MFN permit differences in treatment which are the result of legitimate public welfare objectives.

102.2 TPP also clarifies that regulatory measures relating to health and the environment do not constitute indirect expropriation except in rare circumstances.

102.3 The fair and equitable treatment standard would be interpreted in accordance with the object and purpose of the Agreement. The Government's right to regulate to protect public health, safety and the environment is an overarching objective set out in the Preamble to TPP which provides that the Parties:

> "recognise their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals".

[93] TPP, Article 29.5.

102.4 In this way the right to regulate is included as an element of the substantive obligations in the Agreement, rather than as an exception which needs to be demonstrated.

102.5 In my view the inclusion of caveats on how substantive obligations are to be interpreted is a better way of safeguarding the protection of a Government's policy and regulatory space, than including an exception which is subject to a determination by a tribunal that the measure is necessary to achieve the policy objective and not arbitrary or unjustifiable discrimination.

103. TPP includes a provision which preserves the right to take measures, otherwise in conformity with the Agreement, to ensure that the investment activity is undertaken in a manner sensitive to environmental concerns.[94] This is not an exception to the obligations under the Agreement as the measures must be consistent with the substantive obligations. However, I consider that it is further context to the interpretation of the substantive obligations and sets out the views of the Parties that the investment activity is to be undertaken in a manner sensitive to environmental concerns.

RELEVANT PROCEDURAL AND OTHER RULES FOR ISDS

104. 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. This includes constraints on the claims which may be brought, expedited and other processes for certain claims, regulation of how arbitrators are selected and their conduct, regulation of the conduct of hearings and the decision-making of tribunals. The objective of these provisions is to increase the control of the Parties over arbitral proceedings, increase transparency of arbitral proceedings, and encourage enhanced confidence in the decisions of arbitral tribunals.

Constraints on bringing of claims

105. The following are key constraints on an investor wishing to bring a claim before an arbitral tribunal:

94 TPP, Article 9.15.

105.1 Article 9.17 provides that prior to the submission of a claim to arbitration, a claimant must enter into consultations and negotiations over a six-month period. This provides an opportunity for the investor claimant and respondent State to resolve the investment dispute. In this regard it serves a similar purpose to consultations under Article 4 of the Dispute Settlement Understanding of the WTO.

105.2 A time limit is imposed for the submission of claims to arbitration. Article 9.20.1 provides that no claim may be submitted to arbitration if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the claimant has incurred loss or damage. This constrains the timeframe within which an investor must bring a claim, and prevents claims being brought many years after a breach has occurred.

105.3 TPP provides what is known as a "fork in the road" whereby investors choosing arbitration must waive the right to pursue a claim in domestic courts or under any other dispute settlement procedure.[95] An exception to this is where injunctive relief is sought to preserve the claimant's rights pending arbitration and does not involve the payment of monetary damages.[96]

105.4 A respondent State Party may also make a counterclaim against the claimant in connection with the factual and legal basis of the claim.[97]

Expedited and other processes

106. TPP provides mechanisms designed to streamline the arbitral tribunal processes.

106.1 Expedited hearings are held where there is an objection by the respondent State that the claim is manifestly without legal merit.[98] Such objections to an arbitration claim are heard in advance of the substance of the dispute.

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[95] TPP, Article 9.20.2.

[96] TPP, Article 9.20.3.

[97] TPP, Article 9.18.2.

[98] TPP, Article 9.22.4 and Article 9.22.5.

106.2 Objections that the claim is not within the jurisdiction or competence of the tribunal are also held in advance.[99]

106.3 While the full decision is not yet public, the arbitral tribunal in the *Philip Morris v Australia* claim relating to Australia's tobacco plain packaging measure was concluded at the preliminary phase before the substantive merits stage was commenced.[100] On 18 December 2015 the Tribunal issued a unanimous decision agreeing with Australia's position that the Tribunal has no jurisdiction to hear Philip Morris Asia's claim.

106.4 Preliminary objections are decided expeditiously and costs may be awarded to the prevailing party incurred in submitted or opposing a preliminary objection that was "frivolous".[101]

106.5 TPP also provides for the possibility of the consolidation of claims which are brought by more than one claimant in respect of the same matter.[102] Consolidation facilitates the arbitral tribunal processes and avoids the possibility that a respondent must defend several claims before tribunals simultaneously.

Selection and identity of arbitrators

107. Provisions are included within TPP which regulate the selection of arbitrators for ISDS and the conduct of hearings.

107.1 Arbitrators are selected by the parties to the dispute with each party appointing one arbitrator and the third appointed by agreement of the disputing parties.[103] In event of failure to reach agreement the arbitrator is appointed by the Secretary-General of the International Center for the Settlement of Investment Disputes.[104]

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99 TPP, article 9.22.4.

100 *Philip Morris Ltd v Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12.

101 Article 9.22.6.

102 TPP, Article 9.27.

103 TPP, Article 9.21.1.

104 TPP, Article 9.21.3 and Article 9.21.5.

107.2 Arbitrators are to observe rules regarding independence and impartiality.[105]

107.3 TPP provides that prior to its entry into force, the Parties are to provide a Code of Conduct for arbitrators serving on investor-State dispute settlement tribunals as well as guidance on conflicts of interest.[106]

Conduct of hearings

108. TPP includes provisions on the conduct of arbitral hearings which aim to increase the transparency of hearings.

108.1 Non-disputing parties are able to make submissions to the arbitral tribunal and the submission of amicus curiae briefs from interested non-parties to the dispute are permitted.[107] I would expect that were an investment dispute to raise the Treaty of Waitangi exception, interested non-parties to the dispute, including Māori iwi or organisations, would make submissions to the arbitral tribunal.

108.2 The tribunal may obtain assistance from experts.[108]

108.3 Hearings are held in public and submissions are publicly released, subject to non-disclosure of protected information.[109] This ensures full transparency and seeks to counteract the perception that arbitral tribunals lack transparent processes.

Decision making by tribunals

109. TPP includes two provisions which seek to guide the decision-making by tribunals.

109.1 TPP provides that a disputing party may request that proposed decisions of the arbitral tribunal are to be submitted to the parties for written comment. The comments of the parties are then considered by the tribunal prior to the

[105] TPP, Article 9.21.6.

[106] TPP, Article 9.21.6.

[107] TPP, Article 9.22.2 and 9.22.3.

[108] TPP, Article 9.26.

