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 Agreement Inquiry

CROWN CLOSING SUBMISSIONS

7 April 2016

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MAY IT PLEASE THE TRIBUNAL:

INTRODUCTION

1. The Trans Pacific Partnership (TPP or the Agreement) forms a central plank of successive New Zealand governments' economic policy and strategy of strengthening and broadening international relationships. The Crown says that nothing in the Agreement will prevent it from meeting its obligations to Māori.

2. This is an urgent inquiry of the Tribunal to test this assertion. Urgency was granted on the basis that the Tribunal considered key criteria were met, namely that potential for significant prejudice to Māori is likely to arise from New Zealand's entry into the TPP, and there was no alternative but to hear the claim.[1]

3. Whether these criteria are made out is highly relevant because the claimants seek Tribunal recommendations that the Crown take particular actions in the international and domestic spheres (for example defer ratification, renegotiate the Treaty of Waitangi exception, seek bilateral memoranda, seek agreed interpretations, review the Treaty of Waitangi exception etc.).

4. These would be very serious steps for the Tribunal to recommend given the international context within which TPP occurs, the limited evidential basis upon which the Tribunal would be acting, and the speculative nature of the risk assessment involved.

5. The Tribunal must be satisfied on the evidence that recommending such action is warranted – it must be satisfied that the Crown will breach Treaty principles, cause material prejudice to Māori and that the remedies sought are necessary. In short, the Crown says there is no basis on which to recommend such action.

6. The Crown says that:

   6.1 The purpose of the Treaty of Waitangi exception is to preserve domestic policy space for the ongoing Crown-Māori constitutional dialogue. It is effective in this purpose. The protections contained

[1] #2.5.009, Decision of the Tribunal at [76].

within the TPP (including but not limited to the Treaty of Waitangi exception) preserve New Zealand's regulatory autonomy. The claims are directed at whether the Crown will exercise that regulatory autonomy in a Treaty compliant manner, rather than towards the effects of the TPP. These matters are to be addressed in the domestic sphere through existing legal, constitutional and political checks and balances. The TPP is in no way determinative of these domestic matters. The Treaty of Waitangi exception does not, and should not, enforce particular Treaty requirements on the Crown – to suggest that it should is to circumvent New Zealand's domestic processes and to lose sight of the context within which that clause occurs – an international trade and investment agreement.

6.2 The Crown has accurately assessed the potential adverse impacts of the TPP on the interests of Māori as being of minimal or of generalised effect, or as having Māori interests at play but other interests to the fore, or (for a limited number of matters) a specialised interest. This assessment has been informed not only by TPP-specific engagement but, for some issues (eg UPOV 91, water, natural resource management) by years of agency engagement with Māori as part of their business as usual operations or in relation to specific policy developments. The Crown says Māori interests are neither central to the TPP, nor significantly affected by it. The Crown is engaging with Māori in a manner proportionate to those impacts.

6.3 That areas of interest to Māori are covered by the TPP is not disputed. What is disputed is the degree of impact that the TPP constitutes on those interests. The fact that the Crown's assessment of impact differs so markedly from that of claimants is attributable to claimants' regrettable reliance on evidence that has been demonstrated to be inaccurate, unbalanced, unsubstantiated or overstated. The Crown says that there is no Treaty duty to engage with Māori in relation to claimed adverse impacts that are based on remote (or non-existent) possibilities rather than realistic

probabilities. Treaty principles are not unqualified, they are informed by reasonableness and practicality.

7. Irrespective of the Tribunal's conclusions on these key matters, the Tribunal heard from Dr Walker, Mr Harvey, Dr Ridings and Associate Professor Kawharu that any dealings in relation to the Treaty of Waitangi exception with parties to New Zealand's international trade and investment agreements (whether seeking renegotiation or seeking reassurance as to shared interpretations) comes with no guarantee of success, would come at a cost, and that taking such action is not warranted prior ratifying the TPP. The Crown says further that claimants have not demonstrated the degree of prejudice arising from the clause that would be required to warrant New Zealand taking such risks.

8. It is appropriate for the Tribunal to be cautious in light of the inevitably speculative and unfounded nature of much of the claimant evidence and issues before it. The TPP will not come into effect for approximately two years from the date of signature (should sufficient parties notify). The possibility of the Treaty exception ever being invoked is more distant than that and would require Crown action (which would be reviewable in its own right). There are many imponderables which may occur between now and then which could change the landscape, such as the potential for much greater investment by iwi domestically and internationally. Considering the efficacy of a clause that is many years away from likely invocation (if ever) is fraught in the Crown's view. In that respect, these proceedings differ significantly from other substantive contemporary proceedings that have come before the Tribunal which involved policy initiatives or legislation that were to have immediate effect. In addition, there is an important Parliamentary process under way in respect to TPP. The democratic nature of that process should not be ignored or underrated.

Issues for inquiry

9. The Tribunal set two issues for this urgent inquiry:[2]

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

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

10. Submissions have been made on a broad range of issues that, in the Crown's view, are outside the scope of these issues. This inquiry has not been constituted to assess:

   10.1 The costs and benefits of the TPP as a whole to New Zealand;

   10.2 The economic policies developed by successive New Zealand governments of the last 30 years promoted through Free Trade Agreements (FTAs);

   10.3 The conduct of domestic affairs between the Crown and Māori that are not caused by the TPP;

   10.4 The constitutional arrangements through which the Crown speaks for New Zealand on the international stage qualified by Treaty principles (This has already been the subject of findings by the Wai 262 Tribunal); and

   10.5 Matters that are subject to separate properly constituted Tribunal inquiries other than to the extent they relate directly to the issues defined by the Tribunal for this inquiry.

Jurisdictional duplication

11. Claimants have premised claims on two matters that overlap directly with separate, properly constituted, Tribunal inquiries that are still underway.

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2 #2.5.009, Decision of the Tribunal at [74]; confirmed by #2.5.19, Memorandum-directions addressing issues for inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable, at [11].

These claims raise duplication and, potentially, concerns in relation to the administrative law doctrine of collateral challenge:

11.1 The National Fresh Water and Geothermal Resources Inquiry (the Fresh Water Inquiry)[3] has been adjourned and a collaborative process is currently underway to consider how Māori rights in natural water regimes may be given practical effect. New Zealand Māori Council (NZMC) opposition to that adjournment was not successful at the time and it should not now be able to effect success through collateral use of a separate process. A recommendation sought by the NZMC seeks to relitigate or cut across not only the Fresh Water Inquiry Stage 1 findings and its current adjournment, but also claims that have been rejected by the Supreme Court.[4] Counsel for Wai 2535 argues that this does not cut across or seek to impugn the authority of the Wai 2358 enquiry but "Rather, they are directed at the Crown."[5] With respect, the procedural control of that inquiry is within the authority of the Wai 2358 Tribunal – the current adjournment was directed by that Tribunal (notwithstanding NZMC opposition). The Fresh Water Inquiry is the correct forum in which to progress these matters.

11.2 To the extent that claims, findings and recommendations sought are premised on the *Te Paparahi o Te Raki (Northland) Stage 1 Report*,[6] they are misconceived and cut across Stage 2 of that Inquiry. There is not authority, scope, nor an evidential base on which to make

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3 Wai 2358, the National Fresh Water and Geothermal Resources Inquiry.

4 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [Freshwater Report]; *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [90] (*Mighty River Power case* (SC)). #3.3.22, Closing submissions of the New Zealand Māori Council (Wai 2532) at [74(a)]:

> "The New Zealand Māori Council seeks the following recommendations:
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> That the Crown engage with Māori claimants and the NZMC with a view to resolving by negotiation or co-operation for a speedy resolution to the Waitangi Tribunal, on how Māori proprietary rights in natural water regimes may be given practical effect;".

5 #3.3.24, Closing submissions (Wai 2535) at [75].

6 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty – The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) [*Te Paparahi o Te Raki (Northland) Stage 1 Report*].

novel findings on sovereignty through this inquiry.[7] The 2015 *Te Paparahi o Te Raki (Northland) Stage 1 Report* does not displace anything said in the Tribunal's earlier 2011 Wai 262 report.

Crown approach

Necessity of technical and practical approach

12. The essence of this inquiry centres on to the degree of risk the TPP presents to the interests of Māori and whether the protections provided are adequate to address those risks in a Treaty compliant manner.[8]

13. There is a great deal of technical, legal evidence in this case on complex, legal interpretation issues, particularly relating to the Treaty of Waitangi exception. It is wrong to suggest that the Crown is focussing solely on the legal obligations of the TPP, and it is also wrong to say that, to the extent it does focus on legal matters, the Crown "misses the point."[9]

14. The Crown says that any credible assessment of risk must be arrived at through a proper analysis of relevant matters including but not limited to the legal effect of the clause. Risk is not an abstract concept to be based on unsubstantiated fears or concerns, it can be objectively assessed as the probability of loss or harm occurring and the severity of such loss or harm should it occur. The possible does not equate to the probable. It is not tenable to base allegations that particular risks compromise the Crown's ability to act in a Treaty compliant manner if the alleged risks are not substantiated, unrealistic, or are overstated.

Weight to be accorded to technical experts

15. To assess, in Treaty terms, whether the Treaty exception is the effective protection the Crown says it is, an accurate understanding must first be developed of international trade and investment law in order to properly understand how the exception is most likely to be interpreted and

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7 The Crown has not provided fuller submissions on this point because exchanges between the panel and claimant counsel indicated that the Tribunal did not see this as being relevant to this Inquiry given the caveats stated by Judge Coxhead in his letter of committal that that the report included no express findings about the nature of the sovereignty the Crown exercises today and that such matters would be considered as part of its Stage 2 proceedings (Judge Doogan to Mason, Unofficial Transcript at CLO034-035).

8 For example, #3.3.22, Closing submissions of the New Zealand Māori Council (Wai 2532) at [12]: "there is real risk that in entering the TPP the Crown has materially diminished its capacity to provide redress for outstanding claims."

9 #3.3.22, Closing submissions of the New Zealand Māori Council (Wai 2532) at [12].

implemented in the context for which it is created– protecting the Crown-Māori dialogue from interference by international parties (including through challenges under dispute resolution mechanisms). A Treaty jurisprudence analysis can then be applied to that evidential basis.

16. The Tribunal has had the benefit of hearing from two credible, balanced technical experts and is able to place considerable weight on their evidence in its determinations on the first stage of developing a credible evidential basis to Issue 1. Both Dr Ridings and Associate Professor Kawharu are experts in international trade law, neither claim to be experts in Treaty jurisprudence. Dr Riding's expertise is based in her practical experience as legal counsel at the Ministry of Foreign Affairs and Trade (MFAT or the Ministry) and more recently as a panellist on WTO dispute resolution panels. Associate Professor Kawharu's expertise is primarily academic and draws on her earlier professional practice.

17. The Crown's view is that the same weight cannot be accorded to the evidence of Professor Kelsey. Whilst the Crown acknowledges Professor Kelsey's academic credentials, it has significant concerns about the balance, accuracy, and reliability of Professor Kelsey's evidence and considers that her evidence is more properly characterised as advocacy. Examples of opinions or conduct that raise these concerns include:

    17.1 Nowhere in Professor Kelsey's eight affidavits did she state she worked for governments on international trade agreements or as a direct participant in negotiations and yet she claimed such expertise whilst giving evidence (whilst also acknowledging that she was not undertaking such roles on professional basis);[10]

    17.2 Professor Kelsey's opinion that the essential consideration when assessing whether the Treaty exception provides comprehensive and guaranteed protection is how an ISDS tribunal "might" interpret the exception as opposed to how it should or is most likely to elevates the (remotely) possible over the probable. Treaty

10 Kelsey, Unofficial Transcript at CLO087-088.

principles are premised in practicalities and reasonableness not such academic possibilities;[11]

17.3 Professor Kelsey's proposals for alternate options have an air of unreality about them.

17.3.1 Professor Kelsey discussed a draft tobacco clause purportedly proposed by Malaysia during the TPP negotiations as an example of a more robust clause. However such a clause does not feature in the final Agreement, so clearly, if such a clause had been proposed, it could not have been accepted by the other Parties and is therefore of academic interest only.[12]

17.3.2 Professor Kelsey has suggested that New Zealand should seek bilateral memoranda with the other TPP Parties and has stated that there would be nothing preventing New Zealand from doing so without acknowledging the risks and costs that any such interaction would involve.[13]

17.4 The degree of balance expected of expert witnesses does not appear to be present in Professor Kelsey's evidence. Examples of this overly sceptical and pessimistic approach include:

17.4.1 Professor Kelsey's failure to balance the critical assessments of the TPP in her eight affidavits with any acknowledgment of positive aspects, for example that the Treaty of Waitangi exception applies across the whole Agreement, is the only country specific general exception, the only Agreement wide exception related to indigenous people, and demonstrates leadership – all of which Associate Professor Kawharu does acknowledge;

17.4.2 When questioned about her views on Investor-State Dispute Settlement (ISDS) tribunals Professor Kelsey

11 Heron cross-examination of Kelsey, Unofficial Transcript at CLO092-093.

12 Kelsey, Unofficial Transcript at CLO076, CLO166-167, CLO170-171.

13 #3.3.11, Opening Statement of Kelsey at 10.

stated the system was well recognised to be in crisis and that "It's not a beat up on the part of an ideologically extreme person to say what is happening country by country in the world. No." without balancing her assessment by acknowledging that 12 countries have just signed up to an ISDS.[14]

17.5 Professor Kelsey's assessment of risk is overstated and inaccurate. Examples of this include:

17.5.1 Failing to acknowledge that the investment obligations within TPP are reciprocal and that New Zealand companies (including economic interests of Māori), benefit from these provisions when they operate offshore in TPP countries;

17.5.2 Failing to acknowledge that the majority of New Zealand inbound investment is from Australia (approximately 80% of inbound investment amongst TPP Parties) and that ISDS claims cannot be lodged in relation to those investments;

17.5.3 Assessing the supposed 'chilling effect' without acknowledging that a legitimate and, arguably the primary, correct viewpoint for the chilling effect is the state party; and

17.5.4 Putting forward selective and potentially misleading examples such as *Dow Agro Sciences LLC v Government of Canada*[15] (implying it was an example of a settlement that involved a withdrawal of measures).[16] That inaccuracy

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14 Heron cross-examination of Kelsey, Unofficial Transcript at CLO090-091.

15 See the summary of the case at the website of Global Affairs Canada (Canadian Ministry of Foreign Affairs): http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/agrosciences.aspx?lang=eng.

16 Kelsey, Unofficial Transcript at CLO074-075: "Now some of the settlements are actually bigger than some of the wins and indeed some of the settlements are not monetary settlements but are okay, we'll withdraw that measure and so you have to be very careful about the kinds of mechanisms. One of the notorious examples of a section was in Canada where Dow Chemicals got Quebec to issue a public statement saying 24D was safe for human health."

was demonstrated in cross examination and later accepted by Professor Kelsey;

17.6 A large part of Professor Kelsey's analysis appears to be built on hearsay. Professor Kelsey acknowledged that she has not been a professional participant in ISDS proceedings or in negotiations and yet seemed to assert intimate knowledge of the workings of these because "I talk to a lot of people who do."[17]

18. This is well short of a satisfactory basis for an expert to advise the Tribunal and further short of evidence which could satisfy it to the necessary standard. The consequences of this are significant given the extent to which claimants, their counsel and claimant witnesses have relied on Professor Kelsey's analysis – not only in relation to Treaty analysis but in relation to the likely effects and impacts of the Treaty exception's operations, and those of TPP more broadly.

The context – international trade is critical to a small island nation

19. Whilst the Tribunal's jurisdiction is concerned with assessing the Crown's compliance with Treaty principles, it is important that this assessment is conducted with an awareness of the context within which the TPP has been developed. The strategic opportunities presented through international relations have been presented by Dr Walker in these proceedings, and were well understood by the Wai 262 Tribunal:[18]

> New Zealand is a small country that depends for the fostering and protection of its interests on the making of rules that bind or influence more powerful nations to act in agreed ways. Without this process of making international rules, our interests might receive little or no consideration and protection. Māori, in their turn, depend on their interests being adequately identified, understood, and addressed in this international rule-making.

20. As set out by Dr Walker, challenges to these strategic objectives are very real:[19]

> New Zealand has always traded with the world and international trade is critical for New Zealand's economy. However, in trading with the world

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17 Heron cross-examination of Kelsey, Unofficial Transcript at CLO088-089.

18 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) Vol 2 [*Wai 262 Report*] at 681.

19 #A36, Third Affidavit of David John Walker at [14].

> today, New Zealand faces a number of enduring challenges. We are geographically isolated and distant from the major concentrations of consumers overseas who can afford to buy what we produce. Our comparative advantage lies heavily in producing agriculture and food and beverage products. However, these are exactly the sectors in which many other countries seek to protect their domestic producers from overseas competition through steep tariffs, restrictive quotas and anti-competitive local subsidies. The over-arching goal for New Zealand's trade policy strategy is to mitigate these challenges and maximise the opportunities for New Zealand businesses to succeed in the global market.
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> In this environment, the removal and reduction of barriers to trade and investment and the establishment of frameworks through which trade and investment links can evolve and expand are key. Accordingly, over the past 20 years, successive New Zealand Governments have pursued an international trade policy that encompasses the pursuit of free trade agreements (FTAs) (both bilateral and plurilateral) and working for better international rules for global trade through the World Trade Organisation (the WTO).

21. TPP negotiations formally began in 2010 and concluded in October 2015. The Agreement was signed in Auckland on 4 February 2016. It is not expected to enter into force until late 2017 or early 2018.

22. The reasons for New Zealand becoming a Party to TPP are both economic and strategic. Joining the Agreement would provide various economic benefits to New Zealand through mechanisms such as reduced tariff rates in key markets, improved commitments to ensure New Zealand exporters of goods and services are not discriminated against and greater regional economic integration.

23. The New Zealand government has transparently laid out the pros and cons of ratifying the Agreement in its National Interest Analysis (NIA). Dr Walker emphasised that, while there are both benefits and costs to New Zealand joining the Agreement, there are also risks inherent in New Zealand *not* joining the Agreement.[20] If TPP entered into force with all eleven other countries, but without New Zealand, New Zealand exporters would not only lose the opportunity to benefit from enhanced access to those markets, but would also be placed at substantial disadvantage to their competitors in TPP.

24. In addition, protections provided in TPP are mutual and reciprocal. It would be illogical to consider such protections as detrimental without

[20] #A36, Third Affidavit of Walker at [21]-[22].

considering whether they were capable of applying with equal and opposite advantage to New Zealand businesses or investors (including those related to Māori as identified in a general sense in the evidence of Dr Walker).

Relevant Treaty jurisprudence

Tests to be applied

25. The Tribunal has set out the orthodox tests relevant to this inquiry:[21]

    25.1 The Crown's duty of active protection – the Tribunal has posited that this would be heightened if the TPP is substantially different in substance and reach from previous FTAs;

    25.2 The Crown ought to ensure that it was properly informed as to Treaty rights and interests put in issue; and

    25.3 The Crown ought to take proper steps to preserve its capacity to honour its Treaty obligations to Māori, including the capacity to provide redress.

