BEFORE THE WAITANGI TRIBUNAL

WAI 2522
WAI 2523
WAI 2530
WAI 2531
WAI 2532
WAI 2533

IN THE MATTER OF **the Treaty of Waitangi Act 1975**

AND

IN THE MATTER OF **urgent inquiry into the Crown's actions concerning the Trans-Pacific Partnership Agreement**

Submissions by way of Reply

Dated 13th April 2016

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MAY IT PLEASE THE TRIBUNAL

KUPU WHAKATAKI

1. Tuatahi ake ko te mihi ki te waka whakarei ā te iwi Māori i raro i te whakamarumaru o te Taraipiunara o Te Tiriti o Waitangi hai whakamana i ngā mataapono ā Te Tiriti o Waitangi.

2. E ai ki ngā tikanga Māori ahakoa nō hea, ahakoa kō wai, e kore rawa i tukuna e te Tiriti o Waitangi ki te karauna te mana motuhake me te tino rangatiratanga o ngā hapū o te motu.

3. Nō muri mai i te hainatanga o Te Tiriti o Waitangi i pōhēhē ngā iwi Māori kā pupuri tonu rātou ki tō rātou ake mana motuhake i raro i tō rātou ake ture, kawa me ngā tikanga o te Ao Māori me te noho i rūnga anō i ō rātou ake whenua.

4. E kore rawa te mana motuhake Māori e tāea te rāwekeweke, te whakakorehia e tētahi atu, he mana whakapapa ka heke iho mai i ngā rangi ki te whenua mai ki te ira tangata. He tātai whakapapa he taura hono tangata taura here whenua.

5. Koinei te ngako o tēnei kerēme. He kerēme whakamana i ngā mataapono o Te Tiriti o Waitangi, he kerēme whakamana i te mana motuhake o ngā iwi Māori katoa kei te noho tangata whenua ki Aotearoa.

INTRODUCTION

6. In its closing submissions the Crown has maintained, as it has throughout the hearing, a state of denial that the claimants have any legitimate concerns about the potential prejudice to them arising from the TPPA; that the Crown failed to act as a responsible Treaty partner during the negotiations; and that the Crown has inadequately protected their interests in the final Agreement.

7. These submissions are by way of reply, for the Claimants in Wai 2522, to the Crown's closings and will focus, as the main body of our submission did, on Issue One and the Case Study examples which have formed a significant part of the inquiry process. If we look to the introductory comments of Associate Professor

Kawharu,[1] and we think in terms of a puzzle, these are the key pieces that need to fit together to ensure the effectiveness of the active protection requirement demanded of the Crown in Treaty of Waitangi terms if the TPP is to stand the test of time and deliver the tino rangatiratanga guarantees Maori demand. What has emerged from the evidence, and submission process, is that not all the pieces of the puzzle are there, and those that are have been crafted on very shaky foundations, posing a significant risk to providing the protections that Maori require. These flawed foundations have been unilaterally developed by the Crown without engagement or consent from Maori in contravention of the process recommendations from the seminal Wai 262 Report of the Waitangi Tribunal.

8. It is simply not true that engagement taken in relation to the TPPA exceeded any undertaken for any previous FTA. Professor Kelsey's description of engagement with Maori in the late 1990s and early 2000s,[2] and the Waitangi Tribunal's account of the (still inadequate) engagement involving Te Puni Kokiri and other agencies, shows the Crown was passive and minimalist in engaging with Maori on the TPPA. Repeatedly claiming otherwise does not make the claim true.

9. The Crown is correct that this is not the normal kind of claim the Tribunal is asked to address. It is necessarily speculative because it is considering the future impact of an international agreement whose scale and scope is unprecedented, whose rules are uncertain, and whose specific impacts for Maori will only become clear once it is in force. That does not make the TPPA any less of a threat to the rights and interests of the claimants and other Maori.