[109] TPP, Article 9.23; TPP Article 29.2 and 29.7.

issuance of the final award.[110] Such a mechanism is not included in New Zealand's other FTAs, and allows a Party to raise concerns over the correctness of a proposed decision and thereby enhances the robustness of that decision and may avoid manifestly wrong decisions.

109.2 Joint interpretations may be issued by the TPP Parties and are binding on the tribunal.[111] This is a further safeguard to avoid the possibility that arbitral tribunals deliver awards that fail to reflect the Parties' interpretations of the FTA.

AWARDS GIVEN BY TRIBUNALS UNDER ISDS AND UNDER STATE-TO-STATE DISPUTE SETTLEMENT

110. The awards that may be given under ISDS and under State-to-State dispute settlement differ as a result of the nature of the different proceedings: one being between investors and States, and the other being between two States.

111. In the case of ISDS, awards are limited to the payment of monetary damages for losses suffered or the restitution of property where this is possible.[112] No punitive damages may be awarded. Neither can injunctions or other awards be issued which would require New Zealand to change its laws of policies. Tribunals may also award costs and attorney fees.[113] In the case of frivolous claims reasonable costs and attorney fees may be awarded to the respondent.[114]

112. A State-to-State dispute settlement panel has the function of examining the applicability and conformity of a measure with the Agreement and makes findings and recommendations necessary for the resolution of the dispute.[115] The panel does not award monetary damages, rather the respondent State is required whenever possible to eliminate the non-conformity with the obligations under the Agreement.[116] Where the respondent State cannot or does not do so, mutually acceptable compensation may be

[110] TPP, Article 9.22.10.
[111] TPP, Article 9.24.3 and Article 27.2.2(f).
[112] TPP, Article 9.28.
[113] TPP, Article 9.28.3.
[114] TPP, Article 9.28.4.
[115] TPP, Article 28.11.
[116] TPP, Article 28.18.2.

agreed.[117] If the parties are unable to agree on compensation, the complaining party may suspend equivalent benefits under the Agreement.[118]

113. There is no appeal from either ISDS or State-to-State dispute settlement decisions. TPP does provide for the possibility of a multilateral appeals process if such a process is developed in future.[119]

114. While there is no appeal process from an ISDS arbitral tribunal decision, depending on the arbitral rules governing the investment dispute, it may be possible to review an arbitral tribunal decision.

114.1 The ICSID Convention provides for an "annulment" process which enables a new tribunal (termed an 'ad hoc Committee') to review an award under ICSID rules, but on limited grounds. These grounds are set out in Article 52 of the ICSID Convention and allow the annulment of an award if:

1. the tribunal was improperly constituted;
2. the tribunal manifestly exceeded its powers;
3. a tribunal member was corrupt;
4. there was a serious departure from a fundamental rule of procedure; or
5. the tribunal failed to state reasons for its decision.

114.2 Decisions on annulment seek to strike a balance between ensuring the legal correctness of a decision and ensuring the finality of a decision. Some awards have been partially or fully annulled as a result of the annulment procedure.

115. The law of the place of arbitration may also provide for the review of decisions of arbitral tribunals, but also usually on very limited grounds. While not wishing to overstate the extent to which the decision of an arbitral tribunal may be reviewed, the Supreme Court of British Colombia partially set aside the decision of the arbitral tribunal in the *Metalclad* case. In the *Bilcon* case which has been subject to criticism by Canada and other NAFTA Parties, Canada filed a notice of application on June 16 2015

[117] TPP, Article 28.19.2.

[118] TPP, Article 28.19.2-28.19.4.

[119] TPP, Article 9.22.11.

with the Federal Court of Canada seeking to set aside the award on jurisdiction and liability, on the grounds that the Tribunal exceeded its jurisdiction and that the award is in conflict with the public policy of Canada.[120]

116. Where New Zealand is the seat of arbitration, the Arbitration Act 1996 provides in Article 34 of Schedule 1 the grounds for setting aside of an arbitral award by the High Court. The grounds include that the award contains decisions on matters beyond the scope of the submission to arbitration or is in conflict with the public policy of New Zealand. Article 34(6) of Schedule 1 clarifies that an award is in conflict with the public policy of New Zealand if a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

117. Where New Zealand is not the seat of arbitration, Article 36 of Schedule 1 of the Arbitration Act 1996 provides that a court may refuse to recognise or enforce an arbitral award on limited grounds. The grounds set out in Article 36 of Schedule 1 include in paragraph 1(b):

"if the court finds that—

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of New Zealand".

118. As with the setting aside of an award, the Arbitration Act declares in Article 36(3) that an award is contrary to the public policy of New Zealand if a breach of natural justice has occurred during the arbitral proceedings or in the making of an award.

119. In my view, the setting aside or partial setting aside of an arbitral tribunal decision where the tribunal has widely overstepped its authority and refused to recognise a legitimate public policy measure which fulfils the Crown's obligations under the Treaty of Waitangi is therefore possible. This operates as a safeguard against the egregious actions of an arbitral tribunal.

[120] See the summary of the proceedings from the Canadian government at: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng, a true copy of which is annexed to my affidavit as Exhibit KK.

SCOPE OF ISDS AND STATE-TO-STATE DISPUTE SETTLEMENT WITH REGARD TO THE TREATY OF WAITANGI

120. The scope and implementation of the Treaty of Waitangi exception in ISDS and State-to-State dispute settlement is largely the same.

120.1 The Treaty of Waitangi clause sets out the agreement of the Parties to TPP that the interpretation of the Treaty of Waitangi is not subject to the dispute settlement provisions of the Agreement. The removal of the interpretation of the Treaty of Waitangi from the jurisdiction of both ISDS and State-to-State tribunals includes the nature of the rights and obligations arising under the Treaty.

120.2 To my mind, this reinforces the self-judging nature of the Treaty of Waitangi exception: it is for New Zealand, not an arbitral tribunal, to determine whether a measure is necessary to fulfil obligations under the Treaty, and whether there are any such obligations under the Treaty. However a tribunal could still examine whether the exception had been applied in good faith and in accordance with its chapeau.

121. One difference between ISDS and State-to-State dispute settlement is that the Treaty of Waitangi clause is specific in stating that a State-to-State tribunal may be requested to determine only whether any measure which provides more favourable treatment to Māori is inconsistent with a Party's rights under this Agreement. This makes it clear that a State-to-State tribunal is only to determine the respective rights and obligations of the State Parties. In the case of an alleged breach of the substantive obligations under the investment chapter, a State-to-State tribunal would not be able to examine a breach of an investment authorisation or an investment agreement, since these obligations are not owed to the State. However, an investor-State tribunal could do so.