26. The Wai 262 report considers how to balance the duty of active protection in the contexts of international agreements and concludes that:

> the degree of protection to be accorded to the Māori interest in any particular case cannot be prescribed in advance. It will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders, and on the international circumstances which may constrain what the Crown can achieve.

27. The Crown accepts that this is the correct standard to be applied however considers that clarification is required in relation to what "the [Māori] interest" means in this context. It is a two-step assessment:

    27.1 Firstly an identification of the matters of interest to Māori that is relevant to the particular international instrument concerned and being informed as to the nature and scale of those interests.

    27.2 Secondly, an assessment of the degree of impact the instrument is likely to have on those interests.

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21 #2.5.19, Memorandum-directions addressing issues for inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable, at [15].

28. The degree of protection to be accorded is commensurate to that degree of impact, not solely to the nature and importance of the interest itself to Māori. Whilst a matter may be of high significance to Māori, if TPP either does not have a real adverse impact on that matter, or only a remote hypothetical impact the Crown's duty of active protection is lessened. The Crown contends that TPP is neutral in its effect on Treaty claims and will not prevent the Crown responding appropriately to avoid or remedy breaches of Treaty principles in relation to Māori interests.

Impairment to a material extent of ability to provide redress

29. The relevant test for whether the Crown has taken proper steps to avoid breaching its Treaty obligations is whether the proposed action (in the current claims, ratifying TPP) would "impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty of Waitangi."[22] If it does not, it is not inconsistent with Treaty principles.

30. In deciding whether proposed Crown action will result in "material impairment", the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity must be assessed.[23] Importantly, the Supreme Court (by unanimous decision) has stated that:[24]

> [...] impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluated, will not be relevantly material.; [and]
>
> As well, where the capacity to provide a particular form of redress will be materially impaired, the courts must also consider whether the Crown will nonetheless have the capacity to provide other forms of redress which are equally effective.

31. The Supreme Court's findings further refine those of the Tribunal in relation to the same claims that, even where (which the Crown says has not been demonstrated in the current claims) the Crown ability to undertake particular measures may be made harder by the proposed action being taken, that is not a sufficient basis to halt the action so long as the Crown

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22 *Mighty River Power case* (SC) applying *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR (PC) at [513] [*Broadcasting Assets* case (PC)] at 519.

23 *Mighty River Power case* (SC) at [89].

24 *Mighty River Power case* (SC) at [89].

will be able to provide options and suitable redress (which may differ in form from those sought by claimants).[25]

32. Whilst those proceedings provide guidance, they are factually distinguishable from the current claims in that they concerned specific, well developed Crown policies or proposals that were likely to be implemented in the immediate future. The current claims are based on hypothetical potential future actions and events.

No denial of rights and interests; no dispute as to basic premises

33. The Crown acknowledges that Māori interests in traditional knowledge, culture, economic development, and the environment, among others, can be affected by international agreements the Crown enters into.[26]

34. A further basic premise that is not in any dispute is that Māori are "not just another interest group."[27] Indeed, recognising and protecting the constitutional relationship between Crown and Māori is the rationale for the Treaty of Waitangi exception (and other protections in the TPP). Dr Walker, quoted the Minister of Trade, Hon. Todd McLay as stating publicly that the inclusion of the Treaty of Waitangi exception in New Zealand trade and investment agreements is a bottom line for New Zealand in such negotiations due to its constitutional nature.[28]

Partnership and engagement principles

Treaty obligations require balancing of interests

35. The Tribunal has expressly recognised that the Crown obtained, through Article 1 of the Treaty of Waitangi, kāwanatanga (the right to govern), which includes, among other things, the power to make polices and laws for the government of New Zealand, and the right to represent New Zealand abroad and to make foreign policy.[29] The Crown's right to govern was

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25 *Freshwater Report* at 3.9.2. Note, the terminology used by the Tribunal of "not impossible" differs from the test of "material impairment", the Supreme Court has noted that while there is some overlap in the concepts, the relevant test is that of "material impairment" (*Mighty River Power case* (SC)at [127]).

26 #A2, First Affidavit of Harvey at [29], and #A2(a), Exhibit D, "Strategy for Engagement with Māori on International Treaties".

27 Thomas cross-examination of Harvey, Unofficial Transcript at CLO727.

28 Walker, Unofficial Transcript at CLO591: "We will have to negotiate [the Treaty of Waitangi exception] with the EU but the Minister has made it clear it is essential, it is a bottom line."

29 See, for example, *Wai 262 Report* at 680.

acquired in exchange for its guarantee of active protection of Māori interests.[30] But the duty of active protection is not absolute or unqualified.[31] As the Privy Council made clear in *Broadcasting Assets*, Treaty principles require the balancing and weighing of interests.[32] While the Crown's obligations are constant, the protective steps which it is reasonable for the Crown to take change depending on the circumstances.[33]

36. In Wai 262 the Tribunal said there was no doubt of the Crown's Treaty right to enter international instruments. In doing so, the Crown must protect Māori interests:[34] The Wai 262 Tribunal said (at 689):

> There is no doubt of the Crown's Treaty right to enter into international instruments. When it acquired kāwanatanga rights under Article 1 of the Treaty, the Crown obtained the right to make foreign policy and to represent New Zealand abroad. In return, the Crown promised actively to protect Māori interests and their tino rangatiratanga – full authority – over their own affairs.

37. The same Tribunal also said (at 685):

> New Zealand must speak with one voice internationally, and that voice must be the Crown's except where – by agreement – the Crown is prepared to step aside.

38. In striking an appropriate balance between considerations when forming its policies, the Crown's obligation to protect rangatiratanga does not mean the Crown cannot consider other factors, broader obligations, or goals. What is required will depend upon the particular circumstances, and is highly context specific. Where Māori interests are engaged at the requisite level, Māori engagement and opinion must be sought. The steps required may vary according to the Māori interests engaged, but the Crown retains a responsibility to govern.[35]

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30 *Broadcasting Assets case* (PC) at 517; Wai 262 Report at 681.

31 *Broadcasting Assets* case (PC) at 517.

32 *Broadcasting Assets* case (PC) at 517.

33 *Broadcasting Assets* case (PC) at 517. This approach was approved by the Supreme Court in New Zealand *Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [89].

34 *Wai 262 Report at 689.*

35 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands case*], at 665.

39. Neither kāwanatanga nor rangatiratanga are "absolute" values or categories.[36] Each influences the content of the other in particular circumstances. In Treaty terms, the Tribunal has found that the Crown's right to govern is "qualified by the Treaty's guarantee of continuing Māori authority but, equally, a duly elected Government cannot be unreasonably restricted in the conduct of its policy."[37]

40. In the *Lands* case the Court of Appeal made the same point:[38]

> The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy.

41. The Treaty principles require reasonableness and good faith. The Crown and Māori must engage with each other in a spirit of cooperation and a willingness to consider compromise (the partnership principle). The Crown must take reasonable steps to actively protect taonga, and must preserve its capacity to provide redress for Treaty breaches.

42. It is submitted that a Treaty analysis does not require the Tribunal to "begin" with Article 1 or with Article 2. The Treaty should be read as a whole: each Article informs the other in shaping the acceptable parameters of Crown conduct.

43. The obligations of reasonableness, good faith, partnership and active protection overlap and reinforce one another. While the Tribunal has identified a number of specific principles flowing out of these core obligations, the Crown considers the expression of the principles set out in the *Lands*, *Broadcasting Assets* and *Mighty River Power* cases, remains apposite.

44. In this context, the Treaty of Waitangi entitles Māori to a reasonable degree of protection, when those interests are affected by the international rules that the New Zealand Government negotiates or signs up to. The Tribunal has stated, and the Crown accepts, that if and when they are found to exist,

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36 *Broadcasting Assets case* at 517; Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity - Te Taumata Tuatahi* (Wai 262, 2011) at 24: "It is no longer possible to deliver tino rangatiratanga as full autonomy in all cases in which taonga Māori are 'in play', as it were. After 170 years during which Māori have been socially, culturally, and economically swamped, it will no longer be possible to deliver tino rangatiratanga in the sense of full authority over all taonga Māori. Yet it will still be possible to deliver full authority in some areas." The Tribunal went on to stress the need for genuine partnership and for the Crown to at the very least be open to Māori influence on all decisions.

37 Waitangi Tribunal *The Ngati Kahu Remedies Report* (Wai 45, 2013) at 73.

38 *Lands case* at 665.

Māori interests must be protected to the extent that is reasonable and practicable in the international circumstances.[39] What is reasonable in the circumstances will include the constraints on what can be achieved by a small country acting with "likeminded" states in the world arena.[40]

45. The Crown accepts that the Treaty requires the identification and active protection of Māori interests when they are likely to be affected by international instruments, including FTAs such as TPP.[41] But, the nature and degree of protection required in any particular case will depend on the nature and importance of the interest impacted, balanced alongside the interests of other New Zealanders, and on the international circumstances which may constrain what the Crown can achieve.[42]

CORE ISSUE: IMPACT THE TPP MAY HAVE ON THE INTERESTS OF MĀORI

46. The prejudices claimed to result from the Crown's entry into TPP are at such a level of generality, speculation and abstraction that the prejudice claimed simply cannot be substantiated. Neither do the claimed prejudicial impacts have the same nexus with Crown decision making resulting in real and direct impacts on Māori interests that the cases and inquiries referred to above addressed. This is so because:

46.1 TPP largely confirms current New Zealand domestic economic settings and regulatory policy and practice. The measures that require specific implementation form a relatively minor part of TPP; and

46.2 TPP occurs in the international sphere and only has effect domestically upon implementation. Implementation measures are subject to normal domestic processes that provide opportunity for engagement and challenge through normal judicial, democratic and political pathways.

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39 *Wai 262 Report* at 681.

40 *Wai 262 Report* at 683.

41 *Wai 262 Report* at 681.

42 *Wai 262 Report* at 681. See the statements of the Privy Council in the *Broadcasting Assets* case at 517; endorsed by the Supreme Court in the *Mighty River Power case* at [89].

47. Before turning to address the Issues set by the Tribunal, a realistic understanding of the scale and nature of the impacts TPP may have on the interests of Māori is necessary. This matter lies at the heart of the disjunct between the Crown's approach and the concerns of claimants. In the Crown's view, TPP will not have significantly different impacts on Māori than previous FTAs given that the obligations remain broadly the same. The Claimants' clearly fear that extensive and broad ranging adverse impacts will result but these fears (though undoubtedly sincerely held) are not realistic or well founded.

TPP is not substantively different from previous FTAs

48. The Tribunal has stated that[43]

> The TPPA in both substance and reach is substantially different from previous free trade agreements [and]
>
> it appeared to [the Tribunal] that the TPPA would require a relative surrender of national sovereignty of greater magnitude than has been the case with previous trade agreements.

49. The Tribunal went on to say that, if this was so, the Crown's Treaty obligations would be heightened. Associate Professor Kawharu states:

> the importance of the differences between the texts of the free trade agreements is not about the number of parties involved (as Dr Walker suggests), it is the style of the Trans Pacific Partnership and who the parties are.

50. The Crown does not accept that these assumptions or conclusions are accurate. The Crown says that the substantive obligations in TPP are not substantially different than previous FTAs, and to the extent that they are different, appropriate safeguards and risk analysis have been put in place or undertaken, and that therefore the duty of active protection is not heightened but remains a proportionate standard relative to the degree of impact and risk.

51. TPP is larger and differently structured but does not impose substantially different substantive obligations than those contained in existing New Zealand FTA, nor does it 'reach' into New Zealand's domestic affairs in a

[43] #2.5.19, Memorandum-directions addressing issues for inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable, at [15].

manner substantially different to obligations contained in existing FTA.[44] The technical differences between the TPP and previous FTA are addressed in more detail below at under the subheading "Evolution of the Treaty of Waitangi exception since 2001" starting at paragraph 115. That analysis demonstrates that, to the (limited) extent that TPP has different substantive provisions, appropriate safeguards have been developed conjunctively.

52. Dr Walker's view is that risk is increased:[45]

> only to the extent that there are more investors but you also need to look at the design of the mechanism and the obligations which sit under it and the associated safeguards which the mechanism has in place.

53. Dr Walker notes that the fact that five of New Zealand's top ten trading partners are included (including the first and third largest economies in the world US and Japan) is the basis on which TPP is said to be a "game changer" for New Zealand.[46] Dr Walker sets out that the collective size of the economies of the TPP Parties is the key difference of the TPP - this offers both significant economic and strategic opportunities for New Zealand, and conversely, risks should New Zealand not be involved.[47]

54. Dr Ridings sets out that additional chapters in TPP covering matters such as State-Owned Enterprises, Small and Medium Enterprises and Regulatory Coherence do not impose significant additional obligations over those contained in existing New Zealand FTAs that was to affect the interests.[48] There are increased obligations, and protections, in relation to transparency and intellectual property, including in respect of traditional knowledge and plant varieties.[49] Dr Ridings, Dr Walker and Mr Harvey concur that these differences do not impose substantial additional obligations. They, having all been directly involved in the development of New Zealand's FTAs over the last 15 years, are well placed to make the assessment.

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44 #A16, First Affidavit of Penelope Jane Ridings at [28].

45 Williams cross-examination of Walker, Unofficial Transcript at CLO450.

46 #A36, Third Affidavit of Walker at [18].

47 #A36, Third Affidavit of Walker at [21]-[22].

48 #A16, First Affidavit of Ridings at [28.1]-[28.2].

49 #A16, First Affidavit of Ridings at [29].

55. Claimants have posited that government statements that promote the Crown's view of the substantial benefits of TPP are inconsistent with Crown submissions and evidence in this inquiry that TPP is not dissimilar to New Zealand's existing FTAs.[50] These statements are not mutually exclusive. Securing the number of TPP Parties (and their status sizeable economies and as New Zealand top trading partners) is seen as being of significant benefit and an extraordinary achievement in the international trade and investment field, however the substantive obligations remain not dissimilar to those in existing FTAs.

Nature and strength of Māori interests impacted by TPP

56. The MFAT Strategy for Engagement with Māori on International Treaties provides an indicative list of the matters the Ministry considers likely to be of interest to Māori in respect of the government's position on international treaties, including: intellectual and cultural property; foreign investment; genetic resources; New Zealand flora and fauna; use of natural physical resources; indigenous rights; immigration; and employment.[51]

57. The TPP engages many of these matters to varying degrees. However, what is relevant is not whether an interest is engaged, but the degree to which the proposed Crown action (in this case ratifying the TPP) impacts on those interests.

58. The claimants significantly overstate the potential adverse impacts of TPP on Māori interests. The interests of Māori are not central to the TPP and as such should be distinguished from international and domestic instruments such as:

58.1 UNDRIP, a non-legally binding declaration which has indigenous rights and interests at its core and which deals with the breadth of indigenous rights and interests in a way that a specialised trade agreement like the TPP cannot.

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50 See for example #3.3.20, Closing submissions on behalf of Wai 2523 at [24]. The analysis of impact in these submissions is, with respect, flawed. The evidence relied upon to demonstrate that the scope of agreement is "fundamentally different" is the Tribunal's expression of a preliminary, caveated view and does not constitute evidence (at [25]). The further evidence relied on relates to ISDS without acknowledgement that ISDS mechanisms (without the increased protections included in TPP) are contained in existing New Zealand FTAs (at [26] – [27]).

51 #A2(a), Exhibits to First Affidavit of Harvey, Exhibit D at 95.

58.2 Te Ture Whenua Māori Act 1993, which concerns key elements which fall within the Māori sphere of authority, such as how Māori land is to be owned, used and governed, including what Māori bodies will govern it.[52]

59. TPP is primarily, but not exclusively, a trade and investment agreement between twelve countries. It provides improved market access for goods and services exports, and improved conditions overseas for investors from TPP Parties; as well as the adoption of measures designed to facilitate trade and improve the regulatory environment governing the trade and economic relationships between the Parties. It also includes environmental and labour standards.

60. As Dr Walker has indicated in his evidence:[53]

> Departments have come to the view that the majority of legislative and policy obligations agreed to in TPP are of a general commercial nature (for example tariff rates and customs requirements) and will have no particular impact on Māori interests whether under the Treaty of Waitangi or otherwise. To the extent that Māori interests are impacted, those interests are primarily held as investors, or business or land owners.

61. Further, the majority of New Zealand's international

62. The impacts on interests of Māori can be categorised as::[54]

62.1 No or low impact: Most obligations under TPP are consistent with our existing legal and policy regime. No changes to current policy and legislative settings need occur as a result of TPP – as such the TPP has limited impact on those matters. Many matters in this category do not intersect with Māori interests. This is consistent with the fact that the claimants have not raised concerns as to potential prejudice arising from tariff rate reductions, customs requirements, rules of origin, etc.

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52 Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 236.

53 #A36, Third Affidavit of Walker at [82].

54 #A36, Third Affidavit of Walker at [87].

62.2 Matters where Māori have interests but where the TPP does not directly adversely impact on that interest include the environment and natural resources (including water, trade and biodiversity, and marine capture fisheries) and traditional knowledge; or involve positive impacts e.g. for Māori businesses and exporters.

62.3 More direct impacts on the interests of Māori were identified in relation to one matter, the International Convention for the Protection of New Varieties of Plants 1991 (UPOV 91).

63. The core concerns of the claimants appear to relate to perceived adverse impacts on: natural resources and the environment (in particular water and resource extraction by fracking); intellectual property (IP) (the protections for Māori of their IP, the application of a non-Māori system to mātauranga Māori, and in relation to patenting of plants and of biologics); and health (in particular, perceived adverse impacts on the ability to regulate as necessary to protect public health including tobacco control measures and increases to the costs of biologic medicines).

64. Whilst these interests and concerns are both sincere and significant, the degree of impact the TPP outcomes will have on them is significantly less than claimants fear. The Crown's view is that the requirements concerning accession to the International Convention for the Protection of New Varieties of Plants 1991 (UPOV 91) has the most direct and significant impact. Natural resources, tobacco, and pharmaceuticals – though of importance to the claimants – are not significantly affected.

International Convention for the Protection of New Varieties of Plants 1991 (UPOV 91)

65. The Crown has acknowledged that obligations in respect UPOV 91 have the potential to directly and significantly affect Māori interests. The Crown has been informed through engagement with among others, the named claimants and Professor Kelsey, as to Māori interests in this matter through policy dialogues over a number of decades and through, for instance, the Wai 262 proceedings.[55]

55 Judge Doogan questions to Walker, Unofficial Transcript at CLO576.

66. In line with the Crown's awareness of Māori interests New Zealand negotiated Annex 18-A which provides the Government with the ability to adopt any measure that it deems necessary to protect indigenous species in fulfilment of obligations under the Treaty of Waitangi.[56] New Zealand has three years from the TPP's entry into force to comply with this obligation.

67. The Crown accepts that this issue requires more intensive consultation and discussion. An appropriate engagement strategy is being developed.