10. The Crown wants it both ways, saying the TPPA is a game changer *and* that it is really no different from previous agreements. The table prepared by Associate Professor Kawharu[3] clearly shows the obligations on New Zealand in the TPPA are more extensive and have fewer effective protections than in previous agreements, especially for investment. Professor Kelsey pointed out that the right

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1 **Wai 2522 #3.3.12** Introductory Remarks Associate Professor Amokura Kawharu
2 **Wai 2522 #A1** 1st Affidavit of Professor Elizabeth Jane Kelsey dated 19 June 2015 para[115]
3 **Wai 2522 #4.1.2** Transcript Associate Professor Amokura Kawharu, Opening Statement, pp 605-606

of the litigious US government and US investors to bring disputes against New Zealand qualitatively increases that risk.[4]

11. The Tribunal needs to assess the degree of risk and severity of loss or harm to the claimants in the context of an Agreement that will constrain the autonomy of the Crown to take action into the indefinite future. Those actions are not limited to known obligations, such as recommendations of the Tribunal on which the Crown has yet to act and claims waiting to be heard, or unmet obligations under the UN DRIP. Te Tiriti is a living instrument. The TPPA will constrain the autonomy of the Crown to meet obligations to Maori that arise in the future. Matters such as climate change, water scarcity and resource depletion are already on the horizon.

12. Having refused to release any information and failed to engage with Maori before the TPPA was signed, the Crown insists that no changes can be made to the concluded Agreement. All it is offering the claimants and other Maori, after the fact, is a series of empty gestures: information sessions described as hui-a-iwi, requests at short notice for input on intellectual property laws through inappropriate Pakeha mechanisms, and opportunities to participate in a select committee process that the Crown acknowledges cannot make any difference to the Agreement it has already concluded.

13. The claimants have no other recourse but to ask the Waitangi Tribunal to protect their rights and interests, and to recommend remedial action before the Agreement is ratified.

THE CROWN APPROACH

14. The Crown's methodology in identifying priorities starts from the position of privileging agreements like the TPPA over its obligations under Te Tiriti.[5]

15. Despite clear evidence that the Treaty Exception is inadequate, including initial agreement from the Crown's own expert, the Government seems intent on

[4] **Wai 2522 # A17** 7th Affidavit of Professor Elizabeth Jane Kelsey dated 3 February 2016, para [62]
[5] **Wai 2522 #3.3.27** Crown Closing Submissions paras[60] – [64]

continuing to roll over the Exception into new agreements, describing it as a 'bottom line'.[6]

16. The claimants are deeply disturbed by the Crown's comments that 'reasonable and practicable' protection depends on 'international circumstances which may constrain what the Crown can achieve'.[7] Similarly, the Crown admits the interests of Maori are not central to the TPPA, and are distinguished from international agreements or legislation that are specifically directed to indigenous peoples.[8]

17. It is clear that the Crown treats entering into international economic agreements as a priority over honouring its commitments under te Tiriti. The Crown considers it only needs to meet its obligations, and Maori rights and interests only need to be protected, to the extent that this does not interfere with it concluding such agreements and in a manner that other states are prepared to agree to.[9] In other words, te Tiriti o Waitangi is subordinated to international commercial agreements and other states have the power to determine the extent to which Maori interests can be protected.

18. The TPPA is an agreement between sovereign states,[10] but those states have conferred privileged rights and protections on foreign investors. The Crown defends that policy decision, while it argues that Maori cannot expect the other parties to improve protections available to Maori.

19. The Crown wants to continue to abdicate its responsibilities under Te Tiriti by rolling over the inadequate Exception because it is concerned other states might object to stronger protections for Maori. The claimants say the Crown must confront the problems with the TPPA before ratification and set in train a process of engagement to ensure that future protection puts the rights and interests of Maori ahead of those of foreign states and foreign investors. That process also needs to address the existing agreements that do not have any Treaty protection,

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6 **Wai 2522 #3.3.27** Crown Closing Submissions para [34]
7 **Wai 2522 #3.3.27** Crown Closing Submissions paras [44] and [45]
8 **Wai 2522 #3.3.27** Crown Closing Submissions paras [57] to [59]
9 **Wai 2522 #3.3.27** Crown Closing Submissions para [44]
10 **Wai 2522 #3.3.27** Crown Closing Submissions para [91]

such as the World Trade Organization and the Closer Economic Relations agreement with Australia.