122. It should be noted, however, that the substantive obligations under the Investment Chapter have corresponding rights of the State Party to ensure that its investors and their investments receive the treatment required by the obligations. As I have already noted,[121] both an ISDS tribunal and a State-to-State tribunal would have the competence

[121] See paragraphs 44 to 50 above.

to determine whether the measure fell within the chapeau to the Treaty of Waitangi exception.

123. TPP also excludes certain obligations from being subject to dispute settlement. For example, Chapter 22 on Competitiveness and Business Facilitation, Chapter 24 on Small and Medium Enterprises, Chapter 25 on Regulatory Coherence and Annex 26-A to the Transparency and Anti-Corruption Chapter on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices are not subject to Chapter 28 (Dispute Settlement).

CASE STUDIES

Scenario 1: Fracking

124. I have read the Further Crown Memorandum on Inquiry Planning to the Waitangi Tribunal dated 2 December 2015 which explains some of the legal issues with regard to the fracking scenario. In any scenario the prevailing domestic law will be crucial to any determination of whether there has been a breach of an investor's rights under TPP. This is particularly true of an alleged breach of the fair and equitable treatment standard. If the processes adopted by decision-making bodies follow legal requirements and due process, do not treat the foreign investor capriciously, or provide written assurances which are later rescinded, it is highly unlikely that there would be a breach of the substantive obligations under the investment chapter.

125. The case study fact situation appears to be based on the facts in *Lone Pine Resources Ltd v Government of Canada*.[122] That case relates to certain exploration permits for hydrocarbons including one relating to the bed of the St Lawrence river. The Government of Quebec passed legislation revoking exploration permits in the St Lawrence river in response to findings of a strategic environmental study relating to hydrocarbon development in the basin as well as studies of the risks arising from fracking. While the case is ongoing, the central issues appear to be whether the legislation was a legitimate public policy measure, whether the fair and equitable treatment standard protects an investor's "legitimate expectations", whether there was

[122] ICSID Case No UNTC/15/2. See the summary of the proceedings from the Canadian government at: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng, a true copy of which is annexed to my affidavit as Exhibit LL.

an investment capable of being expropriated, and the quantum of damages sought. This case illustrates the fact-based nature of any inquiry into whether there has been a breach of substantive investment obligations.

Scenario 2: Affordable Medicines

126. This scenario deals with the impact of TPP on access for Maori to new biologic medicines.

127. TPP will permit New Zealand to continue to regulate in order to provide affordable medicines to its people. Specifically in relation to the intellectual property treatment of biological medicines, the TPP outcome can be met within New Zealand's current policy settings and practice. TPP also preserves the PHARMAC model and its ability to prioritise applications for funding and negotiate the best prices for medicines. The application of the TPP text to PHARMAC has been explained further in paragraphs 28-30 of the Second Affidavit of Dr David Walker of 23 October 2015.

128. I would also note one point of clarification: the Treaty of Waitangi exception allows the government to give more favourable treatment to Māori in respect of matters covered by TPP, *including* to meet its obligations under the Treaty of Waitangi.

Scenario 3: Freshwater

129. I have read the Crown's submissions on this scenario and have no comment to make on the freshwater inquiry.

130. I would note that scenario is based on an assumption that ISDS will have a "chilling effect" on the Crown's ability to provide redress to Māori. I have already noted in the past to the Tribunal that in my view the notion of a "chilling effect" is overstated.[123]

SWORN
at Wellington this 19 day of January)
2016)
before me:)

A Solicitor/Deputy Registrar of the High Court of New Zealand

Laura Jane Hardcastle
Solicitor
Wellington

[123] Wai 2358, #A94, Brief of Evidence of Dr Penelope Ridings [5.4].

BEFORE THE WAITANGI TRIBUNAL WAI 2522

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF The Trans-Pacific Partnership Inquiry

THIRD AFFIDAVIT OF PENELOPE JANE RIDINGS

Dated 9 February 2016

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person: Michael Heron QC / Rachael Ennor
Email: michael.heron@crownlaw.govt.nz / rachael.ennor@crownlaw.govt.nz

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

Introduction

1. This is the third affidavit that I have made in these proceedings. My qualifications and experience are set out in my first affidavit and I will not repeat them here.[1]

2. My third affidavit will address the case studies. I do not propose to respond to Professor Kelsey's seventh affidavit as I consider that the issues raised by her have by and large been addressed in my second affidavit. I note that in preparing my third affidavit, I have been provided with details of New Zealand's domestic legal and policy settings by the relevant government departments.

Case studies

3. I propose to review each of the revised case studies in turn and assess how I consider they would be addressed in any ISDS proceedings. There are a number of assumptions that will need to be made in order to provide greater clarity for the Tribunal on how an ISDS tribunal would approach the issues. However, I note that many of the assumptions on which the scenarios are based are unrealistic and would be highly unlikely to occur in practice. As I explain in detail below in analysing the specific case studies, the scenarios are often contrary to the underlying policy approach to the issues, which results in an artificial consideration of scenarios which bears little relationship with what is likely to occur in practice. I have nevertheless stepped through the scenarios in some detail in order to show how the issues may be considered by an arbitral tribunal. However, this analysis can only touch the surface of the scenarios as the outcome of any case will largely depend on its facts.

4. I have also given further consideration to the original case study relating to affordable medicines, since this was not revised by Professor Kelsey.

[1] Affidavit of Penelope Jane Ridings, 19 January 2016, (Wai 2522, #A16).

Fracking

Scenario One

Changes to foreign investment laws to require an extensive cost benefit analysis of foreign commercial establishment of, or foreign investment in, mining companies, including a Treaty of Waitangi assessment of the implications of their proposed operations and a requirement of Maori consent to their investment where it reveals significant implications.

5. The first scenario assumes that changes are made to New Zealand's foreign investment laws regarding foreign establishment of or foreign investment in mining companies.

6. New Zealand's foreign investment laws are set out in the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005.

6.1 This Act provides for consent to be obtained for overseas investment in sensitive land and in significant business assets[2] and sets out the criteria for consent.[3]

6.2 Overseas investment in "significant business assets" includes where an overseas person acquires 25% or more ownership or controlling interest in a company with assets of more than $100 million; establishes a business where the total cost of establishing the business is more than $100 million; or acquires a business currently operating in New Zealand for consideration of $100 million or more.[4]

6.3 The criteria for acquisition of significant business assets are set out in Section 18 of the Overseas Investment Act 2005 and require that the relevant overseas person has business experience and acumen, demonstrated financial commitment and is of good character.