68. The Tribunal and claimants have queried the extent to which these claims being lodged impacted upon the UPOV Annex being negotiated. Counsel for Wai 2522 has gone so far as to assert the Annex was a direct result of these claims. There is no evidential basis to that assertion. Dr Walker was careful not to breach the obligations of confidence he is subject to regarding the conduct of negotiations however, in response to a question from Te Kani Williams Dr Walker clarified that:[57]

> We were well, the government was well aware of the issues involved around UPOV and the government was considering its position in relation to UPOV and the TPP well before this claim was filed.

69. In response to further questions from Judge Doogan Dr Walker stated:

> The government was considering its position in relation to the obligations it would have in UPOV and how it saw UPOV vis-à-vis the recommendations from Wai 262. So the government formed up its position in terms of the substance of those issues." [...] "The claim highlighted the issue again but it was not an issue unknown to the government and the government had been considering its position throughout the negotiation and how we were going to address that in the final element.

Natural resources

70. In brief, the Crown considers that, as demonstrated by the case studies, concerns about how the TPP may impact upon Māori interests in natural resources relate primarily to Crown decision making in the domestic sphere and are not accurately attributable to the TPP. This is demonstrated by the affidavits of Taipari Munro, Peter Tukiterangi Clarke, Tuahuroa Tamati

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56 Walker, Unofficial Transcript at CLO468: "where there are new issues arising, such as in the case of UPOV in relation to TPP, that again we are aware of the concerns and look to safeguard those concerns accordingly and these, these consultations arise out of a number of different processes, Wai 262 for example highlighted a number of those things such as UPOV and MBIE's ongoing processes around intellectual property highlight a number of issues as well."

57 Walker, Unofficial Transcript at CLO470.

Cairns, and Steven Michener which set out the deponents' perspectives of their current experiences and articulate concerns that pre-exist TPP.[58]

71. The Crown's view is that the concerns being expressed do not arise, and will not be significantly impacted upon by the TPP. It is not the place of other countries to intervene in these important matters, which are quite properly within the domestic realm of New Zealand. The TPP process which these claimants fear will result in adverse impacts is the ISDS mechanism – this is addressed further below under the subheading "ISDS does not constitute the degree of risk claimed" at page 46.

Tobacco

72. Tobacco control measures are covered in Article 29.5 of the Exceptions and General Provisions Chapter, under a provision that allows the Government to elect to rule out ISDS challenges over tobacco control measures. The Government has publicly announced that it intends to exercise its rights under this provision.[59]

73. The Crown considers there to be only a minimal risk of a State to State dispute being brought with respect to tobacco control measures. None of the TPP Parties are claimants in the WTO proceedings against Australia or have expressed concerns about New Zealand's tobacco control policies at WTO committee meetings. Some of the TPP Parties, including New Zealand, have supported Australia's position.

74. The transparency provisions in TPP require nothing substantive beyond New Zealand's current policies and practice with respect to consultation on regulations. The provisions do not empower tobacco companies, or any other companies. Likewise, the obligations in the regulatory coherence chapter are a reflection of New Zealand's existing regulatory practices and do not empower the tobacco industry as the claimants suggest.[60] (See also further submissions in relation to Tobacco at Appendix A: Topics of particular interest to claimants.)

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58 #A22, Affidavit of Taipari Munro; #A23, Affidavit of Peter Tukiterangi Clarke; #A24, Affidavit of Tuahuroa Tamati Cairns; #A25, Affidavit of Steven Michener.

59 #3.1.101(a), Trans-Pacific Partnership National Interest Analysis at 16.

60 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [211].

Biologics

75. Dr Paparangi Reid stated in evidence that she agreed with the conclusion of the Ministry of Health paper "Biologics in Trans-Pacific Partnership Negotiations (TPP) – Full Analysis" that:[61]

> It is important for NZ not to prematurely lock in, through TPP, an extended data protection period, which may have significant material effect, when there is still significant doubt as to what the optimal level of additional protection should be provided for biologics.

76. The outcome for New Zealand is that 'effective market protection' will be provided through a combination of five years of data protection from the date of marketing approval and other measures and market circumstances that collectively will deliver a comparable outcome in the market to the other option. Dr Walker's evidence is that this outcome allows the current Medsafe regime to continue unchanged and that a 'comparable outcome' does not mean 'equal'.[62]

77. The combination of provisions on patent term extension, patents for new uses, and patent linkage in the TPP intellectual property chapter will rarely, if ever, have any impact on the entry of generic products on to the New Zealand market as:

77.1 Few, if any, patent term extensions will be granted, due to the efficiency of New Zealand's processes. The estimated costs of any extension for pharmaceuticals is approximately $1 million per year on average;

77.2 New Zealand is not obliged to give data protection for new uses. New Zealand can instead provide five years data protection to new small molecule (but not necessarily biologic) pharmaceutical products that contain both a new and a previously approved active ingredient, which New Zealand already does;

77.3 New Zealand can comply with the linkage provisions based on New Zealand's current law and judicial practice and Medsafe's practice of publishing the details of generic applications.

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61 #A14(b), Biologics in Trans-Pacific Partnership Negotiations (TPP) – Full Analysis at 27.

62 Walker, Unofficial Transcript at CLO542.

78. Claims that "the major impact on affordability will be the new generation biologics medicines ..."[63] are thus unfounded. Whilst it is true that the policy flexibility to drop below five years of data protection will be lost under TPP, New Zealand is already obliged to provide a period of data protection for "pharmaceutical ... products which utilize new chemical entities" under Article 39.3 of the WTO TRIPS Agreement and arguably that obligation includes some biologic medicines. New Zealand has provided a five year period of data protection to all medicines since 1995 under s 23B of the Medicines Act 1981. The loss of flexibility to provide less than five years' data protection is of minimal realistic effect.

79. The Crown's assessment of the TPP outcomes in relation to pharmaceuticals is that they:

79.1 are largely manageable within the current New Zealand policy and practice settings;

79.2 remove policy flexibility to reduce the five year data protection period, yet this period has remained constant in New Zealand legislation for more than 20 years;

79.3 result in increases in costs that fall within the margin of error; and

79.4 are not able to be challenged by way of ISDS and there is no evidence of a risk of state to state proceedings being brought.

80. Notwithstanding the above, the claimants conclude:

> There is significant potential for micro and macro chilling effects to inhibit the government from taking measures to expedite access to biologics in the future, from which Māori would disproportionately benefit.[64]

81. The Crown view is that the TPP will not have any significant impact on the accessibility or affordability of pharmaceuticals or related health outcomes for Māori. (See also further submissions on Biologics at Appendix A: Topics of particular interest to claimants)

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63 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [219].

64 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [229].

ISSUE 1: EFFICACY OF ARTICLE 29.6 (THE TREATY OF WAITANGI EXCEPTION)

82. The Crown's case, that the Treaty of Waitangi exception is indeed the effective protection the Crown claims says it is, has been strongly made out. The Crown has taken proper steps to preserve its capacity to honour its Treaty obligations to Māori, including its capacity to provide redress.

83. Whilst conducting a targeted inquiry into the Treaty of Waitangi exception given the context of urgency, doing so has the potential to result in findings that do not properly locate the clause within the totality of the relevant protections in the TPP and domestically — with the corresponding misrepresentation that Māori are in position of having to rely on a clause within the TPP to ensure the Treaty of Waitangi is upheld. Dr Ridings set out the relevant context both through her Affidavit and through her "Diagram of Considerations Relating to ISDS Process."[65]

How entering into the TPP is said by claimants to impair the ability of the Crown to honour its Treaty obligations

84. The claimants raise concerns that entering the TPP will impair the ability of the Crown to meet its Treaty obligations by (in their view):

84.1 A failure to accurately assess TPP's impact on the rights and interests of Māori and therefore not having sufficient or effective safeguards in place to actively protect the spiritual, cultural and economic interests of Māori. Particular concerns expressed by claimants relate to fears that the TPP is substantially different to existing New Zealand's FTAs, the legal effect of the Treaty of Waitangi exception in effectively protecting regulatory autonomy, perceived risks in ISDS, and the 'chilling effect' on Crown policies and settlements involving Māori, and (to a lesser extent) that the Treaty of Waitangi exception could be easily circumvented;

84.2 Adopting obligations under the TPP that could prevent the Crown from meeting its obligations under the Treaty of Waitangi including a material diminution of its ability to provide redress a

[65] #A16, First Affidavit of Ridings at [51]-[123]; #A39, Diagram of Considerations Relating to ISDS Process (introduced in the hearing and explained by Ridings, Unofficial Transcript at CLO271-280).

reduction in the Crown's ability to make law and policy in a number of policy areas;

84.3 Failing to compel the Crown to meet its Treaty obligations domestically in circumstances where the claimants do not trust the Crown to meet those obligations;

84.4 Displacing the tino rangatiratanga guaranteed to Māori under Article 2 of the Treaty. These concerns are premised on:

84.4.1 perceptions that TPP will limit New Zealand's regulatory autonomy;

84.4.2 the suite of legislative, structural, and policy reforms proposed by the Tribunal through its Wai 262 report "designed to bring about responsible power-sharing" relating both to the making of international instruments but also more generally in the policy areas claimed to be affected by TPP;[66] and

84.4.3 allegations that the New Zealand government does not have authority to act on behalf of Māori in the international sphere (relying largely on *Te Paparahi o Te Raki Inquiry Stage 1 report*).

85. Not all of these matters fall within the scope of the current inquiry.

86. The Crown contends that entering into TPP is neutral in its effect on Treaty claims and its ability to meet its obligations to Māori. This contention is premised on an accurate assessment of the risks involved, and on the Treaty of Waitangi exception, in operation with other measures within TPP, preserving the domestic policy space to meet its obligations to Māori. Further, not only have there been no circumstances to date for which the Treaty of Waitangi exception has been triggered, there have been no Treaty of Waitangi claims upheld by, the Tribunal or Courts, that relate to adverse impacts from existing trade agreements. That is, such agreements have not caused Treaty breaches in the past.

[66] *Wai 262 Report* at 706-707.

87. Crown-Māori relations in the domestic sphere underlie the claims. Concerns arising from this relationship are wrongly attributed to the TPP. These concerns centre on whether the Crown will make Treaty-compliant decisions where international interests are also involved, and, where Māori consider the Crown has failed to do so, whether the mechanisms available to Māori in the domestic arena will be sufficient to protect their interests. Whilst these are legitimate questions, they are questions for another day or other proceedings as they are not caused by the TPP.

Purpose of clause

88. Understandings of the extent of Treaty of Waitangi rights, protections and obligations are still being developed by Māori, the Waitangi Tribunal and Government.

89. The Treaty of Waitangi clause (along with other measures) preserves domestic policy space for the ongoing constitutional relationship and dialogue between the Crown and Māori to evolve domestically. The clause is premised on the constitutional import of the Treaty of Waitangi and, as acknowledged by Associate Professor Kawharu, is unique and demonstrates some leadership internationally by New Zealand. The Crown's diligent participation in this urgent hearing to assist in the testing of the Treaty of Waitangi exception is part of this broader contemporary constitutional framework where Treaty issues have prominence.

90. The Treaty of Waitangi clause provides a defence for New Zealand in respect of certain claims that might be made against it under TPP and it excludes the interpretation of the Treaty of Waitangi from dispute settlement under TPP.

91. The TPP is an instrument of international trade agreed between sovereign states to, amongst other things, facilitate and regulate international trade and investment. The rights created by the agreement are executed within parameters agreed between the Parties for example through ISDS. It is wrongheaded to confuse this instrument with international human rights measures or with measures that may be appropriate between states and their citizens.

92. The specific obligations agreed to in TPP have been designed so as not to impair the ability of TPP Parties, including New Zealand, to make legitimate public policy and to take measures to implement that policy. In addition to Article 29.6, the Exceptions and General Provisions Chapter sets out a number of general exceptions that describe areas where the Parties maintain the ability to adopt or retain policies and to regulate regardless of the obligations contained in TPP. These exceptions cover a broad range of areas including: health, environment, non-renewable resources, and national treasures of artistic, historic or archaeological value.

93. We now turn to more detailed assessment of following matters:

93.1 The legal effect of the Treaty of Waitangi exception;

93.2 The evolution of the context within which the Treaty of Waitangi exception sits since 2001; and

93.3 Further areas of perceived risk (ISDS, ability to provide redress, specific policy areas, certification, chilling effect).

Legal effect of Treaty of Waitangi exception:

A broad degree of agreement as amongst experts – minimal residual ambiguity or risk – clause achieves an acceptable level of active protection

94. There is now is broad consensus amongst all three technical experts as to most aspects of the clause's effect. Dr Ridings and Associate Professor Kawharu largely agree on further aspects on which Professor Kelsey takes a different view. On the remaining aspects:

94.1 Associate Professor Kawharu acknowledged that Dr Ridings' view of the first paragraph, that "more favourable treatment" is primarily self-judging with a good faith limitation, is reasonable; and

94.2 All three experts agreed, and continue to agree that more favourable treatment can be viewed on a continuum and agree as to the effect of both ends of that continuum. They also agree that there is no bright line as to where a measure no longer qualifies and that this assessment would be undertaken on a case-by-case

basis. They differ as to where an ISDS tribunal is most likely to draw this line. This is addressed further below.

94.3 Both Associate Professor Kawharu and Dr Riding assess any risks arising from ambiguity in the second paragraph to be low and do not warrant pre-ratification action.

95. The core question before the Tribunal concerns the efficacy of the Treaty of Waitangi exception. The Treaty jurisprudential test as to the standard that must be met is not one of absolute perfection but of reasonableness and practicality in the circumstances.[67] The Tribunal must determine whether the protection accorded by the Treaty of Waitangi exception (and associated measures) is proportionate to the scale and nature of the impact on Māori interests.

96. The experts range in their assessment of risk and ambiguity. Dr Ridings acknowledges there is some risk and ambiguity however considers it of minimal practical effect and the Crown concurs with that view. However, in the alternative, even should Associate Professor Kawharu's assessment of risk and ambiguity be preferred (which is slightly more cautious than that of Dr Ridings but significantly more positive than that of Professor Kelsey) such a level of risk is reasonable in the context within which the clause exists and will not result in prejudice to Māori of a nature that would constitute a Treaty breach.

97. While the Treaty of Waitangi exception is the principal explicit means by which the Treaty of Waitangi is recognised in TPP, it is not the sole mechanism to protect the Crown's ability to meet its obligations to Māori.

98. The Treaty exception applies when:

98.1 New Zealand (effectively the Crown) deems it necessary to take some action in relation to Māori. This occurs within the domestic sphere;

98.2 The rationale for such action is the Crown's view that either:

[67] *Broadcasting Assets case* (PC) at [519]; *Mighty River Power case* (SC) at [88]-[89].

98.2.1 Māori have rights, and the Crown has obligations, under the Treaty of Waitangi; or

98.2.2 Given the phrase "*including* the Treaty of Waitangi" [emphasis added], the Crown is motivated by another rationale;

98.3 The Crown's action involves some "more favourable" treatment of Māori;

98.4 The Crown's action is arguably otherwise inconsistent with its obligations under TPP;

98.5 The Crown considers that no other provision is more appropriate to defend the breach of its obligation.

99. As illustrated in Dr Ridings' "Diagram of Considerations Relating to ISDS Process"[68] before the Treaty exception would need to be invoked in the event of an ISDS claim, that claim would be filtered through a number of jurisdictional, structural and policy safeguards. A claim would need to:

99.1 Pass through the various jurisdictional hurdles i.e. meet the definition of "investor of a party" and of "investment", not be subject to the denial of benefits measures (e.g. Tobacco Control Measures, or be 'jurisdiction shopping') or other exclusions (e.g. the Overseas Investment Act decisions are not subject to ISDS), and not be manifestly without legal merit;

99.2 (In the case of claims based on breach of National Treatment, Most Favoured Nation (MFN), performance requirements or senior managers and board of directors provisions) not be the subject of an NCM or reservation (including approval for investment activities under Overseas Investment Act, Fisheries Act, various public services, water (other than wholesale or retail trade and distribution of bottled water), foreshore and seabed,

68 #A18, Second Affidavit of Ridings at [26]-[27]; and #A39, Diagram of Considerations Relating to ISDS Process (introduced in the hearing and explained by Ridings, Unofficial Transcript at CLO271-280).

fisheries and maritime matters and cultural heritage and preserving sacred sites).

99.3 Breach one of the key obligations (National Treatment, Minimum Standard of Treatment (MST), expropriation (not including non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, other than in rare circumstances).

99.4 Not be covered by any other general exception that operates as a defence (national security, temporary safeguard measures, taxation, prudential reasons (Article 11.11 Financial Services Chapter)).

100. The legal interpretive issues assessed by experts have practical import only once a claim has passed through these extensive filters. As discussed above, there is agreement on most technical aspects of the clause, and residual disputed matters relate to fine points of legal technicality. When viewed in the whole, the various structural and policy measures and legal matters collectively constitute an exponential reduction of risk.

Matters on which experts are agreed:

101. To provide a balanced analysis of the legal issues and potential risks related to the Treaty of Waitangi exception, it is necessary to outline the areas on which all three experts appear to agree before turning to the few residual matters of dispute. As above, the fact that the experts largely agree that the proper effect and interpretation of the clause is directly relevant to the degree of risk the clause represents to Māori interests and, therefore, the quality of protection the clause offers. Other than where indicated, the following matters are all agreed as between the experts.

1	The Treaty of Waitangi exception is unique. It is the only country-specific general exception (i.e. it applies to the entire Agreement). It is the only general exception that prioritises the rights and interests of indigenous populations.
2	The clause is designed for the Crown to be able to continue to meet its obligations to Māori on an ongoing basis without international agreements interfering with that domestic process. There is some dispute amongst experts as to whether it is entirely effective in achieving this purpose.

3	The Vienna Convention on the Law of Treaties provides the rules for the proper interpretation of the Treaty of Waitangi clause.
4	More favourable treatment may be of a commercial or non-commercial nature, or a mixture of both.
5	Interpreting the Treaty of Waitangi is outside the jurisdiction of any ISDS tribunal
6	The Treaty of Waitangi clause is an exception to the whole of the TPP ("nothing in this agreement").
7	It is consistent with the nature of the state as a single entity under international law that New Zealand invokes the Treaty of Waitangi exception.
8	The Treaty of Waitangi exception is, at least, partly self-judging. "It deems necessary" is similar to the subjective standard of the WTO security exception. A limited form of review for good faith under the Treaty of Waitangi exception could require New Zealand to provide reasons for a given measure adopted to demonstrate the link between the measure and the favourable treatment.
9	The word "Māori" is not defined in TPP. It is likely that a state-state panel or ISDS tribunal would interpret the word in light of New Zealand law and practice and give it a broad meaning. (i.e. encompassing the singular (individual person or group), plural, and Māori as a people)
10	The term "more favourable" is a comparative expression, so the ordinary meaning of "more favourable treatment" is that it involves Māori being advantaged by a measure in some way as compared to someone else. The experts agree that the investor must suffer a comparative disadvantage. The remaining area of dispute in this regard is addressed below under "More Favourable Treatment"
11	The term "more favourable treatment" is reminiscent of the terms used in National Treatment and Most-Favoured-Nation provisions, non-discrimination provisions (counter-point or reverse).
12	The term used in classic non-discrimination provisions is "no less favourable treatment."
13	There is no explicit "likeness" test for more favourable treatment in the Treaty of Waitangi exception.
16	Although the exception is labelled "Treaty of Waitangi" it potentially applies to any measure giving more favourable treatment to Māori, whether required to under the Treaty or not. ("Including in fulfilment of its obligations under the Treaty of Waitangi")
17	If not required in fulfilment of Crown obligations under the Treaty of Waitangi, there must be some legitimate policy rationale for a discriminatory measure.