20. That bias has also informed the Crown's flawed approach to consultation. The Crown claims it had the right unilaterally to determine whether Maori had interests that might be adversely affected by the TPPA, and on that basis to decide what degree of engagement was required.[11] The Ministry of Foreign Affairs and Trade (MFAT) was in charge of that process. Throughout this claim, and in all the evidence it has presented, the Ministry has demonstrated a partisan and uncritical approach to the Agreement which it was in charge of negotiating. It is hardly an independent agency in which the claimants can have confidence that their interests would be recognised, let alone protected.

21. The Crown either misunderstands or misrepresents the nature of the claims.[12] The claimants are fundamentally concerned about the risk the TPPA poses to the regulatory autonomy of the Crown, not just whether the Crown will exercise that regulatory autonomy in a Treaty compliant manner, as the Crown suggests. Likewise, the question is not whether the TPPA causes certain conduct by the Crown,[13] but whether the claimants' rights and interests will be prejudiced by the Agreement.

22. The Crown is quite correct that certain matters are irrelevant to the Waitangi Tribunal's inquiry,[14] in particular the economic policies that inform the decision to negotiate the TPPA and similar agreements, and the costs and benefits to New Zealand as a whole. It is the Crown that has sought to emphasise those issues and does so again from paragraphs 19 to 24 of its closing submissions.

23. It is wrong in suggesting that other matters are not pertinent to the inquiry. The constitutional arrangements through which the Crown speaks for New Zealand on the international stage[15] cannot be disaggregated from the responsibilities of the

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11 **Wai 2522 #3.3.27** Crown Closing Submissions para [6.2]
12 **Wai 2522 #3.3.27** Crown Closing Submissions para [6.1]
13 **Wai 2522 #3.3.27** Crown Closing Submissions para [10.3]
14 **Wai 2522 #3.3.27** Crown Closing Submissions para [10]
15 **Wai 2522 #3.3.27** Crown Closing Submissions para [10.4]

Crown as a Treaty partner, or as the agent through which responsibilities under international instruments such as the UNDRIP are to be met.

CROWN ATTACK ON PROFESSOR KELSEY

24. Instead of addressing the substantive questions raised throughout the claim, the Crown has sought to dismiss those legitimate concerns as hypothetical, unsubstantiated or exaggerated and to attack the claimants' expert.

25. The claimants note that Professor Kelsey is an expert on both the Treaty of Waitangi and trade and investment agreements, unlike the other experts. She has been engaged in policy debates on the protection of Maori interests and the Crown's ability to meet its Treaty obligations under international trade and investment agreements for several decades, including a leadership role in the debates that led to the adoption of the Treaty Exception in the Singapore FTA and subsequent attempts to secure improved protection for Maori. That background and expertise enables her to provide alternative insights and assessments on the issues before the Tribunal that are especially pertinent to this inquiry. Far from undermining her credibility as an expert, it enhances it.

26. The Crown says that Professor Kelsey lacks expertise in negotiations but that she made claims to such expertise in her evidence.[16] As the Crown will be aware, negotiators and their governments are sensitive about public disclosure of who they discuss matters with and seek advice from, especially where there is a tight code of secrecy surrounding negotiations. It should be evident from references in paragraph 4 of Professor Kelsey's first affidavit[17] to having 'prepared technical reports and documents' and 'briefed officials and parliamentarians from a number of countries' and in paragraph 6[18] to being an 'informal observer' at nine negotiating rounds of officials and/or ministerial meetings for the TPPA, held after the formal stakeholder process had ended, that she has been engaged in such sensitive discussions relating to those and other negotiations. It would have been quite improper for her to have provided further details about that in her affidavit.