[2] Overseas Investment Act 2005, s 10(1).
[3] Overseas Investment Act 2005, ss 16 - 18.
[4] Overseas Investment Act 2005, s13.

7. I have assumed in the first instance that the mining operations would be "significant business assets" within the meaning of the Overseas Investment Act (for example if part or all of an existing mining operation was purchased). In the event that the foreign investor wished to acquire land for the mining operation, this is also likely to be covered by the requirements for consent to purchase "sensitive land" which under the Act includes non-urban land greater than 5 hectares.[5]

8. Under this scenario, amendments would be made to the Overseas Investment Act 2005 to include additional criteria prior to the acquisition of a significant business asset where that business asset was a mining venture.

8.1 The ability to change the criteria against which investments are screened under the Overseas Investment Act 2005 is included in Annex II of New Zealand's non-conforming measures.[6] According to this provision "New Zealand reserves the right to adopt or maintain any measure that sets out the approval criteria to be applied to the categories of overseas investment that require approval under New Zealand's overseas investment regime."

8.2 The categories of overseas investment that will require approval once TPP has entered into force are:

8.2.1 The acquisition or control of 25% or more of a New Zealand entity where the value of assets exceeds $200 million;[7]

8.2.2 The commencement of a business or the acquisition of a business where the total expenditures in setting up or acquiring the business exceed $200 million; and

[5] Overseas Investment Act 2005, sch 1.
[6] See #A16(a), Exhibits to Affidavit of Penelope Ridings , Exhibit A.
[7] I note that the $200 million threshold is not currently the level set under the Overseas Investment Act 2005.

8.2.3 The acquisition or control, regardless of dollar value, of certain categories of land that are regarded as sensitive or require specific approval according to New Zealand's overseas investment legislation.

9. This means that the criteria under which screening of proposed investments in significant business assets of greater than the $200 million threshold in TPP could be amended to include, as a condition of granting consent, that an extensive cost benefit analysis was to be conducted, including a Treaty of Waitangi assessment of the implications of the proposed operations. The consent could also be conditioned on the requirement of Māori consent to the investment where the cost-benefit analysis revealed significant implications. If consent to a particular mining operation were not granted, this could not be subject to an ISDS claim, even if the investor suffered loss or damage.[8] In this scenario, the Treaty of Waitangi exception would not be triggered.

10. I have made two assumptions in considering this scenario.

10.1 First, I have assumed that the amendments would follow constitutional principles and the general rule that legislation is prospective, not retrospective in effect. In other words, the amendments would only apply to new (potential) investments.

10.2 Second, I have assumed that the investment would be above the $200 million threshold in TPP and be subject to consent under the Overseas Investment Act 2005.

10.3 However I will consider the contrary assumption where the foreign investment in a mining operation falls below the threshold set out in the Overseas Investment Act 2005, in which case it would not be subject to consent under that Act.

[8] #A16(a), Exhibits to Affidavit of Penelope Ridings, TPP Chapter 9 (Investment), Annex 9-H.

11. Legislative amendments which imposed a new requirement for approval of foreign investment in mining operations below the screening threshold only provided certain conditions were met, if not also applied to New Zealand mining operations, would be inconsistent with the national treatment obligation in Article 9.4 of TPP. Additional requirements imposed on the screening of investments below the threshold would not be protected under the non-conforming measures exceptions in TPP.

12. However from a practical perspective Parliament would be unlikely to pass a law requiring a cost-benefit analysis and a Treaty of Waitangi assessment that applied only to foreign companies. It would be difficult to develop a rational justification for imposing such a requirement on foreign investors which was not also imposed on domestic investors. For example, if the concern of Māori was the adverse impact of such activities on the environment, excluding New Zealand companies from having to undergo such assessments would undermine the rationale for such amendments. It would mean that a New Zealand company could undertake a damaging activity whereas a foreign company could not.

13. Nevertheless I will assume for the purposes of this scenario that Parliament did pass such legislation.

13.1. TPP permits the submission of claims to ISDS by an investor who attempts to make, is making, or has made an investment in the territory of another Party.

13.2. An investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business.[9]

13.3. However, a foreign investor could not bring an ISDS claim for a breach of national treatment in the abstract. The foreign investor would need to establish that it has incurred loss or damage arising out of the breach.[10] It may recover only for loss or damage that it has incurred in its capacity as an investor of a

[9] #A16(a), Exhibits to Affidavit of Penelope Ridings, TPP Chapter 9 (Investment), Article 9.1, at n 12.
[10] #A16(a), Exhibits to Affidavit of Penelope Ridings, TPP Chapter 9 (Investment), Article 9.19.1.

Party.[11] Furthermore, under Article 9.29.4 of TPP where a claimant brings a claim in respect of an attempt to make an investment, a Tribunal may only award damages that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages.

13.4. In other words, in order for a claim to be made, the foreign investor attempting to make an investment in a mining operation would have had to channel capital or resources in order to set up the business in the absence of approval for the investment, and prove that loss or damage was incurred as a result and that the breach was the cause of that damage.

13.5. It is not realistic to assume that this would occur. It would be contrary to the duty that the investor has to exercise due diligence and ascertain the conditions under which a proposed investment would operate that I raised in my second affidavit.[12]

14 Assuming for the sake of argument that nevertheless an investor did suffer losses as a result of going through the process of seeking approval for the investment in the mining operation and the ensuing Treaty of Waitangi assessment found significant implications, and as a result a hapu declined consent to the mining operation, an ISDS claim might be brought.

14.1 The most likely breach claimed would be a breach of national treatment if New Zealand investors did not also have to undergo a cost-benefit analysis or Treaty of Waitangi assessment for their mining operations.

14.2 An investor might also claim a breach of the obligation to provide investors with fair and equitable treatment.

[11] #A16(a), Exhibits to Affidavit of Penelope Ridings, TPP Chapter 9 (Investment), Article 9.29.2.
[12] Second Affidavit of Penelope Ridings, dated 2 February (unsworn), at [56].

14.3 A breach of either obligation would need to be established first, before the Treaty of Waitangi exception would come into play.