18	Under the chapeau the Treaty of Waitangi exception, discrimination must be against persons of 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 although Associate Professor Kawharu has some reservations which are addressed further below.
19	The fundamental point of the chapeau is to ensure that the measure at issue gives effect to a legitimate policy. It serves as a mechanism to ensure that an otherwise self-judging exception is not misused, contrary to the international law obligation against abuse of rights.
20	The burden on New Zealand to meet the requirements of the chapeau in relation to legitimate policies adopted in good faith would not be overly onerous or difficult.
21	Dr Ridings and Associate Professor Kawharu agree that although the concept of discrimination has been interpreted widely in WTO and investor-state cases to cover a wide range of conduct, in the context of the chapeau, it is more likely to be interpreted in a way that is similar to the way it has been interpreted under the WTO chapeau.

Residual areas of dispute as to legal effect:

102. Turning now to the residual areas of dispute. It should be noted by the Tribunal that these remaining issues cannot be significant in terms of the total agreement, or even the overall scope and positive aspects of the Treaty of Waitangi exception. They are residual and one should take care not to elevate the inevitable differences in expert opinion (like with almost any untested provision) as translating to a real and present impairment. These residual areas can be described as:

102.1 How 'treatment more favourable' applies to measures of general application where meeting the Crown's obligations to Māori is a policy rationale (but not the dominant or primary rationale);

102.2 Whether the second paragraph is ambiguous and if so, what risks arise;

102.3 Whether the clause has remained fit for purpose in the context of FTA evolution since its first introduction;

102.4 Application of the chapeau to investment disputes.

'More favourable treatment' – measures of general application not excluded; uncertainty does not raise an unacceptable level of risk; broad approach to self-judging nature of phrase

103. All three experts agree that 'more favourable treatment' will apply to measures that exclusively benefit Māori and that it will not apply to measures where the benefit to Māori is peripheral or incidental to other more generalised benefit. Associate Professor Kawharu and Dr Ridings agree that measures of general application where a primary or significant policy rationale for the measure is to enable the Crown to meet its obligations to Māori (not only under the Treaty of Waitangi) so long as there is a rational connection between that policy rationale and the proposed measure. The remaining area of uncertainty is limited to the weighting and resultant protection to be accorded to how important or determinative the policy rationale was to the particular measure.

104. The Crown says that the term "more favourable treatment" will not require any independent interpretation in cases when the Treaty of Waitangi clause is invoked in a claim under the TPP involving discrimination. A decision by a tribunal that there has been a violation of, for example, National Treatment provisions, is a conclusion that Māori have received more favourable treatment.

105. Where the claim is not based on discrimination, a dispute settlement tribunal or panel is likely to see more favourable treatment where Māori have received benefits while the investor or TPP Party has suffered a loss.

Self-judging generally and in respect to more favourable treatment

106. 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. It is not for a tribunal to determine whether such measures are "necessary" according to some objective standard.

107. The use of the words "it deems necessary" should prove an effective barrier to a tribunal making its own determination of whether the measures at issue are necessary, when Article 29.6 is invoked.

108. The fact that 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, New Zealand is the party to any dispute settlement proceedings. However, there are domestic and international mechanisms (outside of TPP) which are intended to ensure that Māori are engaged in decisions on what is required for the Crown to meets its obligations under the Treaty of Waitangi, including the domestic Waitangi Tribunal process.

109. Associate Professor Kawharu accepted that this argument is reasonable however she does not prefer it. The Crown says that the disputed area of interpretation is relatively minor in relation to the clause as a whole and even more so when related to the agreement as a whole. The Tribunal need not make a determinative finding on which legal interpretation is to be preferred (nor would it be within its jurisdiction to do so). Even if the Tribunal does not prefer the Crown's view on this matter, Associate Professor Kawharu's view that the position is reasonable (when contextualised within the areas where there is no dispute) is sufficient to satisfy the Tribunal as to the protections achieved by the Treaty of Waitangi exception for the purposes of these proceedings.

Any ambiguity in the second paragraph does not significantly impair protective effect of Treaty of Waitangi exception

110. The second paragraph is not ambiguous, or in the alternative, the extent to which it may be is of no detrimental effect.

111. Article 29.6.2 provides 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 TPP. TPP dispute settlement panels and ISDS tribunals may interpret the Treaty of Waitangi exception provision, but not the Treaty of Waitangi itself. The Crown says this would also preclude a tribunal or panel referring to the domestic law of New Zealand to establish the meaning of the Treaty, for that would be to engage in the interpretation of the Treaty.

112. Dr Ridings and Associate Professor Kawharu agree that even if there is ambiguity it is not sufficiently important to warrant pre-ratification action. That, with respect, should be sufficient to assuage concern. Added to that is the clarity of the intention expressed in the first sentence of the second

paragraph. It is not tenable to suggest that the further sentences could in effect rewrite that clear text and purpose.

Application of the chapeau to investment disputes

113. There are broad areas of agreement as between all experts in relation to the chapeau:

113.1 The general language of the proviso in the chapeau is similar to and was likely lifted from the introductory paragraph to the general provisions in Art XX of the GATT and Art XIV of the GATS.

113.2 The fundamental point of the proviso is to ensure that the measure at issue gives effect to a legitimate policy. It serves as a mechanism to ensure that an otherwise self-judging exception is not misused, contrary to the international law obligation against abuse of rights.

113.3 The WTO chapeau refers to measures that constitute "unjustifiable" discrimination, whereas the proviso in the Treaty Exception refers to "unjustified" discrimination. There is not a great deal of difference, an unjustifiable measure cannot be justified, while an unjustified measure is one that has not been or is not justified.

113.4 The WTO chapeau refers to measures not being "applied" as a means of discrimination. The Treaty exception states that measures must not be "used" as a "means" of discrimination.

114. The Crown's view of the remaining matters (to which Associate Professor also professed general agreement) is:

114.1 Where a measure adopted to provide more favourable treatment to Māori within the meaning of the substantive part of Article 29.6 provides less favourable treatment to foreign investors and does nothing further then there would be no basis for a finding that there had been arbitrary or unjustified discrimination or a disguised restriction on international investment.

114.2 Where a measure adopted to provide more favourable treatment to Māori within the meaning of the substantive part of Article 29.6 has been applied in a way that discriminates between different foreign investors, such a measure may be found to constitute arbitrary or unjustified discrimination or a disguised restriction on international investment. However, the mere fact that a measure discriminates does not mean that the discrimination is arbitrary, unjustified, or a disguised restriction on international trade or investment. If there is a sound policy reason for the discrimination then it won't be any of these things;

114.3 In the unlikely event that such a hypothetical situation occurred in reality, where a measure adopted to provide more favourable treatment to Māori within the meaning of the substantive part of Article 29.6 also provides more favourable treatment to non-Māori New Zealanders by comparison with foreign investors, such a measure runs a risk of being found to constitute arbitrary or unjustified discrimination or a disguised restriction on international investment. However, such a risk is less likely where the benefits to non-Māori New Zealanders are limited and the degree of discrimination between them and foreign investors is marginal.

Evolution of Treaty of Waitangi exception since 2001 – the clause remains fit for purpose within the context of the Agreement

A proper understanding of the evolution of the context within which the Treaty of Waitangi exception sits is required to assess whether it remains fit for purpose

115. The Crown acknowledges that international trade law and agreements have evolved in the 15 years since the Treaty exception was first included in a New Zealand Trade agreement. The Crown says that the associated evolution of various contextual provisions throughout those 15 years ensures the Treaty of Waitangi exception remains an effective protection. It is also acknowledged that Treaty of Waitangi jurisprudence has also, and will continue to, evolve. As discussed above, the purpose of the Treaty of Waitangi exception is to preserve space for this evolution to occur without being adversely impacted upon by international trade agreements. The TPP does not need to contain provisions relating to the evolution of Treaty jurisprudence because it is effective in carving out this space.

116. The Crown says that the obligations within the TPP remain the same in essence as those in existing trade agreements notwithstanding that they are structured differently - the regulatory protections have been incorporated into the investment chapter and the Treaty exception continues to allow for dynamic protection to be afforded to Māori. The claimants make much of the proposition that the clause has not been updated or but are unable to point to realistic practical scenarios that are unable to be accommodated within either the regulatory protections or the Treaty exception.

117. Associate Professor Kawharu noted a number of positive changes provided for in the TPP including:

117.1 Preamble language encouraging balance between commercial and public interests;

117.2 Novel language in relation to National Treatment through a footnote and Drafter's Note which helps clarify the TPP Parties' intentions regarding how measures with legitimate policy objectives should be assessed including 'like circumstances', that different treatment may be justified for legitimate policy goals, that a claimant investor must be in competition with domestic investor and that the purpose of the National Treatment obligation is to prevent deliberate protectionist discrimination based on nationality.[69]

117.3 Noting that although Professor Kelsey is sceptical as to the value of the footnote and Drafter's note, in Associate Professor Kawharu's own view they go a long way towards ensuring the policy objectives would be a central factor in the assessment of 'like circumstances'.[70]

117.4 A measure adopted to protect legitimate Māori interests under the Treaty of Waitangi may not be inconsistent with the National

69 #A35, Brief of Evidence of Kawharu at [169].

70 #A35, Brief of Evidence of Kawharu at [170].

Treatment obligation, even if it results in relatively less favourable treatment of a TPP investor when compared to a Māori investor.[71]

117.5 TPP drafter's efforts to safeguard regulatory autonomy.[72]

117.6 Interpretive Annex to confirm shared understandings as to what constitutes an expropriation, including regulatory expropriation.[73]

118. Associate Professor Kawharu prepared a table comparing the investment provisions of New Zealand's FTAs and the CER Investment Protocol.[74] Although providing a useful guide, as Associate Professor Kawharu acknowledged, comparison between the actual provisions of each agreement is more complex than the table suggests.

119. Dr Walker described how particular measures have changed since 2001 including the change in structural and substantive approaches to policy safeguard design. He noted that a number of safeguards around ISDS continue to evolve (as did Associate Professor Kawharu). Dr Walker stated that the TPP represents the latest iteration of those safeguards.[75] Dr Walker attributes the inclusion of the Treaty of Waitangi exception one reason why only one ISDS dispute has been undertaken under an agreement signed since 2010. In Dr Walker's view, the Treaty of Waitangi exception is effective for the entire subject matter – the protection evolves as the subject matter expands.[76]

120. For the assistance of the Tribunal, the Crown notes several examples to provide detail relevant to Associate Professor Kawharu's table and relevant to how the structural approach outlined by Dr Walker works in practice.

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71 #A35, Brief of Evidence of Kawharu at [172].

72 #A35, Brief of Evidence of Kawharu at [183.4], referring to TPP, Preamble.

73 #A35, Brief of Evidence of Kawharu at [191].

74 #A35(b), Kawharu, Table: New Zealand Trade and Investment Treaties since 2001: Investment Commitments by New Zealand.

75 Sykes cross-examination of Walker, Unofficial Transcript at CLO562-563. Dr Walker notes that governments have continued to evolve the safeguards and stated that in many areas that are of interest to Māori the terms were negotiated with that interest in mind. This is a structural and contextual approach to evolution that enables the Treaty of Waitangi exception to remain intact and stable rather than being renegotiated with each agreement.

76 Walker, Unofficial Transcript at CLO563-564.

120.1 In this table, Associate Professor Kawharu notes that the "general exceptions" in the GATT (Article XX) and GATS (Article XIV) agreements do not apply to TPP's Investment Chapter. This is correct. However, the applicability of those general exceptions is more complex than a simple yes/no answer. For example, in New Zealand's FTA with the Republic of Korea, the general exceptions in Article XIV of GATS apply to the that agreement's investment chapter (Article 20.1.1). However, the general exceptions in Article XX of GATT do not. As with the Australia-New Zealand-ASEAN FTA (AANZFTA), the position under the FTA with the Republic of Korea is – as noted in the table in respect of AANZFTA – limited.

120.2 The table also notes that the National Treatment and Most Favoured Nation provisions of the Malaysia FTA and the National Treatment provision in the AANZFTA are subject to further agreement. In both agreements, the parties have agreed to these obligations. However, those obligations will not apply until the parties' schedules of NCMs (for Malaysia) or reservations (for AANZFTA) to each agreement's respective investment chapter have entered into force. These schedules have not yet been agreed because negotiations to put in place a framework of commitments on investment applicable between New Zealand and Malaysia have taken place in the context of TPP and for New Zealand and ASEAN will take place within the context of RCEP.

121. These examples are not comprehensive but they do demonstrate that greater nuance is required to accurately assess the evolution of trade practice and the effect of the Treaty of Waitangi exception in the context of the whole TPP. The Crown refutes Associate Professor Kawharu's contention that the Crown's position on this point is not credible[77] and states that the evidence, including Dr Walker's explanation and understanding of the evolutionary changes (with which he has been involved either as negotiator (eg China, TPP) or as Deputy Secretary and other trade related roles within the Ministry) and the technical material provided by way of example above,

77 Kawharu, Unofficial Transcript at CLO604.

demonstrate that there is a robust and credible basis for the Crown's position.[78]

Other matters relevant to assessing risk and therefore degree of protection provided by Treaty of Waitangi exception

ISDS does not constitute the degree of risk claimed

122. In addition to the various filters set out above acting to reduce risk with ISDS, the following points are also relevant.

123. An ISDS tribunal may make an award of monetary damages and interest and restitution of property or damages in lieu thereof.[79] It cannot award punitive damages.[80]

124. Whilst the investor is limited to a damages claim, they must also forego rights to take domestic judicial proceedings (save for measures to preserve their position). This is an important consideration as those seeking to take advantage of ISDS provisions forsake the ability to challenge the "measure" in conventional administrative challenges (domestic parties of course do not need to give away such rights).

125. The TPP is an international agreement – a treaty – and hence its interpretation is governed by rules of international law relating to the interpretation of treaties. The source of those rules is Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[81] Although a number of states are not party to the Vienna Convention, the provisions on treaty interpretation in Articles 31 to 33 are generally accepted as representing customary international law and binding on all states as such.

126. The basic rule of treaty interpretation set out in paragraph 1 of VCLT Article 31 is:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

78 Sykes cross-examination of Walker, Unofficial Transcript at CLO563-564.

79 Trans-Pacific Partnership Agreement (signed 4 February 2016) [TPP], art 9.29.1.

80 TPP, art 9.29.6.

81 115 United Nations Treaty Series 331 (signed 23 May 1969, entered into force 27 January 1980).

127. In the application of the principles of treaty interpretation, ISDS tribunals also take account of the way in which other international courts and tribunals apply these principles. There is no doctrine of precedent in international law nonetheless, as a matter of practice ISDS tribunals tend to look at what other courts and tribunals have said. There is, however, an important qualification in the case of investment disputes. Such disputes generally involve the interpretation of a particular investment treaty whose terms may differ from the terms in other treaties. Thus, caution has to be exercised in assuming that interpretation of provisions in one investment agreement will automatically be relevant to the interpretation of clauses in another agreement.

128. The interpretative approach in considering the precise meaning of the Treaty of Waitangi clause is clear. VCLT Article 31 sets out the trilogy of text (ordinary meaning), context and object and purpose, all of which are to be considered as a unity and not sequentially. Interpretation does not start with the ordinary meaning and then stop if that seems clear. That ordinary meaning has to be considered in context and in light of the object and purpose of the treaty.

129. In paragraph 47 of her Affidavit of 19 January 2016, after referring to how the chapeau to GATT Article XX has been interpreted, Professor Kelsey states in respect of the Treaty of Waitangi clause, "it is quite unpredictable how a state-to-state tribunal might interpret the untested provision outside the WTO." The Crown does not consider this to be the case. A number of points can be made.

129.1 First, state-to-state dispute settlement panels are so uncommon in the area of investment that the interpretation of any provision of an investment in this area by a state-to-state tribunal will be largely one of first impression. But this is no different from any other provision of the TPP and has no greater significance in the context of the Treaty of Waitangi clause than it has elsewhere in the TPP.

129.2 Second, where matters are ones of first impression and there are no previous interpretations of the provisions in question through

case law, courts and tribunals reason by analogy, looking to see how related provisions have been interpreted.

129.3 Third, ISDS tribunals have shown a willingness to look to WTO interpretations of provisions that ae the same or similar to provisions found in the WTO agreements. Moreover, since the TTP is a trade and investment agreement, recourse to similar provisions of the WTO agreements will be even more apposite.

129.4 Fourth, on the basis of the few instances where state-to-state dispute settlement tribunals have been established, the composition of those bodies has been similar to those of ISDS tribunals. Thus, there is no reason to believe that somehow a different approach to interpretation will be taken simply because it is a state-to-state rather than an ISDS tribunal.

129.5 Fifth, in light of the above, it is difficult to see what particular unpredictability would exist in the case of the interpretation of the chapeau to the Treaty of Waitangi clause that is different or more enhanced than that of the interpretation of any other provision of the TPP.

130. Professor Kelsey makes the further statement that "differences can be expected between state-state and ISDS tribunals, making interpretation unpredictable."[82] It is not clear, therefore, what basis there is for the proposition that differences between state-to-state and ISDS tribunals will make interpretation unpredictable.

131. There is academic debate about whether WTO provisions are contextually different from some ISDS provisions and thus might justify alternate approaches, but it is not yet possible to draw any conclusion on the basis of the practice of tribunals. Associate Professor Kawharu takes a more balanced approach that recognises that ISDS (as with any judicial body) is

82 #A15, Sixth Affidavit of Professor Elizabeth Jane Kelsey at [55].

evolving and that many, though not all, of the concerns expressed about its operations have been addressed in the TPP.[83]

Claims alleging breach of MST

132. There are three matters of importance to these claims in relation to MST.

132.1 In assessing whether the Treaty of Waitangi exception is fit for purpose the Tribunal should not consider that part of its fitness includes the ability to flout customary international law or well established legal standards in international trade or investment law.

132.2 The Crown considers the chances of success unlikely in New Zealand and, that as a government that welcomes foreign investment, the Crown considers that MST represents nothing more than good regulatory and administrative practice.

132.3 Fear about NAFTA-type cases is unwarranted. The TPP's investment chapter contains more safeguards than NAFTA does.

133. MST is more than a guarantee that an investor will receive exactly the same treatment as a person of the obligated State. It is a standard guaranteed and defined independently by customary international law (and as such, New Zealand already owes this obligation to foreign investors quite independently of TPP or any of New Zealand's other FTAs). It is a 'floor' or 'base line', a level of treatment below which a responsible state will not go. It is necessary because sometimes some States pass laws or operate their courts or decision making bodies in ways that offend against the standard required by customary international law.