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16 **Wai 2522 #3.3.27** Crown Closing Submissions para [17.1]
17 **Wai 2522 #A1** 1st Affidavit Professor Elizabeth Jane Kelsey dated 19 June 2015 para[4]
18 Ibid

27. As Professor Kelsey explained in oral evidence,[19] it is her involvement in and understanding of the complex context of trade and investment agreements and reform debates, including discussions with negotiators, politicians, business lobbies, non-government organisations, professionals from various sectors, and other academics, as well as practicing lawyers and arbitrators, that informs her assessment of how technical legal provisions may be interpreted by investment tribunals in practice.

28. The claimants note that the Crown's expert Dr Ridings has been involved as counsel and panels on trade disputes, but not in the quite different context of investment arbitration.

29. Investor-state arbitration is not an arena where the key question is how a provision technically 'should' be interpreted in an abstract legal sense, even assuming that meaning could be agreed among academics or lawyers. As evidenced in numerous publications Professor Kelsey cited, the very nature of investment tribunals involves a case by case approach that can be inconsistent, even where the same agreement and facts are involved.[20] In seeking to discredit Professor Kelsey for contributing insights about how investment tribunals deliberate, the Crown itself has proposed a purely 'academic' position.

30. The series of technical legal questions the Crown posited to Associate Professor Kawharu (without the claimants' knowledge) took that same abstract approach. She agreed that her evidence had not addressed other relevant contextual issues such as the chilling effect, which she accepted was a 'hot topic' in academic literature.[21]

31. Professor Kelsey has provided consistent, independent expert evidence throughout this inquiry. That can be contrasted with the apparent lack of independence on the part of the Crown's expert. Dr Ridings initially presented consistent expert evidence on the interpretation of the Treaty Exception in her first affidavit, her meeting of the experts, and her second and third affidavits. The

[19] **Wai 2522 #4.1.2** Transcript pp 76 - 152
[20] **Wai 2522, #A35** Brief of Evidence of Associate Professor Amokura Kawharu dated 24 February 2016. Attached as Exhibit #1
[21] **Wai 2522 #4.1.2** Transcript X-exam Sykes of Associate Professor Amokura Kawharu pp 649 – 651

Crown then tried and failed on several occasions to have additional evidence from Professor Don McRae introduced, which implies a lack of confidence in the evidence provided by Dr Ridings. After the Tribunal refused to admit that evidence, Dr Ridings radically changed her expert opinion during the course of the Tribunal hearing. She admitted that her change of evidence followed consideration of external advice from Professor McRae, although she said she had thought about that advice and reached her own conclusion.[22] If any expert's opinion is to be discounted in this inquiry, it is that of Dr Ridings.

32. The Crown's preference to play the person, not the ball, suggests a lack of confidence in engaging the substantive debates. The Crown has systematically ignored the evidence Professor Kelsey has produced to support her arguments, including the crisis of legitimacy confronting investment arbitration (to use UNCTAD's term),[23] the diverse forms of chilling effect that are now being documented by researchers[24] (what Associate Professor Kawharu and Dr Ridings agreed was a 'hot issue' among academics[25]), and that countries are proposing radical new measures into trade and investment negotiations (such as the EU's proposal for an investment court), among others.

33. Associate Professor Kawharu described the role of academics and professional practitioners as providing complementary insights, noting 'the role of the academic is to look at the whole body of work and try and analyse that body of work, make predictions and so on'.[26] She also described Professor Kelsey as 'critical' of certain things.[27] That is a perfectly legitimate approach for an academic working on such issues. Under the Education Act 1989 universities are characterised as accepting the role of critic and conscience of society'[28]. This role does not detract in any way from the rigour or the integrity of the analysis an

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22 **Wai 2522 #4.1.2** Transcript Justice Doogan to Dr Ridings, p. 421 lines 15-23 and p 431 lines 7-11

23 **Wai 2522 # A 46 (a**) UNCTAD Report Proposes Ways to Reform International Investment Agreement System

24 **Wai 2522 # A 38** ; Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada at pp 7 – 35 ; The Expropriation of Environmental Governance by Kayla Tienhaara at pp 36 – 40.