15 In the case of a breach of national treatment, an assessment would be made of whether the treatment accorded to the foreign investor was less favourable than that provided to domestic investors "in like circumstances" taking into account factors such as whether the difference in treatment was plausibly connected to a legitimate policy objective. If, for example, foreign investors proposing to invest in mining operations in New Zealand were required to undergo additional approval requirements for new investments, while New Zealand mining operations also had to go through the same requirements for new mining operations or expansions of existing mining operations, the foreign and New Zealand investors may be considered to be in "like circumstances" as they relate to new investments.

16 Assuming for the purposes of the scenario that this was not the case, and a breach of national treatment was found, the Treaty of Waitangi exception could be pleaded in defence.

16.1 The requirement that hapu give their consent to mining operations which have significant implications under the Treaty of Waitangi would be considered by New Zealand to be necessary including to meet its obligations under the Treaty of Waitangi.

16.2 Evidence for this could be adduced, for example, from the Parliamentary debates of the legislation.

16.3 It could be argued that the "more favourable treatment to Māori" would be enabling hapu to give prior consent to certain mining operations in recognition of the Treaty of Waitangi. I consider that there would be little argument that prior consent was an additional right provided to hapu to be involved in decision making on whether the mining operation would go ahead. On this basis it would be considered more favourable treatment to Māori.

16.4 The tribunal's decision would then turn on the interpretation of the chapeau and whether the new legislative requirements were "arbitrary or unjustified" discrimination or a disguised restriction on trade and investment.

16.5 If there was a rational connection between the objective of providing more favourable treatment to Māori and providing hapu with the right to give its consent to mining operations, and the discrimination against foreign investors was rationally explained, the Treaty of Waitangi exception might be effective.

16.6 However the rationale for the measure would need to be adduced. If it was motivated by environmental concerns, or to recognise Māori concerns about fracking, then it would be difficult to demonstrate a rational connection between those concerns and a measure imposed on foreign, but not on New Zealand, companies. Indeed in order to be effective, any such measures would have to be imposed against all fracking companies, whether New Zealand or foreign owned.

16.7 If there was no connection between the measure and its rationale, it may come within the chapeau to the Treaty of Waitangi exception as unjustified discrimination or a disguised restriction on trade and investment.

17 The outcome would depend on the facts. However as indicated earlier, the scenario is unrealistic as it would be difficult to imagine a situation where potential foreign investors had to undergo a cost-benefit analysis and Treaty of Waitangi assessment whereas New Zealand companies undertaking mining operations did not have to do so.

18 In the case of fair and equitable treatment, the tribunal would need to assess the situation against the customary international law standard of fair and equitable treatment. The investor would have the burden of establishing a breach of this standard.

18.1 Much the same considerations would be relevant as in the previous paragraphs, including whether foreign investors were in effect being discriminated against purely because of their nationality.

18.2 If no breach was found of the fair and equitable treatment standard, it would be highly unlikely that the same conduct were found to be a breach of "arbitrary or unjustified discrimination".

19 In conclusion, if realistic assumptions are used, the Treaty of Waitangi exception would not be triggered. However if restrictions were imposed on foreign investors that were not also applied to New Zealand companies undertaking new mining operations, such distinctions would need to be explained rationally in order for the Treaty of Waitangi exception to apply. Otherwise the discrimination may be considered to be arbitrary or unjustified discrimination based on nationality and not on the objective for which the measure was introduced (such as recognition that mining operations should not have significant implications for the Treaty of Waitangi without the consent of the tangata whenua).

Scenario Two

A moratorium or ban on fracking through national legislation, or by a regional and local council declaring fracking a prohibited land use in a specific robe where that is legally possible now or in the future, in response to concerns of Maori among other advocates.

20 The second scenario is a ban on fracking through national legislation or by a regional and local council declaring fracking a prohibited land use in response to concern of Māori as well as other advocates. I will deal with national legislation first, then action by a regional or local council.

National legislation

21 A ban on fracking imposed by national legislation is similar to the factual situation in *Lone Pine Resources Inc v Canada*, where Canada is vigorously defending a claim for breach of fair and equitable treatment and expropriation obligations under the North American Free Trade Agreement (NAFTA) arising out of the passage of legislation by the

Government of Quebec to place a moratorium on fracking.[13] Some of the allegations made by Lone Pine Resources Inc include that the legislation was introduced without notice, and passed within a month without adequate consultation.

22 This is not the place to address the likely outcome of the *Lone Pine* case since the case is ongoing. However I would summarise the five main concepts of fair and equitable treatment which the United Nations Commission on Trade and Development (UNCTAD) has highlighted as those on which arbitral tribunals have converged:

a) Prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;

b) Prohibition of the denial of justice and disregard of the fundamental principles of due process;

c) Prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

d) Prohibition of abusive treatment of investors, including coercion, duress and harassment; and

e) Protection of the legitimate expectations of investors arising from a government's specific representations or investment inducing measures, although balanced with the host State's right to regulate in the public interest.[14]

23 UNCTAD adds to this that the investor's own conduct is also a relevant factor and the investor is under the obligation to perform full due diligence in order to independently assess the risks involved in making an investment in a particular State, as well as to

[13] See #A16a, Exhibits to Affidavit of Penelope Ridings, Exhibit LL.

[14] #A16(a), Exhibits to Affidavit of Penelope Ridings, Exhibit CC, UNCTAD "Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II", 2012, at xv-xvi.

manage its investment in a sound manner.[15] The need for an investor to exercise due diligence was discussed in my second affidavit.[16]

24 Governments have the right to regulate in the public interest. This includes taking action to protect the environment. While the scenario is based on concerns on the part of Māori, as well as other advocates, it appears that most concerns are on environmental grounds. I assume for the purposes of this scenario that the following occurs with the passage of the moratorium or ban legislation:

24.1 The Government undertook public consultation on the proposal and undertook a regulatory impact statement;

24.2 The proposal was based either on scientific studies into the environmental or socio-economic effects of fracking or public concerns over fracking;

24.3 The legislation was passed following normal legislative processes and consideration by Parliament, including a Select Committee process which provided an opportunity for submissions from the public; and

24.4 There were no specific assurances provided to an existing foreign investor that the legislation or policy on fracking would remain unaltered.

25 In these circumstances it is highly unlikely that there would be a breach of substantive obligations under TPP. I will address two specific obligations: fair and equitable treatment and expropriation (assuming for the sake of argument that the moratorium or ban had an adverse impact on an investor's investment).

Fair and equitable treatment

26 I have explained in my earlier affidavits that the threshold for a breach of fair and equitable treatment is high. It requires arbitrary or grossly unfair conduct by the

[15] #A16(a), Exhibits to Affidavit of Penelope Ridings, Exhibit CC, UNCTAD "Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II", 2012, at xvi.
[16] Second Affidavit of Penelope Ridings, dated 2 February (unsworn), at [55-57].