134. But there are limitations:

134.1 An investor must take a foreign country's domestic law as he or she finds it.

83 Kawharu, Unofficial Transcript at CLO678: "I guess I'm trying to think of what are the many criticisms mostly commonly levelled against these provisions? They would be lack of transparency, I think transparency is dealt with; inability for interested groups to participate, I think that is dealt with; inability to appeal, that is not dealt with." and further "The independence issue, so that relates to the independence of arbitral members, it is only partially dealt with, [...] I think a number of concerns have been dealt with, some of them have become standard practice now. Other concerns haven't been dealt with and I guess you'd say this to a reform agenda."

134.2 The legitimate scope for regulatory flexibility remains. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.

134.3 Determining a breach of MST must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.

135. So if the criteria for the allocation of a natural resource or a licence has Māori interests built in and those criteria are applied with a result that Māori (or even one iwi or rohe) receive more favourable treatment than an overseas investor then there is no breach of MST – provided that the decision making process was properly followed. This is an important point – there is no risk where process is transparent, reasonable and conducted in accordance with due process. In addition, if the decision making process is applied to all applicants regardless of whether they are foreigners or nationals then there is no breach of National Treatment or MFN provisions either.

136. A country like New Zealand is highly unlikely to act in a way that would fall foul of the MST required by customary international law. Claims have not been laid against New Zealand in this regard to date (either under existing FTAs or under customary international law. Claimants have pointed to claims against Canada which is seen as exercising similar procedural and good governance practices as New Zealand and project that New Zealand could find itself equally vulnerable. The Crown notes that the Canadian cases referred to have occurred under the very different provisions of the NAFTA agreement; that Canada's regional, state and federal arrangements are substantially more complex than those of New Zealand; and that Canada (with the support of US) is challenging what it views as a manifest abuse of power by a tribunal constituted under NAFTA (*Bilcon*).

137. In the unlikely event that New Zealand did fail the test of MST in the TPP, an investor would have strong (but not water tight) grounds for arguing that New Zealand would also fail the test in the chapeau of Article 29.6.1 that the measure not be arbitrary or unjustified discrimination. In assessing that the Treaty of Waitangi exception is fit for purpose, as noted above, the Tribunal must not consider that part of its fitness should include the ability to flout customary international law or well established legal thresholds in international trade law. The Crown is confident that any measure it might take to accord more favourable treatment to Māori (or otherwise fulfil its obligations to Māori) would not breach the very high threshold of MST as set out in the *Waste Management* case:[84]

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

138. New Zealand is obliged, under Article 9.6 of the TPP, to accord to covered investments "treatment in accordance with applicable customary international law principles, including fair, including fair and equitable treatment and full protection and security". Article 9.6(2)), however, makes it clear that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment and does not create additional substantive rights (in contrast to the original NAFTA text, and other early agreements, which do not draw the link to customary international law).

139. The obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the general principle of law of due process embodied in the principal legal systems of the world;

84 #A16(a), Exhibit AA, *Waste Management, Inc v The United Mexican States (Award)*, Emphasis added.

140. Moreover, under the TPP:

140.1 A determination that there has been a breach of another provision of the TPP, or of a separate international agreement, does not establish that there has been a breach of MST.

140.2 The mere fact that a party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach, even if there has been a loss or damage as a result. NAFTA does not have this limitation on legitimate expectations.

140.3 Loss of profits is not a cause of action. Future profits could be taken into account in the measure of damages but with limitations. See Article 9.29 ('Awards') which:

140.3.1 Clarifies that no punitive damages can be awarded by an ISDS tribunal (paragraph 6); and

140.3.2 Makes clear there are additional constraints on what can be awarded by a tribunal. Paragraph 2 notes that an investor can only recover loss or damage that it has incurred in its capacity as an investor. And paragraph 4 also requires an investor to prove the damage incurred to its investment was a result of the government in question breaching its TPP investment obligations.

Threat of litigation one risk factor amongst many of relevance to a decision maker and will not result in an inappropriate chilling on the Government's willingness to provide effective rights recognition and redress

141. All experts agree that a 'chilling effect' exists however their views diverge significantly as to its nature and effect and on how it should be characterised.[85] Dr Ridings recognises the effect being described as the 'chilling effect' but considers that it is more accurately characterised as a risk assessment process.[86] The claims relating to this effect are overly simplistic

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85 Associate Professor Kawharu queried the weight that can be accorded to some sources relied on by Professor Kelsey (particularly that of Kyla Tienhaara and Gus van Harten) and referred the Tribunal to a separate source that she considers more useful (Kawharu, Unofficial Transcript at CLO696). She also noted that concerns expressed by the UN Special Rapporteur cannot be relied upon as they inaccurately assess the operations of international trade law (Kawharu, Unofficial Transcript at CLO625).

86 Compare with #3.3.20, Closing submissions on behalf of Wai 2523 which wrongly state that "Dr Ridings can't see the Taniwha and denies that a chilling effect exists."

as to causality and are made at a level of abstraction that fails to assist the Tribunal as to the likelihood of its effect.

142. Professor Kelsey's thesis is that the Crown would be deterred from adopting Treaty compliant measures in the future, where such measures may adversely affect the interests of overseas investors by claims being made under ISDS whether those claims are well-founded or simply tactical.

143. In the first place, it needs to be emphasised that Professor Kelsey's thesis is based in its entirety upon each of a series of assumptions: that redress necessitated measures that caused an investor loss; that that loss would not be compensable by the Crown or by other methods; that the loss could be argued to engage the quite specific protections accorded to foreign investors under the TPP; that the Crown's conduct did not fall within the other exceptions in the TPP or the Treaty of Waitangi exception; and that the Crown was unable or unwilling to defend such a claims.[87] The evidence has a hypothetical base only.

144. Dr Ridings has said that there is nothing in the TPP which would restrain the Government's power to regulate for legitimate public purposes or to hinder the Crown from providing appropriate redress for claimants. This is based on three things:

144.1 The range of thresholds set out in the TPP means that there is a high bar which has to be reached for a successful claim by an investor.

144.2 The range of safeguards included in the TPP in order to prevent an expansive interpretation of the obligations (including reference to customary international law (which provides a restraint on minimum standards of treatment rules) in the MST obligation; and

144.3 The general and specific exceptions which enable the government to regulate for legitimate public policy reasons and in accordance with the subject-specific outcomes negotiated by New Zealand.

87 #A16, First Affidavit of Ridings at [51] – [109].

145. Further, as noted above, remedies for a breach of TPP's investment obligations under ISDS are limited to fiscal awards, in contrast to the substantive and procedural remedies available through domestic judicial processes including injunction or quashing measures. [88] Thus any such 'chill' must be premised primarily on the potential fiscal consequences of litigation including cost of proceedings and potential awards for compensation or damages. ISDS awards are limited to the payment of monetary damages for losses suffered or the restitution of property where possible.[89]

145.1 Dr Ridings evidence was that the costs of participating in proceedings vary depending on the litigation strategies employed.[90] In her experience, New Zealand has achieved successful outcomes in an efficient manner through primarily using in-house counsel. The potential fiscal consequences including costs and in relation to awards (which must be premised on actual investment, not intended investment) have been overstated.

145.2 Claimant evidence has not quantified the scale of the risks involved. The fact that litigation threats might be made, and that settlements or proceedings may result, does not assist the Tribunal in understanding how probable or severe the consequences of such a possibility may be. Whilst a number of international proceedings are referred to, and the difficulties of demonstrating the 'chilling effect' have been noted, there has been no assessment of the quantity and scale of governmental actions that have proceeded without any such consequences eventuating. The

88 #A16, First Affidavit of Ridings at [111].

89 #A16, First Affidavit of Ridings at [111].

90 Unofficial Transcript at CLO289-290:

> **Penelope Ridings:** Well luckily respondent states, depending on how they do it, can keep it in-house and litigate relatively cheaper, more cheaply, than an investor.
>
> **Peter Andrew:** Well the Australian government reported it spent $50M on the Philip Morris litigation, that's hardly cheap is it?
>
> **Penelope Ridings:** Yes, but the Australians have got a different approach to litigation. I would just give two examples, first the Apotex case which was litigated against the US, the total costs for that which included their time was $500 million and that was a long running case, investor state dispute – similar case. In the case of whaling, and I think this is public, in the case of the whaling case, Australia spent $20m. New Zealand intervened in that case and I think again this is public, our expenditures were $200,000.

Tribunal should exercise caution in premising any findings on unsubstantiated or unquantified risks.

145.3 The circumstances of cases in which awards have been made are extreme and are well removed from the kinds of situations put forward through case studies or in discussions during the hearing.

145.4 Costs run both ways. There would need to be a significant effect on investors' interests for a claim to be contemplated. It would have to mean that the investors' steps to minimise the adverse impacts of any form of Treaty rights recognition on its bottom line would have failed. There is significant uncertainty about whether there would ever be such losses.

146. The consequences of delays implementing measures have been described as a further impact of the 'chilling effect' particularly so in relation to health measures. It should be noted that nothing in the TPP arms investors or TPP Parties with injunctive powers. Government action cannot be stopped or delayed as a result of ISDS threats – should a government, after undertaking an informed consideration of all relevant risks and benefits, determine that it will proceed with its intended course, it may do so. And, should it chose not to proceed, it is reasonable to understand that, when all the relevant considerations have been weighed and balanced, the decision maker has determined the best course of action is not to proceed – it is overly simplistic to allege that such a decision would be premised on one factor only (i.e. the threat of litigation).

147. Dr Ridings view is that the 'chilling effect' is simply the prudent caution any decision maker exercises when balancing the threat of litigation against the multiple other factors that will be relevant to that decision. Relevant factors may include the likelihood or otherwise of success in litigation, the policy objectives, assessments of time critical impacts resultant from delay, resource availability, reputational risk etc. The threat of litigation on its own will rarely be a determinative factor.

148. To suggest, for example, that the Phillip Morris ISDS proceedings against Australia was the sole factor that contributed to the New Zealand government's position on plain packaging as a tobacco control measure

would be overly simplistic and ignores the risk of a WTO dispute proceeding.[91] A more realistic assessment may consider first a number of relevant considerations (e.g. the robustness of the relevant legal positions, alternative policy options available, efficiency of resource use, the impact of potential delay relative to other tobacco control policies or measures also under development, and the overall policy objective etc); and secondly the pros and cons of the various options available to the decision maker; and thirdly, whether the decision made was reasonable in all the circumstances. This is not to deny that the ISDS proceedings were a relevant consideration and, in those particular circumstances, may have been accorded some weight – it is simply to stress that multiple factors will be involved in complex policy and litigation decision making and it would be wrong to take an overly simplistic approach.

149. To the extent that the threat of litigation can be said to result in decision makers or their advisors taking overly cautious positions, such a risk is not isolated to the TPP or to ISDS proceedings. Dr Ridings stated:[92]

> Such a threat of litigation [by an international investor under TPP] occurs in a threat of domestic litigation just as much as it might do with a threat of ISDS.

Domestic litigation against the Crown, including by Māori, has been (and remains) extensive. As claimants to this inquiry are aware, the threat of litigation may or may not be successful in delaying or changing proposed Crown action – it will depend on the factors relevant in each situation.

150. The Government faces risk in every regulatory step it takes in every direction. The operation of investment protections form part of the ordinary business of government. While future Crown actions may engage particular commitments under the TPP, that simply does not have the chilling or paralysing effect described by Dr Kelsey.

'The chilling effect' in Bilcon

151. Professor Kelsey invokes the reference in Professor McRae's *Bilcon* dissent to the chilling effect of the majority opinion, but she treats it with a broad brush and does not look closely at what was being said there. *Bilcon* has

91 See for example #3.3.20, Closing submissions on behalf of Wai 2523 at [44].

92 Ridings, Unofficial Transcript at CLO288-289.

received attention in the evidence. If the Tribunal wishes to consider this further, the Crown view as to its relevance is contained in **Appendix B.**

No diminution of Crown ability to provide redress

152. It is a longstanding principle of the Treaty, through both Tribunal jurisprudence and that of the Courts, that the Crown not take action which could now or in the foreseeable future impair, to a material extent, the Crown's ability to provide appropriate redress.[93]

153. The Supreme Court has recently confirmed this principle and provided further guidance as to its application:[94]

153.1 Before intervening, the Court must be brought to the conclusions that the proposed Crown action (in that case, privatisation, in the current circumstances, ratifying the TPP) are inconsistent with Treaty principles—a measure will be inconsistent if it impairs, to a material extent, the Crown's ability to take the reasonable Treaty action which it is under an obligation to undertake;[95]

153.2 In deciding whether proposed Crown action will result in "material impairment" a judicial body must assess the difference between the Crown's ability to act in a particular way if the proposed action does not occur and its likely post-action capacity.

153.3 Impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluated, will not be relevant material.[96]

153.4 To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climate;[97]

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93 *Broadcasting Assets case* (PC).

94 *Mighty River Power case* (SC) at [88-90].

95 *Mighty River Power case* (SC) at [89].

96 *Mighty River Power case* (SC) at [89]. The Supreme Court noted that the expression "substantial prospect" comes from the judgement of Cooke P in *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 27.

97 *Mighty River Power case (SC)* at [89].

153.5 Where the capacity to provide a particular form of redress will be materially impaired, the courts must also consider whether the Crown will nonetheless have the capacity to provide other forms of redress which are equally effective;[98]

153.6 The onus of showing inconsistency with the principles of the Treaty rests on the claimants in circumstances where the proposed conduct of the Crown is not permitted only if it falls foul of a Treaty obligation.[99]

154. That case related to water rights and regulation and involved a privatisation proposal in a context where Crown obligations to international investors (including under existing ISDS provisions) were directly in point. The Court concluded that:[100]

154.1 The privatisation proposal involved might limit the scope to provide some forms of redress "at least theoretically available" but concluded that it had not been shown that notwithstanding some diminishment in Crown ownership and control of the relevant assets, a material impairment would not result from the proposal;

154.2 The unlikelihood of the specific forms of redress being sought resulting in the harms claimed, and the continuing availability of other policy options, were salient to this conclusion;

154.3 The Crown accepted the need for action on Māori claims to water; and

154.4 It was not satisfied that implementing the policy proposal would affect future legislative changes or Crown conduct in compliance with the Treaty, particularly in light of the constant evolution of the law in this area and determined no material impairment had been shown.

98 *Mighty River Power case* (SC) at [89].

99 *Broadcasting Assets case* (PC) at 524, cited with approval by the Supreme Court in *Mighty River Power case* at [88].

100 *Mighty River Power case* (SC) at [133 -141], [146], [149], [150].

155. The Crown submits that the evidence before this Tribunal does not demonstrate a realistic risk of material impairment, never mind one that cannot be mitigated through multiple redress policy options being available. The case law is clear that the Crown is not bound to provide specific forms of redress that may be preferred by Māori, so long as policy options are open to it that are capable of meeting the Crown's obligations to Māori.

156. Through closing submissions, Counsel for the NZMC (Wai 2535) clarifies that the "claimants don't seek a specific protection mechanism that compels the Crown to take action but instead, seek "a recommendation from the Tribunal that the Crown act now, before it is too late". The recommendations sought are that the: [101]

> Crown engage with Māori claimants and the NZMC with a view to resolving by negotiation or co-operation for a speedy resolution to the Waitangi Tribunal, on how Māori proprietary rights in natural water regimes may be given practical effect", and
>
> Crown give consideration to publishing information in official Crown publications to ensure potential foreign investors are put on notice that the Crown "remains committed to resolving outstanding Treaty claims for natural resources and that this might involve recognition of Māori proprietary rights in water. It might also involve further regulation, including amendments to the Resource Management Act 1991, to provide for Māori interests in those resources.

157. As submitted above, the Crown's view is that (so far as they relate to water) the current claims and the recommendations sought, duplicate matters which have already been the subject of Supreme Court consideration and are subject to the ongoing jurisdiction of the Fresh Water Inquiry.

158. Despite claims to the contrary, the first recommendation sought attempts to pre-empt or cut across both Stage 2 of the Fresh Water Inquiry, which is currently adjourned specifically to allow the processes currently underway between Crown and Māori (the water process) to come to fruition. The NZMC were unsuccessful in opposing that adjournment and, with respect, seek to undermine that Tribunal's decision to adjourn. Should claimants to that inquiry (including the NZMC) be unsatisfied with that process or progress being made, the proper channel is to apply to that Tribunal. In the Crown's view the water process pre-dates the TPP negotiations concluding

101 #3.3.24, Closing submissions on behalf of Wai 2535 at [74].

or the TPP being ratified. The Crown has been well informed as to these matters whilst undertaking TPP negotiations and is confident that the TPP does not materially impair the Crown's ability to provide redress due to the combined effect of:

158.1 Crown acknowledgements that Māori have rights and interests in relation to water and, a broad range of policy options being available to provide for those interests;

158.2 The water reservation (which precludes investor claims relating to water based on the National Treatment (Article 9.4) and Senior Managers and Board of Directors (Article 9.11)obligations in the Investment Chapter);

158.3 The transparency of the ongoing Crown-Māori dialogue and processes related to freshwater (which would significantly undermine any claims based on MST including any legitimate expectation claims as to a stable regulatory environment in this area);

158.4 Claims as to the 'chilling effect' are misapplied. Evidence as to the supposed 'chilling effect' was presented in the Fresh Water Inquiry (in a more fact specific context) but not made out, and were subsequently rejected as constituting any material impairment by the Supreme Court in *Mighty River Power*;[102]

159. In relation to water, and to other matters of concern to the claimants, no realistic prejudice has been demonstrated by the claimants that the TPP that would result in any material impairment or diminution of the Crown's ability to provide redress. The prejudice alleged to arise from the TPP in relation to water, and other subject matters, is speculative, generalised or highly abstracted and cannot form the basis of credible, practical findings or recommendations. Further, the claims as to prejudice are founded on claimant allegations of unsatisfactory decision making or conduct of the Crown in the domestic sphere rather than as an effect of the TPP. These

102 See also submissions on this matter under sub-heading "Threat of litigation one risk factor amongst many of relevance to a decision ".

domestic issues can be more properly addressed by ongoing Crown-Māori dialogue and recourse to domestic legal and political mechanisms.

160. The second recommendation is, with respect, redundant. The ongoing water process between Crown and Māori has been widely publicised and reported upon, including by the Tribunal and Courts. Should any specific proposals be developed for implementation in the future, the Crown-Māori dimension of those proposals will be communicated (as they were for instance in the Mighty River Power privatisation proposal).[103] Due diligence undertaken by any potential investor would involve an awareness of these issues, and should the investor not do so, the fact that this situation is so broadly known would provide determinative weight against any claim to 'legitimate expectations' in this regard.

Political aspects of domestic ratification processes and their impact on New Zealand

161. As Dr Walker has stated, all Parties are now conducting their domestic processes to determine whether to ratify the agreement as negotiated. Evidence for the claimants has raised concern about the potential for either the United States not to ratify the agreement or, to insist on changes against New Zealand's interests before certifying that United States ratification can proceed. It is not appropriate for the Crown to engage in conjecture about the domestic processes of other Parties, nor even to comment other than in the following respects:

161.1 As described to the Tribunal throughout, ratification is a yes/no decision to ratify the decision as whole. It is not an opportunity for further negotiations – the agreement signed by the Parties was reached after extensive negotiation;

161.2 The United States domestic process towards ratification is set out in legislation on a transparent basis;

161.3 The internal politics of any nation are a matter for that nation.

Case Studies

162. The case studies were put forward to assist the Tribunal to understand the efficacy of the Treaty of Waitangi exception rather than as substantive areas

103 *Mighty River Power case* (SC) at [88]-[89].

of inquiry in their own right. Dr Ridings and Associate Professor Kawharu largely agree that the case studies are strained and either would not be circumstances in which an ISDS claim could be lodged, or would not trigger the Treaty of Waitangi exception. The Crown relies on the Crown evidence and submissions already on the record in this regard.[104]

163. The cases studies have hopefully given some more concrete examples against which to test the operation of the Treaty of Waitangi exception but the Crown urges the Tribunal not to attempt to go further and adjudicate upon likely interpretations. First, they are hypothetical and necessarily abstract. Second, the expert opinion which favours the claimant's case is at best equivocal or heavily caveated. Third, with respect, this is not an area where the Tribunal can or should claim expertise. Fourth, to do so goes beyond the scope of the issues the Tribunal rightly limited itself. Were the Tribunal to reach any conclusions on the scenarios, given these and other limitations, it would inevitably be engaging in non-expert speculation.

Fit for purpose Treaty of Waitangi exception – no change required prior to ratification

164. The Crown supports the stance taken by the Tribunal in its directions confirming the scope of this inquiry:[105]

> the core issue for inquiry is what the actual Treaty of Waitangi exception does and does not do. What it could (or should) be, assuming a different process, is an important question, but is not one we can answer in the context of an urgent inquiry on specific issues.

165. During the panel session, the Tribunal asked the three expert witnesses what a 'fit for purpose' Treaty Exception would look like. The Crown cautions the Tribunal against making findings in relation to particular wording given that any such theoretical exercise would not sufficiently provide for:

165.1 the complexities of international trade law jurisprudence and practice;

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104 See #A16, First Affidavit of Ridings; #A19, Third Affidavit of Ridings; #3.1.86, Crown memorandum regarding inquiry planning, at [15]-[29]; and, #3.1.90, Further Crown memorandum regarding inquiry planning, at [5]-[15].

105 #2.5.19, Memorandum-directions addressing issues for inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable, at [18].

165.2 the interface of the clause with the remainder of the Agreement; or

165.3 any realistic accounting for the associated competing interests of multiple parties that would occur in reality.

166. Dr Walker, Mr Harvey, and Dr Ridings, drawing on their experience as negotiators and technical advisors, all cautioned strongly that negotiating reality means that any change to the wording of the exception would likely result in unintended adverse consequences.[106] Associate Professor Kawharu also acknowledged the limitations of undertaking a theoretical redrafting exercise absent the realities of a live negotiation and noted the very real value in maintaining existing wording insofar as possible.[107] Furthermore, Associate Professor Kawharu agreed with Dr Ridings that the risk from any ambiguity arising from the current drafting is not sufficiently high to warrant action during the ratification stage.[108]

Essential elements of a fit for purpose Treaty of Waitangi exception clause

167. The Crown submits that Article 29.6 is fit for purpose. To be fit for purpose a Treaty exception must meet four criteria:[109]

167.1 be self-judging;

167.2 have broad scope of application;

167.3 be subject to a good faith requirement; and

167.4 ensure that the Treaty of Waitangi is not subject to interpretation by a dispute settlement body.

168. All of the technical experts agree as to the first element. Associate Professor Kawharu put a strong emphasis on the need for a fit for purpose clause to be clearly self-judging.[110] As Dr Ridings explained, if the exception is not self-judging it means that the entire clause would be subject to

106 Walker, Unofficial Transcript at CLO600-601; Harvey, Unofficial Transcript at CLO764; Ridings, Unofficial Transcript at CLO818.

107 Kawharu, Unofficial Transcript at CLO818, and CLO827.

108 Kawharu, Unofficial Transcript at CLO818.

109 Ridings, Unofficial Transcript at CLO826-827.

110 #A35(c), Kawharu Draft 'fit for purpose' Treaty Exception clause: "The proposed clause removes the doubt on the self-judging issue. It is clearly self-judging."

examination by an ISDS.[111] In particular, New Zealand would have to justify why it was taking any particular measure and the linkages between measures taken and the Crown's obligations to Māori would come under very close scrutiny. Professor Kelsey accepted that Dr Ridings was correct that a fit for purpose clause ought to be self-judging and redrafted her proposed clause to include the phrase "New Zealand deems necessary".[112]

169. All of the experts further agree that the exception must have a broad scope of application. Dr Ridings explained that the clause drafted by Professor Kelsey for the iwi chairs is problematic because, amongst other things, it is limited to social, cultural, spiritual and environmental concerns. This would make it difficult for New Zealand to assert that measures taken to address Māori concerns outside of that list should also be protected by the exception.[113] Professor Kelsey also accepted this point, and proposed a re-draft that does not list any specific areas of concern.[114]

170. In relation to the third element of good faith, Dr Ridings explained that the absence of an express requirement of good faith would not mean the exception would not be subject to good faith obligations, but would mean that it would be extremely difficult to persuade other countries to agree to inclusion of the clause in any international agreements because it would look like a carte blanche.[115] As she explained, the good faith element is fundamental to achieving agreement in negotiations. Professor Kelsey noted that the clause drafted by her for the iwi chairs was modelled on the alleged tobacco exception proposed by Malaysia.[116] However, as already noted above, such an exception does not feature in TPP, so if it were proposed, clearly it was not agreed by the TPP Parties.

111 Ridings, Unofficial Transcript at CLO825.

112 Kelsey, Unofficial Transcript at CLO829; #A47, Kelsey, Best 'fit for purpose' Tiriti Provision.

113 Ridings, Unofficial Transcript at CLO826.

114 Kelsey, Unofficial Transcript at CLO829; #A47, Kelsey, Best 'fit for purpose' Tiriti Provision, see second proposed redrafted exception clause which states: "Nothing in this Agreement shall apply to any measure [adopted by New Zealand] [New Zealand deems necessary] to fulfil the obligations of the Crown to Maori, including under te Tiriti o Waitangi."

115 Ridings, Unofficial Transcript at CLO826.

116 Kelsey, Unofficial Transcript at CLO829.

171. In relation to the fourth element, Dr Ridings, Associate Professor Kawharu and Professor Kelsey agree that the interpretation of the Treaty of Waitangi should be a domestic matter.

Article 29.6 is fit for purpose

172. The Crown's view is that the Treaty of Waitangi exception is fit for purpose as the current drafting of the clause fulfils all four criteria:

172.1 It is self-judging: it applies to measures New Zealand "deems necessary".[117]

172.2 It has broad scope of application: it applies to measures deemed necessary to accord more favourable treatment to Māori, including under the Treaty of Waitangi.

172.3 It is subject to a good faith requirement: the chapeau.

173. It ensures that the Treaty of Waitangi is not subject to interpretation by a dispute settlement body.

174. Although Associate Professor Kawharu took the view that it would be possible for the self-judging element of the Treaty of Waitangi exception to be drafted more clearly, she acknowledged that the Crown's interpretation as to the wide scope of the self-judging element is reasonable rather than unlikely.[118] Associate Professor Kawharu also accepted that the Treaty of Waitangi exception is unique *because* it is self-judging.[119]

175. Associate Professor Kawharu expressed concerns about the scope of application of the Treaty of Waitangi exception being limited to "positive discrimination". The Crown accepts that, in line with Professor Kawharu's views, the phraseology "more favourable treatment" could be misconstrued by readers without international trade law expertise as referring only to positive discrimination and thus not necessarily reflective of current domestic Treaty jurisprudence in relation to Crown-Māori relationships

117 Counsel notes that Associate Professor Kawharu did not suggest a change to this phrasing, and Professor Kelsey redrafted her proposed clause to include this same phrasing.

118 Kawharu opening statement to the expert panel session, Unofficial Transcript at CLO799-800.

119 Kawharu, Unofficial Transcript at CLO638: "I'm not aware of anything remotely like it, its unique for two reasons (1) it's a specific exception for indigenous people, that's unique, it's also unique because it's self-judging."

which clearly involve rights and obligations beyond the rubric of positive discrimination. However, Article 29.6 is not a domestic mechanism and should not be assessed as such. The Treaty of Waitangi exception exists and operates within the jurisdiction of international trade and commercial law. In this context a narrow legal interpretation of the term "more favourable treatment" cannot be sustained. As Dr Ridings explained, the term "more favourable treatment" is the flipside of a term which is very common to international trade negotiators – "less favourable treatment" – it is therefore meaningful and appropriate in the trade arena and is understood to require broad interpretation.[120]

176. Finally, in relation to the fourth element, Dr Ridings and Associate Professor Kawharu agree that the first sentence of the second paragraph supports the intention of the first paragraph such that a tribunal not

Zealand's part to change the scope of the exception, or as conceding a deficiency in the earlier version that could be exploited.

178. It would not be logical and reasonable to expend limited 'negotiating capital' seeking changes which, in the Crown's view, would have no significant impact on the legal effect of the provision, and could result in reductions to the scope of application of the exception, would need to be assessed in the context of New Zealand's international relations and domestic considerations as a whole.

ISSUE 2: MĀORI ENGAGEMENT

Inquiry essentially forward looking

Evidence and findings to be consistent with future focus

179. The Tribunal has defined the second issue for inquiry as:[123]

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

180. Issue 2 is forward looking. Given the context and constraints of urgency, the Tribunal elected not to expand this second issue into a backwards looking inquiry[124] and stated that:

> should the Tribunal not be persuaded through the urgent hearing that the Treaty of Waitangi exception is not the "valuable and effective protection of Māori interests" the Crown claims it to be, the Tribunal may draw inferences as to the process by which the clause was negotiated;[125]
>
> the focus of the second issue touched upon and was informed by the adequacy or otherwise of steps in the process to date.[126]

181. Mr Harvey's evidence filed in relation to the urgency application covers the MFAT 'backwards looking' engagement to the extent that was possible in the short time available to prepare that evidence. As stated by Dr Walker, that affidavit does not cover all of MFAT's engagement or the entirety of

123 #2.5.19, Memorandum-directions addressing issues for inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable.

124 #2.5.19 at [11].

125 #2.5.19 at [18].

126 #2.5.19 at [20].

the whole-of-crown engagement.[127] Whilst this evidence remains on the record, the Crown has not, given the "essentially forward looking"[128] focus of the inquiry, submitted further 'backwards looking evidence'.

182. Accordingly, a full evidential base is not before the Tribunal on which to base findings in relation to 'backwards looking process'. The Presiding Officer indicated an understanding of this evidential limitation in stating: "we accept the limitations of the scale and the scope of the available evidence but we nonetheless do regard it as a relevant and important consideration."[129] The Crown's view is that discussion of context relating to 'backwards looking' process can be based on the material that is on the record but can be preliminary only and must be heavily caveated in accordance with the evidential limitations. The Crown considers that findings must focus on the issues as stated (i.e. in relation to the Crown's current and ongoing engagement process in relation to steps needed to ratify the TPP).

Crown future focussed engagement proportionate to the impacts on interests

183. In response to the second issue for inquiry, the Crown says that:

183.1 The claimants have not demonstrated that the Crown's assessment of the impact of TPP is inaccurate or that TPP will have significant direct adverse effects on Māori interests;

183.2 The claimants have provided little evidence or comment on what Māori 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 Māori);

183.3 The Crown's current and proposed engagement leading up to and post-ratification is proportionate and appropriate to the nature and extent of the impact of TPP on Māori interests.

184. The steps between the completion of negotiations and ratification relate to:

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127 #A36, Third Affidavit of Walker at [75].

128 #2.5.19, Memorandum-directions addressing issues for inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable at [45].

129 Judge Doogan, Unofficial Transcript at CLO254.

184.1 Informing as to the outcomes of the negotiations;

184.2 Engaging or seeking input into areas where there is policy flexibility in implementation;

184.3 Enabling advantage to be taken from the outcomes of negotiations should they be ratified; and

184.4 Participating in the national dialogue as to whether New Zealand should ratify the Agreement as negotiated.

185. The Crown has consistently stated that, once negotiations concluded, no changes could be made to the text, and the focus for the Government turns towards the domestic steps through to ratification. This new focus informs the nature of engagement post conclusion of negotiations.

Spectrum of Māori interests

186. There is no general Treaty duty to consult in all circumstances. Rather, the Treaty duty is that the Crown has an obligation to make informed decisions as part of the Crown's general duty to act in good faith, fairly, and reasonably towards Māori and it must take steps that are reasonable in the circumstances and that are consistent with its other Treaty obligations (for example partnership obligations) in order to become informed. Where the interests in play and the potential impact on them warrant it, consultation may be one means by which this duty can be met however an obligation to make informed decisions is not the same as a general duty to consult with Māori (to be viewed as such confuses the outcomes with means – depending on the situation, other means may suffice for example, reliance on existing information). A standing plenary duty, the Courts have said, is too vague an obligation to impose on the Crown.[130] Whether the duty to make informed decisions requires consultation, and to what extent, depends on the nature of the issue involved.[131]

187. The Tribunal in Wai 262 accepted that it would be impractical and undesirable for the Crown to engage in full-scale consultation with Māori

130 *Lands case* at 665 per Cooke P and at 683 per Richardson J.

131 *Lands case* at 683 per Richardson J. The Waitangi Tribunal has previously accepted consultation is not, as a general rule, mandatory and is dependent on the circumstances of the particular case (The Final Report on the MV Rena and Motiti Island Claims (Wai 2391, Wai 2393, 2014) at 15).

over every international instrument.[132] Such an approach would also be unduly burdensome on Māori.[133]

188. The Tribunal in Wai 262 referred to Māori interests in international instruments and the Treaty standard for corresponding Crown engagement operating along a "sliding scale", the operation of which is by its nature imprecise. The Crown accepts the first three categories set out:[134]

188.1 Where the Māori interest is very minor, very little engagement is required, other than perhaps the provision of general information.

188.2 Where Māori interests are at play, but wider interests are to the fore or there is a specialised Māori interest, such circumstances may justify a very general level of engagement, such as informing and seeking the views of FOMA.

188.3 Where Māori interests are significantly affected, intensive consultation and discussion is required.

189. In relation to the first category, the Tribunal stated:[135]

> Investment or export agreements could be an example. Without wanting to be prescriptive, such circumstances may justify a very general level of engagement such as informing or seeking views from the Federation of Māori Authorities which tends to speak for iwi business interests.

190. The Tribunal went on to define two further categories that that the Crown has not accepted are required by the Treaty principles and that, in any case, would not be invoked in relation to an international trade and investment Treaty where the interests of Māori cannot be said to be central:

190.1 that where the Māori Treaty interest is so central and compelling (the Tribunal gave UNDRIP as a possible example), engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent; and

132 Wai 262 Report at 681.

133 *Wai 262 Report* at 681.

134 *Wai 262 Report* at 681-682 and 689.

135 *Wai 262 Report* at 682.

190.2 when the Māori interest is so overwhelming, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its decision-making powers.

191. The three classifications of Māori interests set out at subparagraphs 188.1-188.3 above are reflective of established Treaty jurisprudence, and supported by statements on the form and content of consultation from the Court of Appeal:[136]

> In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

Consultation is a mutual obligation

192. As stated by the Tribunal:[137]

> it is for the Crown to inform Māori as to upcoming developments in the international arena, and how it might affect their interests. Māori must then inform the Crown as to whether and how they see their interests being affected and protected.

193. The High Court has expressed the same concept in that, in a context where broad consultation was undertaken, an iwi might be expected to raise issues it was concerned about and, had they not taken advantage of opportunities to do so, the Crown should not be held responsible.[138]

194. Mr Harvey's evidence is that across all sectors, including Māori, business groups tend to most active in participating in engagement opportunities.[139]

136 *Lands case* at 683.

137 *Wai 262 Report* at 681.

138 *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422 at [135], [136], [139], [140].

139 #A2, First Affidavit of Harvey. Note also, that in addition to the specific information provided in relation to international agreements under negotiation, the international treaties list invites recipients to get in touch. Dr Walker, in response to questioning from claimant counsel, stated in evidence that he was not aware of any groups that, during the negotiations process contact the Ministry and asked for meeting that did not have a meeting or engagement from the Ministry as a result of the specific request (Unofficial Transcript at CLO515). Mr Harvey notes that, prior to the conclusion of negotiations, in response to an Official Information Act request, the Ministry issued a specific invitation to meet with the Wai 2523 claimants and counsel to discuss TPP (#A2 at [68], see letter, #A2(a), Exhibit U). No response to that invitation was ever received.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

195. Mr Paul expressed the view that the Crown cannot and should not have engaged in the process of negotiation of TPP without first obtaining the free prior and informed consent of Māori premised on his views of the effect of UNDRIP.[140]

196. UNDRIP must be read in light of the statement by Dr Pita Sharples at the time of signature:[141]

> The Declaration acknowledges the distinctive and important status of indigenous peoples, their common historical experiences and the universal spirit that underpins its text. The Declaration is an affirmation of accepted international human rights and also expresses new, and non-binding, aspirations.
>
> In moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.

197. The Crown's view is that the UNDRIP references to "agreement" reflect aspirational parts of the Declaration and should be read in that light rather than as a suggestion of a new legal standard being imposed.[142]

Crown-Māori consultation or engagement in relation to TPP

Crown's process of assessment of the intersection between the TPP and the interests of Māori

198. The Tribunal has recommended that:[143]

> the lead agency responsible for an international instrument consult with Te Puni Kōkiri before coming to a view whether there is a Māori interest, the likely strength and nature of that interest, and the degree of engagement that its priority might justify.

199. This process recommendation is to ensure that lead agencies have the benefit of the Te Puni Kōkiri's expertise on matters of interest to Māori and on the nature of Treaty of Waitangi obligations in particular circumstances.

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140 #A28, Brief of Evidence of Cletus Maanu Paul at 34.

141 Pita Sharples, Minister of Māori Affairs, Announcement of support for the Declaration on the Rights of Indigenous Peoples (19 April 2010), presented during the 9th session of the United Nations Permanent Forum on Indigenous Issues 19- 30 April 2010.

142 The Supreme Court stated in *Mighty River Power case* (SC) at [92] that it doubted that UNDRIP adds significantly to the principles of the Treaty statutorily recognized (in that case, under the State-Owned Enterprises Act and Part 5A of the Public Finance Act), although the Court accepted that UNDRIP provides some support for the view that those principles should be construed broadly.

143 *Wai 262 Report* at 690.

It does not displace the responsibilities and obligations of lead agencies and the Crown as a whole under the Treaty, nor does it enable a 'tick the box' approach to be utilised to discharge such obligations. The obligations have both procedural and substantive effect.

200. MFAT as the agency responsible for the TPP negotiations as a whole, and other government departments as the lead agencies for various policy areas impacted or potentially impacted upon by TPP, have sought advice from Te Puni Kōkiri at various points during and post conclusion of negotiations.[144] Agencies cannot and do not rely solely on Te Puni Kōkiri advice.