Government or involves a lack of due process leading to an outcome which offends judicial propriety. I make the following assumptions in relation to this scenario:

26.1 The proper legislative processes are complied with and due process is followed as outlined in paragraph 24 above;

26.2 The legislation is applied on a non-discriminatory basis: i.e. not just to foreign investors, or not just to the activities of a particular investor; and

26.3 The legislation is evidently based on a rational policy objective.

27 In such a situation there would be no breach of the obligation to provide fair and equitable treatment and therefore no need to rely upon the Treaty of Waitangi exception.

28 I note that any attempt by a foreign investor to seek to claim loss of anticipated earnings from an investment in fracking as a result of changes to legislation would be likely to fail:

28.1 It is my understanding that resource consents for fracking operations are usually issued for periods of two to three years. There is no specific assurance that future resource consents will be granted.

28.2 It is incumbent on an investor to exercise due diligence and to be aware of the socio-economic, cultural and historical situation in the country in which it invests. An investor ought to know that fracking was a controversial issue (not just in New Zealand) and that the regulatory environment for fracking may well change.

28.3 The arbitral tribunal decisions in *Methanex v United States* and *Glamis Gold v United States* cases referred to in my second affidavit provide support for this assessment.

Expropriation

29 I assume that Parliament will not pass legislation which runs counter to the constitutional principle that new legislation should respect existing property rights and that the Government will not take property without good justification and in accordance with fair procedures, and usually on payment of compensation unless there is a sound policy justification for doing otherwise.

30 My understanding is that a resource consent for fracking is typically for a duration of two to three years. A ban or moratorium could come into effect after existing resource consents had been exercised.

31 Should there be the contrary assumption that Parliament does intend to revoke existing resource consents, there may be a claim by a foreign investor that the legislative amendments "expropriated" existing property rights.

31.1 The Expropriation Annex 9-B of TPP clarifies that non-discriminatory regulatory actions taken by a Party to protect legitimate public policy objectives, such as the environment, are not indirect expropriation "except in rare circumstances".

31.2 As I noted in my second affidavit, the "except in rare circumstances" provision has not been the subject of ISDS claims to date and is likely to be interpreted very narrowly.[17]

31.3 The Expropriation Annex also sets out that an inquiry into whether there has been an indirect expropriation of the investor's rights should take into account factors such as the economic impact and character of the government action.

31.4 Footnote 36 to the Expropriation Annex 9-B also suggests that account be taken of factors such as the nature and extent of government regulation or the "potential for government regulation in the relevant sector".

[17] Second Affidavit of Penelope Ridings, dated 2 February 2016 (unsworn), at [42].

31.5 While the analysis will depend on the facts, if there were evidence, for example, of the need to take immediate action to place a moratorium on or to ban fracking, and of the legitimate public policy objective of the legislation and its non-discriminatory application, and the potential for government regulation in the sector, it may not be found to be prohibited expropriation.

32 It follows that in this part of the scenario it is unlikely that New Zealand will have to rely upon the Treaty of Waitangi exception as a breach of a substantive obligation would not be found.

Action at the regional or local level

33 I wish to explain briefly explain the domestic legal framework at the regional or local level relating to fracking before turning to this part of the scenario.

33.1 A company wishing to frack needs to have the relevant resource consents that cover any activities regulated under the Resource Management Act 1991 and a permit under the Crown Minerals Act 1991.

33.2 In order to carry out an exploration or mining activity in New Zealand, the company would need to determine what resource consents are required under the relevant regional and district plans. In the case of fracking, unless the water take and use, land use and discharge activities were permitted in the regional plan or district plan, resource consents would be required from the relevant council. Consents are also generally required for other aspects of petroleum development.

33.3 Section 8 of the Resource Management Act requires all persons exercising functions and powers under the Act to take into account the principles of the Treaty of Waitangi. This is done by consulting with relevant iwi on relevant resource consent applications and in the preparation of plans.

33.4 Fracking takes place in the context of petroleum exploration or mining and a permit to access the resources must be obtained under the Crown Minerals Act 1991 from New Zealand Petroleum & Minerals (NZP&M) which sits within the Ministry of Business, Innovation and Employment (MBIE).

33.5 Section 4 of the Crown Minerals Act requires all persons exercising functions and powers under the Act to have regard to the principles of the Treaty of Waitangi. For petroleum permits, this is given effect through Chapter 2 of the Petroleum Programme. This provides that iwi and hapu whose rohe includes some or all of the permit area or who may be directly affected by a permit to be consulted on matters including on applications for mining permits and the preparation of a petroleum exploration permitting round.

33.6 Iwi and hapu may request that certain areas not be included in a petroleum exploration permit round or a permit.

34 The prohibition of a land use at a national level would require amendments at a central government level to the Resource Management Act either through changes to the primary legislation, the development of a regulation or a national environmental standard, or through the development of special legislation; or at a regional or district council level though a plan change.

35 At the regional or district council level, changes to the regional or district council plans to prohibit a land use would go through the usual processes of consultation, cost benefit analysis, hearings, and appeals in accordance with Schedule 1 of the Resource Management Act.

36 If the changes instituted at central government level or at regional or district council level followed due process, were fair and applied the administrative principles of natural justice and complied with legislative requirements, it would be unlikely that they would breach the obligation to provide fair and equitable treatment.

37 Action at the regional or local level would need to be consistent with existing legislation, which protects against expropriation.

37.1 Sections 10, 10A and 20A of the Resource Management Act protect existing land use rights. If a land use was lawfully established and an investor had a land use consent from a district council to frack before a rule set out in a regional or district plan rule or a national environmental standard was in place to prohibit the land use, the investor would be able to continue the activity until the consent expired.

37.2 Existing use rights do not apply if the land use is discontinued for a continuous period of 12 months or more.

37.3 Existing use rights protection also would not apply if the moratorium or ban was land use for the purposes listed in section 30(1)(c) by a regional council (for soil conservation, the maintenance/enhancement of water quality and quantity, avoidance or mitigation of natural hazards, prevention or mitigation of any adverse effects of hazardous substances), or in the coastal marine area or on a river or lake bed.

38 It follows that in this part of the scenario, provided that legislative requirements, due process and natural justice principles were followed, it is unlikely that New Zealand would have to rely upon the Treaty of Waitangi exception as a breach of a substantive obligation would not be found.