Process may be informed by accumulated knowledge

201. The Crown's assessment of the strength and nature of the Māori interest in relation to any international agreement cannot be viewed in a silo related solely to that agreement or negotiation. TPP and the Crown's assessment of its potential impact on Māori interests needs to be viewed within the context of the ongoing Crown-Māori dialogue, and within the constant process of international negotiations MFAT and agencies are engaged in. Agencies can and do make evaluations of impact on the basis of their institutional knowledge garnered through their ongoing engagement with Māori in relation to their respective domestic policy processes and what has been communicated in terms of public dimensions of interest.[145] For example, the Crown has an understanding of the high importance of issues in relation to New Zealand's accession to UPOV 91 based on engagements over a lengthy period.[146] Dr Walker's evidence made clear that:[147]

> the Departments saying that their current policy settings are based on the accumulated, accumulated history of process and therefore that is how they're assessing the interests.

202. It is implicit in the Wai 262 Tribunal's sliding scale, and explicit in the Court of Appeal's judgment in the *Lands* case, that in some instances there are Treaty implications about which the Crown "may have sufficient

144 Walker, Unofficial Transcript at CLO569-570.

145 Walker, Unofficial Transcript at CLO 517-518.

146 Walker, Unofficial Transcript at CLO495.

147 Walker, Unofficial Transcript at CLO496.

information in its possession for it to act consistently with the principles of the Treaty without any specific consultation".[148] It is wrong to assess the Crown's state of knowledge concerning a matter as only being garnered during the specific negotiation process.

Applying the outcomes of that impact analysis to categories of engagement

203. Government departments have assessed the level of Crown engagement required against the scale of Māori interests impacted or potentially impacted by TPP as follows:

203.1 Where the Māori interest is very minor, very little engagement is required, other than perhaps the provision of general information.

203.2 Where Māori interests are at play, but wider interests are to the fore or there is a specialised Māori interest, such circumstances may justify a very general level of engagement, such as informing and seeking the views of entities or individuals which tend to speak for Māori in relation to those specialised interests.

203.3 Where Māori interests are significantly affected, intensive consultation and discussion is required.

204. These categories reflect both the first three categories described in the Wai 262 report and set out at subparagraphs 188.1-188.3 above and orthodox legal requirements in relation to duties to consult which, in the Treaty context as with other contexts, is ultimately a proportionality standard.

205. The areas of interest to Māori that are potentially affected by the TPP, and the Crown's analysis of the degree of impact the TPP will have on those interests, is set out by Dr Walker[149] and under the subheading "Nature and strength of Māori interests impacted by TPP" above.

206. In applying the outcomes of that impact analysis to the categories above, agencies determined that:[150]

148 *Lands case* at 683.

149 #A12, Second Affidavit of Walker at [24]-[35]; #A36, Third Affidavit of Walker at [61]-[65] setting out TPP outcomes requiring implementation through legislation and, more particularly at [73]-[89].

150 #A36, Third Affidavit of Walker at [87].

206.1 most aspects of the TPP fit in with the first category. This is consistent with the fact that the claimants have not raised concerns as to potential prejudice arising from tariff rate reductions, customs requirements, rules of origin, etc.

206.2 Matters where Māori have interests but where the TPP does not directly adversely impact on that interest include the environment and natural resources (including water, trade and biodiversity, and marine capture fisheries) and traditional knowledge, or involve positive impacts e.g. for Māori businesses and exporters – these require a mix of information and general engagement.

206.3 More direct impacts were identified in relation to two matters, intellectual property provisions and UPOV. These require more targeted processes.

207. The engagement program discussed below is premised on this analysis.

Engagement pre-conclusion of negotiations

208. Crown evidence (albeit limited) was before the Tribunal both at the hearing to determine whether or not to grant urgency and at the substantive hearing. The Crown relies on that evidence and associated submissions as to past process.[151]

209. As noted at paragraph 192 above, engagement and consultation is a mutual obligation.

Engagement post-conclusion of negotiations

210. Dr Walker's evidence sets out the programme of engagement that the Government has been and will be undertaking leading up to the ratification and entry into force of TPP.[152] This engagement has two work-streams: outreach and domestic legal and policy processes for implementation. Aspects of TPP assessed by departments to require general information and engagement will be met through a general programme of public and Māori-specific outreach.[153] Obligations assessed as having the potential for

151 #A2, First Affidavit of Harvey.

152 #A36, Third Affidavit of Walker at [90]-[120].

153 #A36, Third Affidavit of Walker at [91].

significant impact on Māori interests (UPOV 91) will be the subject of more targeted engagement through the Government's programme of implementation related engagement.[154]

211. Outreach underway or completed:

211.1 A series of public "roadshows": in New Zealand's main and regional centres. The roadshows include the opportunity to ask questions about any issues or concerns in relation to TPP, and the opprtunity to access more in-depth information and to discuss various TPP outcomes.[155]

211.2 Māori-specific outreach through regional hui-a-iwi. The hui aim to explain the outcomes of TPP negotiations, provide an opportunity for participants to discuss any areas of interest or concern and ask questions, and enable those questions and concerns to be heard and considered as appropriate.[156]

212. Current and planned targeted technical engagement includes:

212.1 A targeted public consultation document in relation to the Government's intended approach to implementation of the intellectual property chapter obligations, and the opportunity for public submissions on that approach (submissions closed 30 March 2016).[157]

212.2 Targeted engagement on issues related to the changes to the plant variety rights regime, including discussion on how Māori want to engage with the Crown on these issues, whether or not New Zealand should accede to UPOV 91, and the Tribunal's recommendations on plant variety rights in the Wai 262 report.[158]

154 #A36, Third Affidavit of Walker at [91].

155 #A36, Third Affidavit of Walker at [101]-[102]; #A36(a), Exhibit K, draft TPP Roadshow programme.

156 #A36, Third Affidavit of Walker at [110].

157 #3.1.157(a), the Crown notes that the options in relation to UPOV 91 are not covered in this targeted consultation document as they do not need to be implemented before New Zealand ratifies the TPP.

158 #A36, Third Affidavit of Walker at [119].

212.3 After entry-into-force, on-going consultation with Māori as part of the proces of implementation of aspects of TPP's Environment Chapter, including provisions relating to the establishment of an Environment Committee and public participation.[159]

212.4 Increased engagement with business about realising economic opportunities under TPP, including consideration of how best to support Māori exporters.

213. The Crown says that the Government's programme of current and future outreach and engagement should not be viewed as fixed. It is a work in progress, and plans for future engagement are subject to ongoing consideration.

Future focussed engagement plan is Treaty compliant

214. The planned combination of general and Māori-specific, informative and consultative, engagement will provide Māori with appropriate opportunities to engage with, discuss, and have input into the implementation of TPP obligations (pre- and, in relation to UPOV, post-ratification), to make informed decisions concerning the ratification of TPP, and to prepare to take advantage of the opportunities under the Agreement.

215. The engagement indicated is proportionate to the impacts of the TPP on the Māori interests at play, and therefore aligns with the Tribunal's recommendations for engagement for international investment and export agreements.

216. The Crown cautions against the Tribunal making overly prescriptive recommendations in terms of future consultation in areas in which it has heard very limited evidence and in which it has little or no expertise. For example, PHARMAC, the evidence comes from one claimant Doctor and in general terms from Dr Walker and Mr Harvey. That is hardly a sound basis on which to conclude any specific consultation obligation. As discussed above, the Crown view is that the claimed adverse impacts of the TPP on affordable pharmaceuticals and other matters of interest to Māori are overstated.

159 #A36, Third Affidavit of Walker at [120].

217. The Crown has benefitted significantly from hearing the concerns of the claimants about consultation. Irrespective of the scope of this Inquiry being future focussed, and the Crown's view that its actions are Treaty compliant, Counsel is instructed that MFAT and the Crown are considering how, they might improve performance with respect to engagement with Māori about current and upcoming negotiations involving international treaties.

WAI 262

> In sum, the Treaty requires the identification and active protection of Māori interests when they are likely to be affected by international instruments. Māori must have a say in identifying the interest and devising the protection. But the degree of protection to be accorded the Māori interest in any particular case cannot be prescribed in advance. It will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders, and on the international circumstances which may constrain what the Crown can achieve. [160]

218. Crown conduct has been informed by the Tribunal's findings and recommendations in the *Wai 262 Report* and the outcomes negotiated through the TPP are reflective of that, to the extent reasonable and practicable within the international multiparty context of the TPP negotiations.

219. The Crown considers that the measures secured on the international stage, including through the TPP, to reflect New Zealand's constitutional foundation should not be overlooked or underestimated. Dr Walker's evidence made clear that the inclusion of the Treaty of Waitangi exception in the TPP and the maintenance of its terms should not be taken for granted and was not a foregone conclusion.[161] Associate Professor Kawharu acknowledged New Zealand's leadership in this regard.[162] The fact that the clause evolved as a response to the domestic constitutional conversation in the late 1990s including through litigation, advocacy and consultation with Māori should not be characterised as somehow limiting its significance – the clause is unique on the international stage and its inclusion in the TPP is a significant demonstration of New Zealand leadership regarding indigenous rights internationally and the Crown's

160 *Wai 262 Report* at 681.

161 Judge Doogan questions to Walker, Unofficial Transcript at CLO573.

162 #A35, Brief of Evidence of Kawharu at [268], confirmed in oral evidence, Kawharu, Unofficial Transcript at CLO639.

ongoing commitment to ensuring that the TPP does not prevent the it from meeting its obligations to Māori.

220. The evidence of Dr Walker and of Mr Harvey is that MFAT, and the lead policy agencies that formed the TPP negotiation team, were informed by the findings of Wai 262.[163] Whilst 'backwards looking' engagement is not directly within the scope of the current inquiry, the evidence on record demonstrates that engagement undertaken in relation to the TPP exceeded that undertaken for any previous FTA.[164] Both Dr Walker and Mr Harvey acknowledged that ongoing work is required to further develop better practice in this area and that the Ministry is committed to doing so.[165]

221. It is not the function of the TPP or any trade agreement to address the full range of interests and concerns of indigenous people, or to determine what the Crown's obligations to Māori are.[166] Determination of this very important question is quite properly a function of New Zealand's domestic legal, constitutional and political system. The findings of WAI 262 are a seminal contribution to that ongoing dialogue.

222. The substantive outcomes of the TPP demonstrate that the Crown was informed as to matters addressed in the Wai 262 report and, to the extent practicable in the context of a multiparty international trade negotiation, has both preserved the necessary domestic policy space for the ongoing domestic constitutional and policy dialogue (through the Treaty of Waitangi exception and other structural measures), and achieved policy-specific outcomes in relation to issues that intersect with Wai 262 including:

222.1 The UPOV Annex ensures that New Zealand can define its own compliance with UPOV 91 in a way that provides for Crown-Māori obligations in respect of indigenous species, and that where there is direct conflict between those domestic policy measures and UPOV 91, the domestic measures will prevail;

163 #A2, First Affidavit of Harvey at [29]; Walker, Unofficial Transcript at CLO516-517, CLO575-576.

164 #A2, First Affidavit of Harvey.

165 Walker, Unofficial Transcript at CLO581; Harvey, Unofficial Transcript at CLO781.

166 Walker, Unofficial Transcript at CLO436; #A36, Third Affidavit of Walker at [43] and [44].

222.2 Health related intellectual property measures remain largely consistent with current New Zealand practice other than in two matters which are discussed above.

222.3 Other intellectual property measures proposed are either being consulted upon either prior to introduction, or opportunities for submissions will be provided as part of Parliament's select committee consideration prior to domestic implementation and ratification;

222.4 Articles 18.16 (Intellectual Property Chapter) and 29.8 (General Provisions and Exceptions Chapter) acknowledge the relevance of traditional knowledge to intellectual property policies and decision making and, as such, are of considerable symbolic value. In international law, concepts develop and evolve over time – it is a significant achievement to have these interests being recognised.

223. Broader Crown responses to Wai 262 are not within the scope of the inquiry however it is not correct to conclude that there has been no response. Whilst a formal statement of response has not been made, Crown policy and practice decisions have intersected with and been informed by the Wai 262 report since its release including developments in intellectual property legislation and regulation, innovative Treaty settlement outcomes, and innovative developments in relation to the environment and to te reo Māori.

CONCLUSIONS

224. Nothing in the TPP prevents the Crown from meeting its obligations to Māori. This statement refers to the TPP as a whole, not solely to the Treaty of Waitangi Exception.

225. The claimants' evidence falls well short of establishing a material impairment of the Crown's ability to meet those obligations.

226. The Tribunal should be cautious about reaching any conclusion to the contrary given the subject matter, the urgency, the limited evidential material and the sceptical and unreliable nature of some of the evidence relied upon. That caution should increase given the hypothetical nature of

claims made in circumstances which are unknowable given that claims under the TPP (and its impact generally) are likely to be some if not many years away.

227. Associate Professor Kawharu and Dr Ridings have been able to reach a consensus that there is no need to take any steps in terms of the text of the Treaty of Waitangi exception prior to ratification.

228. The consultation process looking forward is on the right track and appropriately measured in terms of the intensity of interest as outlined in Wai 262.

Prejudice

229. The claimants have failed to demonstrate that they are suffering, or are likely to suffer significant and irreversible prejudice as a result of current or pending Crown action. The TPP will not have significant adverse impact on Māori interests. The concerns of adverse impacts put forward by claimants are overstated and unsubstantiated and have not demonstrated that prejudice will result.

230. A balanced view of the TPP is required. Perpetuating an unbalanced perspective results in inaccurate analysis of the benefits and risks of the TPP and has real consequences in unnecessarily undermining Crown-Māori relationships.

231. The Tribunal is urged to consider that it has heard only from a selection of Māori, in a very constrained fashion. The views of those not before the Tribunal should not be assumed or presumed notwithstanding media coverage. It is appropriate in those circumstances for the Tribunal to be cautious about echoing strong views with such a limited opportunity to be informed on the issues.

232. A practical approach centred on the probable must be preferred over an overly academic approach centred on consequences that are either not probable or are remote possibilities. Treaty principles are not unqualified, they are informed by reasonableness and practicality. The real issue is what degree of risk arises. The Crown says the degree of risk has been closely

assessed by the New Zealand government and it has determined that the benefits outweigh those risks.

233. A proper analysis of risk requires the Treaty of Waitangi exception to be viewed in the context of the whole TPP. In relation to ISDS, claims can only be made in relation to investment, where jurisdiction exists, where a breach of the investment obligations has been established by the claimant investor, where a general or specific exception does not apply, and will fail where a defence exists. Various procedural mechanisms have been developed to better balance investor state interests.

7 April 2016

M Heron QC / R Ennor / G Gillies
Counsel for the Crown

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

APPENDIX A: TOPICS OF PARTICULAR INTEREST TO CLAIMANTS

Tobacco

1. Tobacco control measures are covered in Article 29.5 of the Exceptions and General Provisions Chapter, under a provision that allows the Government to elect to rule out ISDS challenges over tobacco control measures. The Government has publicly announced that it intends to exercise its rights under this provision.[167]

2. The Crown notes that the conduct of negotiations is subject to the obligations and agreements amongst Parties as to confidence. As such, the Crown cannot directly confirm, deny or comment on negotiating measures allegedly proposed by other Parties – this includes the alleged "Malaysian tobacco control clause" discussed by Professor Kelsey.[168] What the Crown can state is, were such a clause proposed the fact that it was not included in the final text demonstrates that its terms were not acceptable to all Parties. Conjecture as to hypothetical outcomes, and hearsay as to TPP Parties' positions during the negotiations is of limited value to the Tribunal. As noted in its Wai 262 report, the relevant standards are, whilst being informed by Treaty principles, what is reasonable and achievable within the context of international trade negotiations.

3. Counsel for Wai 2522 compares the WTO agreements to TPP without properly contextualising the same. TPP is a very different agreement to the WTO agreements which are the subject of the WTO dispute settlement proceedings against Australia's tobacco plain packaging legislation. In particular, TPP does not include the TRIPS provisions that are central to the WTO dispute. The claimants have also neglected to refer the Tribunal to Article 8.4 of the TPP Technical Barriers to Trade Chapter which provides that although certain provisions of the WTO's Technical Barriers to Trade Agreement (TBT Agreement) are incorporated into the TPP, TPP Parties shall not have recourse to dispute settlement for a dispute that exclusively alleges a violation of the TBT Agreement.[169] In light of the

167 #3.1.101(a), Trans-Pacific Partnership National Interest Analysis at 16.

168 Kelsey, Unofficial Transcript at CLO076, CLO166-167, CLO170-171.

169 An investor can only bring an ISDS claim in respect of a breach of the Investment Chapter and so cannot bring a claim alleging a breach of the Technical Barriers to Trade Chapter.

absence of a number of key TRIPS provisions in TPP and in light of Article 8.4 of the TPP, the risk of a State-to-State dispute in respect of tobacco plain packaging is less than under the WTO agreements. The Crown considers the WTO is the more likely forum for these matters to be tested in.

4. The Crown considers there to be only a minimal risk of a State to State dispute being brought with respect to tobacco control measures. None of the TPP Parties are claimants in the WTO proceedings against Australia or have expressed concerns about New Zealand's tobacco control policies at WTO committee meetings. Some of the TPP Parties, including New Zealand, have supported Australia's position.

5. The transparency provisions in TPP require nothing substantive beyond New Zealand's current policies and practice with respect to consultation on regulations. The provisions do not empower tobacco companies, or any other companies. Likewise, the obligations in the regulatory coherence chapter are a reflection of New Zealand's existing regulatory practices and do not empower the tobacco industry as the claimants suggest.[170]

6. On 15 February 2016, the Prime Minister made an announcement about the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill at the post-Cabinet press conference.[171] His reported comments state that he confirmed a bill, on pause partway through the parliamentary process, would be resumed and he expected it to become law "sooner as opposed to later" and possibly by the end of this year.

7. Counsel for Wai 2522 discusses New Zealand's non-conforming measures and makes a bald assertion that:

> Nor does [the Non-Conforming Measure] protect the right to adopt measures that breach other rules in the chapters on investment and cross-border services, technical barriers to trade, intellectual property rights, or sanitary and phytosanitary measures.

without explaining how New Zealand's tobacco control policies breach any of these measures. The submission also neglects to analyse all of the in-

170 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [211].

171 Stacey Kirk "Tobacco plain packaging likely to be law by end of year – John Key" (15 February 2016) Stuff <www.stuff.co.nz>.

built policy flexibilities and exceptions that would permit the TPP Parties to regulate to protect public health. Nor does the submission acknowledge that the GATT and GATS general exceptions are not at issue in the WTO proceedings against Australia. The Crown's view (premised in both international trade law and Treaty jurisprudence) is that general exceptions, in combination with subject-specific terms and with various structural and procedural measures are an effective mechanism.

Pharmaceuticals including Biologics

1. Dr Paparangi Reid stated in evidence that she agreed with the conclusion of the Ministry of Health paper "Biologics in Trans-Pacific Partnership Negotiations (TPP) – Full Analysis" that:[172]

> It is important for NZ not to prematurely lock in, through TPP, an extended data protection period, which may have significant material effect, when there is still significant doubt as to what the optimal level of additional protection should be provided for biologics.

2. As discussed in that paper, the Crown is aware of, and does not dispute the fact that if the TPP had resulted in significant delays in the market entry of generic and biosimilar pharmaceuticals, the distribution of the costs and/or adverse health impacts associated with these delays would have a disproportionate effect on Māori however the outcome achieved is what is relevant.

3. Dr Reid queried the credibility of the New Zealand government's assessment of these matters partly because New Zealand has not undertaken a Health Impacts Analysis and yet agreed with the conclusions and analysis of the Ministry of Health's biologics analysis contained in that paper (which is also reflected in the NIA). Under cross examination Dr Reid confirmed that Health Impact Analyses of the type she was advocating for are not currently orthodox practice.[173]

4. The Tribunal will be aware that the negotiated outcome in TPP achieves the position expressed in the conclusion to the Ministry of Health's paper (that was agreed to by Dr Reid). The outcome for New Zealand is that 'effective market protection' will be provided through a combination of five years of data protection from the date of marketing approval and other measures and market circumstances that collectively will deliver a comparable outcome in the market to the other option. Dr Walker's evidence is that this outcome allows the current Medsafe regime to continue unchanged and that a 'comparable outcome' does not mean 'equal'.[174]

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172 #A14(b), Biologics in Trans-Pacific Partnership negotiations (TPP) – Full analysis at 27.

173 Reid, Unofficial Transcript at CLO059 - 062.

174 Walker, Unofficial Transcript at CLO542.

5. The combination of provisions on patent term extension, patents for new uses, and patent linkage in the TPP intellectual property chapter will rarely, if ever, have any impact on the entry of generic products on to the New Zealand market as:

5.1 Few, if any, patent term extensions will be granted, due to the efficiency of New Zealand's processes. The estimated costs of any extension for pharmaceuticals is approximately $1 million per year on average;

5.2 New Zealand is not obliged to give data protection for new uses. New Zealand can instead provide five years data protection to new small molecule (but not necessarily biologic) pharmaceutical products that contain both a new and a previously approved active ingredient, which New Zealand already does;

5.3 New Zealand can comply with the linkage provisions based on New Zealand's current law and judicial practice and Medsafe's practice of publishing the details of generic applications.

6. The outcome on data protection for all pharmaceuticals, including biologics, can be met within New Zealand's current law and practice, and in light of market circumstances. Claims that "the major impact on affordability will be the new generation biologics medicines ..."[175] are thus unfounded. Whilst it is true that the policy flexibility to drop below five years of data protection will be lost under TPP, New Zealand is already obliged to provide a period of data protection for "pharmaceutical ... products which utilize new chemical entities" under Article 39.3 of the WTO TRIPS Agreement and arguably that obligation includes some biologic medicines. New Zealand has provided a five year period of data protection to all medicines since 1995 under s 23B of the Medicines Act 1981. The loss of flexibility to provide less than five years' data protection is of minimal realistic effect.

7. Despite speculation to the contrary by claimants, there is no evidence that the Crown's interpretation "is likely to be challenged by the US" in a State

175 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [219].

to State dispute.[176] Speculative submissions are also made alleging "There are also some risks of an investment dispute, but the rules governing such disputes in relation to intellectual property and licensing are complex."[177] The Crown queries what risks this abstract statement relates to. If a TPP investor attempted to challenge New Zealand's implementation of Article 18.51, an ISDS tribunal would not have jurisdiction to consider whether New Zealand violated that provision.

8. To claim that "other protections for public health in [the Intellectual Property] chapter are weak" is an overstatement and fails to provide a balanced interpretation of the Intellectual Property Chapter as a whole. For example, in Article 18.6 of the IP Chapter, TPP Parties affirm their commitment to the *Declaration on the TRIPS Agreement and Public Health* that was adopted by the WTO in 2001, and record certain understandings about the IP Chapter, including:[178]

> The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all. ...

9. With respect, the fears of claimants in regard to biologics appear to be related either to:

   9.1 Feared possibilities that did not eventuate in the negotiated outcomes of TPP relating to both procedural requirements and to the duration of data protection;

   9.2 Feared possibilities of extensions to data protection somehow resulting from further negotiations post-signature;

176 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [222].

177 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [223].

178 TPP, art 18.6(a).

9.3 Factors that relate to the global development of biologics that are well beyond the ability of the New Zealand Government to control or even exercise significant influence over, and are nothing to do with the TPP.

10. Counsel for Wai 2522 acknowledged in closing submissions that the transparency and procedural requirements in TPP are not "as restrictive as initially envisaged" but go on to say that TPP "provides new opportunities for leverage by the pharmaceutical industry to contest PHARMAC's decisions and bring pressure to fund expensive medicines." Tribunal Member David Cochrane queried Dr Reid on the extent of any such leverage referring to the increases in operational costs against the entire budget:[179]

> COCHRANE: In Mr Key's statement which I saw (it was public) and I notice it's in Ms Kelsey's evidence is that the estimated costs are about $4.5m in the first year and $2m every year thereafter for PHARMAC. Now in a budget of $800m spending that's about 0.2% which is kind of around the margin of error isn't it, I mean how hard it is going to be for the Crown to do that. The Crown can fund a 75% blowout on an office block, surely it's not going to find it very hard to find a 0.2% increase. You know unless people get people get sick or whatever, 0.2% its tiny, you know its minute.
>
> REID: I think the point is that the costs that are being referred to there are the increased costs of processes of change that the Pharmac will have to do to meet the new requirements. They not increase in costs of the downstream effects that might happen because of less availability of new drugs because of the increased time of biosimilars coming to market etc.

11. It is correct to query the realism of concerns based around increased costs supposedly arising from the TPP. The 'downstream effects that might happen' Dr Reid describes are speculative. PHARMAC will be required to formally provide timelines for decision making a review process. However:

11.1 the timelines can be extended;

11.2 the review can be internal (i.e., PHARMAC itself, may undertake the review) and the Government intends to take this approach;

11.3 there is broad freedom to design and implement the review process;

179 Unofficial Transcript at CLO058.

11.4 when reviewing an application, the reviewer does not need to consider assessments related to other proposals for funding.

12. The exceptions regime in the Agreement will allow the government to regulate for legitimate public policy purposes, including public health measures.

13. The Crown's assessment of the TPP outcomes in relation to pharmaceuticals is that they:

13.1 are largely manageable within the current New Zealand policy and practice settings;

13.2 remove policy flexibility to reduce the five year data protection period, yet this period has remained constant in New Zealand legislation for more than 20 years;

13.3 result in increases in costs that fall within the margin of error (and that come out of operational not funding budget); and

13.4 are not able to be challenged by way of ISDS and there is no evidence of a risk of state to state proceedings being brought.

14. Notwithstanding the above, the claimants conclude:

> There is significant potential for micro and macro chilling effects to inhibit the government from taking measures to expedite access to biologics in the future, from which Māori would disproportionately benefit.[180]

15. The Crown submits the TPP will not have any significant impact on the accessibility or affordability of pharmaceuticals or related health outcomes for Māori.

180 A Sykes/P McDougall-Moore, Closing Submissions on behalf of Wai 2522 (filed 31 March 2016) at [229]

ISDS

1. An ISDS tribunal may make an award of monetary damages and interest and restitution of property or damages in lieu thereof.[181] It cannot award punitive damages.[182] However, it can award damages to a respondent in respect of any counterclaim[183] and give costs to the respondent in the event of a frivolous claim.[184]

2. Whilst the investor is limited to a damages claim, they must also forego rights to take domestic judicial proceedings (save for measures to preserve their position). This is an important consideration as those seeking to take advantage of ISDS provisions forsake the ability to challenge the "measure" in conventional administrative challenges (domestic parties of course do not need to give away such rights). If the risk of litigation for damages is chilling, it must be compared to the risk of domestic orders which compel the government to reconsider the "measure" or replace or revoke it (such remedies which are the effect of successful judicial review proceedings).

3. The award of a tribunal established under International Convention for the Settlement of Investment Disputes (ICSID) Arbitration Rules can be annulled in accordance with Article 52 of the ICSID Convention. The Award of a tribunal established under the ICSID Additional Facility Rules or the United Nations Commission on International Trade Law (UNCITRAL) Rules, can be reviewed or annulled by the domestic courts of the place of arbitration.

4. The TPP is an international agreement – a treaty – and hence its interpretation is governed by rules of international law relating to the interpretation of treaties. The source of those rules is Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[185] Although a number of states are not party to the VCLT, the provisions on treaty interpretation in Articles 31 to 33 are generally accepted as representing customary international law and binding on all states as such.

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181 TPP, art 9.29.1.

182 TPP, art 9.29.6.

183 TPP, art 9.19.2.

184 TPP, art 9.29.4.

185 115 United Nations Treaty Series 331 (signed 23 May 1969, entered into force 27 January 1980).

5. The basic rule of treaty interpretation set out in paragraph 1 of VCLT Article 31 is:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

6. The remaining provisions of Article 31 elaborate on the meaning "context" and other factors that can be taken into account in the interpretative process.

7. In the application of the principles of treaty interpretation, tribunals also take account of the way in which other international courts and tribunals apply these principles. There is no doctrine of precedent in international law, that is to say the decisions of international courts and tribunals are not binding on other courts and tribunals. Nonetheless, as a matter of practice ISDS tribunals tend to look at what other courts and tribunals have said as guidance and perhaps out of a sense that consistency in international decision-making is a good thing. This applies just as much to dispute settlement in investment matters as it does in other areas.

8. There is, however, an important qualification in the case of investment disputes. Such disputes generally involve the interpretation of a particular investment treaty whose terms may differ from the terms in other treaties. Thus, caution has to be exercised in assuming that interpretation of provisions in one investment agreement will automatically be relevant to the interpretation of clauses in another agreement.

9. This notwithstanding, the practice of ISDS tribunals is to look at the other decisions of ISDS tribunals and follow their reasoning where it is on point, distinguish it where it is not, or disagree with the reasoning where it thinks that it is wrong. As a result, there is in fact a considerable body of consistent reasoning in the interpretation of particular provisions although there are areas where differences have emerged and there is controversy over differing interpretations. Moreover, bodies of jurisprudence have developed under particular regional agreements, such as North Atlantic Free Trade Agreement (NAFTA), where tribunals tend to look first at the decisions of other NAFTA tribunals sometimes independently of looking at decisions of ISDS tribunals under other bilateral, investment agreements. The Crown

contests Professor Kelsey's thesis that arbitration in the field of investment has resulted extensive inconsistencies. Particularly in respect of expropriation and MST, consistency is more the norm.

10. Thus, there is no reason to assume that ISDS tribunals established under the TPP will not look at the decisions of other TPP ISDS tribunals or that there will be no consistency with ISDS tribunal interpretation under other investment agreements. It can be expected that while there may be differences in the initial stages what is likely to emerge over time is a relatively consistent body of case law involving interpretations of the provisions of the TPP.

11. However, the Treaty of Waitangi exception is not a provision found in trade and investment agreements (apart from New Zealand's FTAs since 2001 and the CER Investment Protocol with Australia) and has not yet been the subject of interpretation in dispute settlement. Thus, while analogies can be drawn from provisions of other agreements utilising similar language, any interpretation of the provision will likely be one of first impression.

12. This notwithstanding, the interpretative approach in considering the precise meaning of the Treaty of Waitangi clause is clear. VCLT Article 31 sets out the trilogy of text (ordinary meaning), context and object and purpose, all of which are to be considered as a unity and not sequentially. Interpretation does not start with the ordinary meaning and then stop if that seems clear. That ordinary meaning has to be considered in context and in light of the object and purpose of the treaty.

13. In paragraph 47 of her Affidavit of 19 January 2016, after referring to how the chapeau to GATT Article XX has been interpreted, Professor Kelsey states in respect of the Treaty of Waitangi clause, "it is quite unpredictable how a state-to-state tribunal might interpret the untested provision outside the WTO." The Crown does not consider this to be the case. A number of points can be made.

    13.1 First, state-to-state dispute settlement tribunals are so uncommon in the area of investment that the interpretation of any provision of an investment agreement by a state-to-state tribunal will be largely one of first impression. But this is no different from any

other provision of the TPP and has no greater significance in the context of the Treaty of Waitangi clause than it has elsewhere in the TPP.

13.2 Second, where matters are ones of first impression and there are no previous interpretations of the provisions in question through case law, courts and tribunals reason by analogy, looking to see how related provisions have been interpreted.

13.3 Third, ISDS tribunals have shown a willingness to look to WTO interpretations of provisions that are the same or similar to provisions found in the WTO agreements. Moreover, since the TTP is a trade and investment agreement, recourse to similar provisions of the WTO agreements will be even more apposite.

13.4 Fourth, on the basis of the few instances where state-to-state dispute settlement tribunals have been established, the composition of those bodies has been similar to those of ISDS state tribunals. Thus, there is no reason to believe that somehow a different approach to interpretation will be taken simply because it is a state-to-state rather than an ISDS tribunal.

13.5 Fifth, in light of the above, it is difficult to see what particular unpredictability would exist in the case of the interpretation of the chapeau to the Treaty of Waitangi clause that is different or more enhanced than that of the interpretation of any other provision of the TPP.

14. Professor Kelsey makes the further statement that "differences can be expected between state-state and ISDS tribunals, making interpretation unpredictable."[186] There are a few examples of state-to state disputes under investment agreements but Professor Kelsey does not refer to them to substantiate the point. It is not clear, therefore, what basis there is for the proposition that differences between state-to-state and ISDS tribunals will make interpretation unpredictable.

186 #A15, Sixth Affidavit of Kelsey at [55].

15. If Professor Kelsey is referring to differences between state-to-state dispute settlement bodies in the field of trade (WTO panels and the WTO Appellate Body) and ISDS tribunals, then it is true that individuals who sit on WTO panels largely do not overlap with tribunal members in ISDS cases, although there is more overlap with Appellate Body members. There is academic debate about whether WTO provisions are contextually different from some ISDS provisions and thus might justify alternate approaches, but it is not yet possible to draw any conclusion on the basis of the practice of tribunals. Associate Professor Kawharu takes a more balanced approach that recognises that ISDS (as with any judicial body) is evolving and that many, though not all, of the concerns expressed about its operations have been addressed in the TPP.[187]

187 Kawharu, Unofficial Transcript at CLO678: "I guess I'm trying to think of what are the many criticisms mostly commonly levelled against these provisions? They would be lack of transparency, I think transparency is dealt with; inability for interested groups to participate, I think that is dealt with; inability to appeal, that is not dealt with." and further "The independence issue, so that relates to the independence of arbitral members, it is only partially dealt with, [...] I think a number of concerns have been dealt with, some of them have become standard practice now. Other concerns haven't been dealt with and I guess you'd say this to a reform agenda."

APPENDIX B: RELEVANCE OF THE *BILCON* CASE

1. The *Bilcon* case is discussed in the affidavits of Professor Kelsey and has been heavily relied on in claimant submissions. The Crown view is that the claimants have misrepresented the finding of that Tribunal and that, *Bilcon* has little to offer on the question of the interpretation of the Treaty of Waitangi clause, and in fact it is largely used by Professor Kelsey to demonstrate opposition to investor state dispute settlement more generally.

How international MST addressed in Bilcon

2. It is argued by Professor Kelsey that the majority in *Bilcon* took an expansive view of the content the MST obligation because it quoted from the statement in *Merrill and Ring*, which set out a "reasonableness" standard. But this ignores the fact that the *Merrill and Ring* statement was referred to by the *Bilcon* majority in the context of pointing out a move away from the position taken in *Glamis*. In fact, the majority in *Bilcon* adopted and purported to apply the test set out in *Waste Management*, which is not the same as the *Merrill and Ring* test.[188]

3. Professor Kelsey also focuses on the use by the majority in *Bilcon* of the concept of "legitimate expectations" to bolster the argument of a lack of fair and equitable treatment, but as Professor McRae pointed out in his dissent, the only legitimate expectation that the majority identified was an expectation that Canadian law would be complied with. That is not an expansion in the notion of legitimate expectations – it just renders it meaningless.

4. The Crown agrees that controversy remains in the field of investment law over the scope of the notion of "legitimate expectations" and Article 9.6.4 seeks to limit its application. But, the controversy relates to what constitutes a substantive breach of the MST, the Crown fails to see how it has any implications for the application of the Treaty of Waitangi clause. A breach of MST, whether based on legitimate expectations or not, can be the basis for the invocation of the Treaty of Waitangi clause. Whether the clause

188 #A15(a), Exhibit AB, *Bilcon* (Award) at 427 and 443.

applies depends on its own terms, not on whether the breach is based on a denial of legitimate expectations.

Bilcon considerations of comparators in National Treatment

5. In the context of the National Treatment principle the majority in *Bilcon* had a broad conception of the appropriate comparator. This potentially expands the range of potential comparators in the application of the National Treatment obligation and is consistent with Professor Kelsey's general view of the unreliability of ISDS arbitrators. But again, particularly given how the issue of favourable treatment under the Treaty of Waitangi clause will be dealt with (as set out above) the *Bilcon* approach to a comparator has little relevance to the application of the clause.

Chilling effect as addressed in Bilcon

6. Professor Kelsey invokes the reference in Professor McRae's dissent to the chilling effect of the majority opinion, but she treats it with a broad brush and does not look closely at what was being said.

7. The majority in *Bilcon* took the view that the Joint Review Panel's reliance on "core community values" was not in accordance with Canadian domestic law. Professor McRae took the view that arguably it was in conformity with Canadian law but that even if it did not comply with Canadian law that was not a sufficiently serious breach to contravene NAFTA Article 1105 (MST). The potential consequence, in Professor McRae's view, was that environmental review panels who previously could have their recommendations rejected or overturned by federal court review would now have to operate under the possibility that their error could lead to a damages claim against the Canadian government and that could have a chilling effect on their review process.

8. Professor McRae also took the view that if a focus on the human environment – the socio-economic consequences of a project – by an environmental review panel and giving it priority over the scientific and technical feasibility of a project, was to be regarded as a NAFTA breach, this also could have a chilling effect on future environmental review where panel members might be less inclined to give weight to such factors because it could result in claims for damages against the government.

9. This was a statement about the impact of the decision on future environmental review panels if the NAFTA standard is simply that of a violation of domestic law. If the standard is wrong (as Professor McRae said in his dissent) then there is no such chilling effect. What Professor Kelsey is seeking to do is to turn Professor McRae's limited and quite focused statement into broad support for the proposition of those who oppose ISDS, that ISDS itself causes regulatory chill. This is evident in her statement, which she attributes to Professor McRae that, "the chilling effect describes a systemic impact of potential of ISDS claims, not a narrow risk assessment of the likelihood and potential success of a claim".[189] To the extent that the Crown understands what is actually being said in that statement, the Crown certainly cannot find it reflected in page 18 of Professor McRae's dissent, to which Professor Kelsey refers. A more careful reading of that dissent shows that this is not what was being said.

189 #A17, Seventh Affidavit of Kelsey at [59].