Scenario three

Changes to the conditions of licenses for mining by fracking, including new restrictions on water draw-off, stricter rules for storage, transportation and disposal of toxic substances, higher standards for water quality and land stability, and a ban on land farming, as per concerns expressed by Māori.

39 The response to the third fracking scenario would be much the same as for the second scenario. Again it is useful to place this scenario within the domestic legal context.

39.1 The Crown issues permits for prospecting for, exploring for and mining petroleum. The environmental effects of activities like fracking are handled by regional councils and territorial authorities. As this scenario appears to address environmental effects, I interpret it as referring to resource consent conditions rather than conditions of a mining permit.

39.2 Under section 128 of the Resource Management Act the consent authority is permitted to review consent conditions for a number of purposes. These include:

39.2.1 to deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage;

39.2.2 to require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment;

39.2.3 in the case of a coastal, water, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met;

39.2.4 a relevant national environmental standard has been made (in the case of a coastal, water or discharge permit); or

39.2.5 the information made available to the consent authority by the applicant for the consent for the purposes of the application contained inaccuracies which materially influenced the decision made

on the application and the effects of the exercise of the consent are such that it is necessary to apply more appropriate conditions.

40 Sections 129 and 130 of the Resource Management Act set out the process by which conditions are to be changed. These reflect due process considerations and sometimes hearings may be required.

41 Assuming resource consent conditions were changed consistent with legislation, it would be difficult to see how there would be a breach of a substantive investment obligation under this scenario.

42 Even if the conditions for changing a resource consent did not exist, in practice existing resource consents, which as mentioned typically lasts two to three years for fracking, could be allowed to run with new, higher standards being applied to future resource consents.

43 Given the domestic legal framework, the practical possibilities for phasing in changes to resource consents, the environmental nature of the scenario and the safeguards in TPP for non-discriminatory regulation which meets public policy objectives including environmental objectives, it is difficult to identify the breach of a substantive obligation under which an investor might bring a claim. Changes to the conditions of future resource consents would not be contrary to the obligation to provide fair and equitable treatment under customary international law and this is supported by the arbitral tribunal decisions in *Methanex* and *Glamis Gold*. Again in these circumstances there would be no need to rely upon the Treaty of Waitangi exception.

Freshwater

Scenario One

Amendment to the Resource Management Act to provide a sustainable framework for the management of fresh water within every catchment, covering all aspects of freshwater governance, values, limits, decision-making, and allocation and that recognises the mana of iwi and hapu and provides for iwi

rights, including proprietary rights, and for relationships and responsibilities as kaitiaki in respect of water.

44 As with the fracking case study, it is useful to first set out the current domestic legislative settings under the Resource Management Act.

44.1 The purpose of the Act as set out in section 5 is the "sustainable management of natural and physical resources".

44.2 Sections 6 and 7 of the Act includereferences to Kaitiakitanga, the ethic of stewardship and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, in addition to section 8 mentioned above at [33].

44.3 Regional councils exercise functions in respect of freshwater management under section 30.

44.4 A mandatory or voluntary co-decision making and delegated decision making arrangement may apply in a region. Such an arrangement may have been established under sections of the Act (sections 33, 34 and 36B) or as part of Treaty of Waitangi settlements which provide co-management arrangements over water catchments and the recognition of kaitiaki and mana: for example the Whanganui River Iwi Settlement, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, and the Hawkes Bay Regional Planning Committee.

44.5 Section 122 of the Resource Management Act explicitly states that resource consents are not real or personal property.

45 In addition to the provisions in the Act, the Government has made the National Policy Statement for Freshwater Management 2014 (the NPS) which is an instrument made under the Resource Management Act. The NPS requires regional councils to recognise the national significance of fresh water for all New Zealanders and Te Mana o te Wai (the mana of the water) when applying the water management framework in the regions.

46 Based on the assumption that amendments to the Resource Management Act and National Policy Statement for Freshwater Management 2014 would be required for this scenario, any such amendments should be considered in light of the fair and equitable treatment and expropriation obligations of TPP.

47 Amendments to the Resource Management Act and NPS would be within the right of the Government to regulate for legitimate public policy objectives. If the Government followed the processes set out in paragraph [24] above, it would be difficult to see how this would be considered a breach of the obligation to provide fair and equitable treatment.

48 Assuming for the purposes of this scenario, that legislation granted proprietary rights in water to iwi only, an investor might attempt to claim that because its existing water permits were not transferred into proprietary rights to water (in the process of recognition of proprietary rights to iwi), its investment was "expropriated" indirectly by the Government's actions.

48.1 A tribunal would first have to determine whether the investor had an investment that had been "expropriated" or "taken" directly or indirectly.

48.2 This would involve an assessment of whether the investor's permits to take water constituted an "investment" within the asset based interpretation of investment in TPP. According to footnote 4 of Article 9.1 of TPP, permits which do not create rights protected under the Party's laws do not have the characteristics of an investment and would therefore not fall within the definition of "investment".

48.3 An investor might nevertheless attempt to argue that its investment (eg in a hydro power station) was hinged on being able to acquire rights to water, and that granting proprietary rights in water to iwi deprived the investor of the full value of its investment.

48.4 Assuming no compensation was paid, a tribunal in such a circumstance would be called upon to consider whether the action was a non-discriminatory action designed to protect legitimate public policy objectives.

48.5 In this case the public policy objective - to recognise that Māori had proprietary rights in water – would provide the rationale for the action. The question would be whether the action interfered with the investor's "distinct, reasonable investment-backed expectations", such as whether the government had provided binding written assurances, and the character of the government action.[18]

48.6 This would be a fact-based inquiry which would include, among other things, an assessment of the economic impact and character of the government action.

48.7 If, following such an inquiry, it were found that there was no economic impact from granting proprietary rights in water to iwi (for example, if the investor obtained permits to water from iwi rather than from councils), or if government otherwise took action to reduce any adverse economic impact from the measure (such as by permitting the investor to continue to exercise the resource consent for the balance of its life), there would be no breach of the expropriation obligation.

49 In this case there would be no need to rely upon the Treaty of Waitangi exception, either as a defence against an alleged breach of fair and equitable treatment, or as a defence against a breach of the expropriation obligation.

50 [redacted]

was sufficiently capricious or otherwise arbitrary as to warrant a finding that it did not fall within the exception. In light of the cultural and Treaty-based environment in New Zealand, and the specific recognition of the Treaty of Waitangi exception in TPP, it would be unlikely that a tribunal would find that the legislation did not fall within the exception.

Scenario Two

The exercise of powers under that amendment to freeze current allocations of fresh water rights in an iwi's rohe, and either prohibit the granting of new rights so as to protect the quality and mauri of the water, or distribute all new rights only to local iwi and hapu for both customary and commercial purposes.

51 It is not entirely clear what this hypothetical scenario involves. It appears to be based on the assumption that amendments would be made to the Resource Management Act necessary to achieve Scenario One for freshwater to create a decision making regime to recognise iwi interests in water. This would appear to involve (i) removing the administrative priority accorded to existing consent holders when they reapply for a consent for the same activity and/or (ii) placing a freeze on the grant of any new water permits to ensure new permits only go to iwi or hapu for both customary and commercial purposes. This appears to mean that existing permits would not be affected, but consent holders may not have access to water at the expiry of that consent.

52 As with Scenario One, it is difficult to identify what substantive investment obligations would be breached by any legislative amendmentsrequired to give effect to this scenario.

52.1 If an investor had been allocated water permits and these permits were affected as a result of the legislation, this may affect the investment of a foreign investor depending on whether the permits were regarded as an "investment" with the asset-based definition in TPP.

52.2 However this would be justified as a legitimate exercise of the right to regulate in the public interest. This assumes, once again, that due process and legal processes were followed in the passage of the legislation.

52.3 The scenario does not appear to contemplate taking current allocations of fresh water permits away from an investor – which if done without compensation may be regarded as expropriation. The considerations set out in the previous scenario would apply in that case.

52.4 I would also note that there is an exception to the national treatment obligation in Annex II to TPP in respect of water. A foreign investor would therefore not be able to argue that there was a breach of national treatment. The Drafters' Note on the interpretation of "in like circumstances" may also be relevant where the difference in treatment is reasonably connected to a rational government policy goal.

53 In any case, if there were a breach of a substantive obligation under the investment provisions of TPP, the Treaty of Waitangi exception would apply.

53.1 The distribution of new water permits only to iwi and hapu would clearly be "more favourable treatment to Māori".

53.2 It would be useful for the rationale of providing more favourable treatment to Māori to be clearly identified in the legislation or policy documents behind the legislation so that there is an objective link between the measure and the rationale. This would provide evidence that the chapeau to the Treaty of Waitangi exception had been met.

53.3 The exception would apply to according rights to iwi or hapu to use water for both commercial and customary purposes: the exception is not limited to treatment of a commercial (or non-commercial) nature. There is in any case an exception in the Resource Management Act (section 14(3)(b)) which allows fresh water to be taken without a permit for reasonable domestic needs provided there is no adverse environmental effects.

53.4 If the legislative processes followed usual Parliamentary processes and due process so that the action was not considered to be "arbitrary", and there was no discrimination against foreign investors on the basis of their nationality (eg if foreign investors and domestic investors were treated the same), the requirements of the chapeau would be met.

54 This scenario therefore appears to be a situation where either there is no breach of a substantive obligation, or the Treaty of Waitangi exception could be relied upon in order to provide more favourable treatment to Māori.

Case study: Affordable Medicines

55 In her Sixth Affidavit, Professor Kelsey examined case study 2 relating to affordable medicines in which she highlighted the impact of TPP on patent term extension and biologics, the Transparency Annex relating to PARMAC, and the potential for an ISDS challenge to decisions adversely affecting pharmaceutical companies' commercial interests. I make the following comments in response.

56 New Zealand law currently provides five years data protection for biologics. Entering into TPP will not change this.

57 The prospect of an extension of patent term relating to a pharmaceutical product for an unreasonable delay in issuing the patent[19] or in providing marketing approval for the product[20] is unlikely to occur in New Zealand due to our efficient patent examination and marketing approval processes.

58 Second, the Transparency Annex retains PHARMAC's role in providing affordable medicines by preserving the PHARMAC model and PHARMAC's ability to prioritise spending and negotiate the best prices for medicines. The Annex includes additional processes with which PHARMAC will need to comply, but it is my understanding that

[19] TPP, Article 18.46
[20] TPP, Article 18.48.

these changes may impose operational costs but will not affect the pharmaceutical budget. The Annex will therefore not impact on access to affordable medicines.

59 Third, the provisions of the investment chapter do not mean that pharmaceutical companies will be able to challenge decisions which adversely affect those companies' commercial interests, as stated by Professor Kelsey.

59.1 A pharmaceutical company would have to establish that it has made an investment in New Zealand, which as the *Apotex* case indicated, is not the case when the pharmaceutical company is merely seeking approval for the sale of the drug or its inclusion on the list of subsidised medicines.[21]

59.2 Were the company to seek to argue that its intellectual property rights had in some way been "taken" by the Government through regulatory decisions, these would likely be permitted as nondiscriminatory actions to protect legitimate public policy, ie health, objectives, consistent with the TPP Expropriation Annex 9-B.

59.3 Indeed TPP specifically provides that regulatory actions to protect public health include actions relating to the regulation, pricing, supply and reimbursement of pharmaceuticals including biologics.[22]

59.4 Further, the rules on expropriation do not in any case apply to the issuance, revocation or limitation of intellectual property rights where this is consistent with the Intellectual Property Chapter of TPP and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.[23]

60 In my view therefore, were an investment claim to be brought by a pharmaceutical company, there would be no need to rely upon the Treaty of Waitangi exception.

[21] See *Apotex Inc v Government of the United States of America*, #A16(a), Exhibits to Affidavit of Penelope Ridings, Exhibit T.
[22] #A16(a), Exhibits to Affidavit of Penelope Ridings, TPP Chapter 9 (Investment), Annex 9-B, at n 37.
[23] #A16(a), Exhibits to Affidavit of Penelope Ridings, TPP Chapter 9 (Investment), Article 9.8.5.

Conclusion

61. It is always possible to develop scenarios of situations where the Treaty of Waitangi exception may not be effective as a defence to a claim for a breach of an investment obligation. However to do so requires that the scenarios are constructed in such a manner that they do not follow well-established constitutional rules or the administrative principles of due process and natual justice. In my view, where Government adopts policies which provide more favourable treatment to Māori, there is a reasonable nexus between the measures taken and rational government policies, and the Government follows due process, either the measures will not breach substantive obligations under TPP or the Treaty of Waitangi exception will be effective to protect Māori interests.

SWORN)
at Hamilton this 16th day of February)
2016)
before me:)

Maninder Kaur Sidhu
Solicitor
Hamilton