25 Crown Law Office Transcript of Hearings Ridings p 802

26 **Wai 2522 # 4.1.2** Transcript, X-exam Heron QC of Associate Professor Amokura Kawharu p 636 line 20 p 637 line 13

27 **Wai 2522 # 4.12** Transcript X-exam Heron QC of Associate Professor Amokura Kawharu p 644, lines 5-10

28 Section 162 (4) (a) (iv) of the Education Act 1989

academic brings to bear on that work. The same applies when an academic performs the role of public intellectual, which Professor Kelsey has accepted in responding to requests from many Maori organisations, including the iwi chairs, to brief them on the TPPA in the absence of information from the Crown.

34. The Crown suggests Professor Kelsey's evidence was inaccurate.[29] The example it relies on was a peripheral reference to the chilling effect in a Canadian case involving Dow chemicals, which was not included in Professor Kelsey's written evidence but given orally at the hearing. It was not an important matter and she undertook to go away to review it, which she did and apologised to the Tribunal further research showed the terms for settling the dispute were more complex than she had indicated.

35. By contrast, Dr Ridings made a significant error in her third affidavit on the duration of resource consents relating to fracking, which was based on information from another ministry. That error was fundamental, as it skewed the discussion among the experts of the second and third scenarios on fracking. Professor Kelsey later conducted independent research and found the consent terms were much longer, which would have likely altered the outcome of the experts' discussion on those scenarios. Dr Ridings subsequently apologised that her evidence, presented in good faith, was misleading.[30]

36. Other factors the Crown cites as assessments of risk that are 'overstated' or 'inaccurate' are simply matters of argumentation and basically irrelevant.[31]

TREATY JURISPRUDENCE

Diminution of Capacity to Provide Redress

37. It is a long standing principle of the Treaty that the Crown not take action which could now or in the foreseeable future impair, to a material extent, the Crown's

[29] **Wai 2522 #3.3.27** Crown Closing Submissions para [17.5]
[30] **Wai 2522 # 4.1.2** Transcript CLO 382 lines 15-30
[31] **Wai 2522 #3.3.27** Crown Closing Submissions para [17.5]

ability to take the reasonable Treaty action which it is under an obligation to undertake.[32]

38. That principle has been recently reaffirmed by the Supreme Court in *New Zealand Maori Council* v *Attorney General* (the Water Rights case).[33] The Supreme Court held that deciding what was "reasonable action" requires a contextual evaluation which might require consideration of the social and economic climate.

39. As was highlighted in closing submissions for the New Zealand Maori Council,[34] the contextual evaluation approach is important in this case. The principle of reasonable action is not to be applied in a formal, legalistic or mechanical way. The narrow focus of the Crown on the legal obligations of TPP misses the point.

40. Associate Professor Kawharu and Professor Kelsey have both concluded the TPP is quite a different free trade and investment Treaty. In terms of style and the particular parties involved, it represents significant change. There is a real risk that in entering the TPP the Crown has materially diminished its capacity to provide redress for outstanding claims.

41. The Crown submissions[35] relying on other dicta in the Supreme Court Judgement [36] highlight that 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.

42. In this case the claimants don't seek a specific protection mechanism that compels the Crown to take action (as the Crown misapprehends). Rather, they seek a recommendation from this Tribunal that the Crown act now, before it is too late.

43. It is acknowledged that there is uncertainty about the immediate and long term impacts of TPP. However, measured against the Crown's Treaty obligations of acting reasonably and in good faith and given the risk of irreversible prejudice,

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32 *New Zealand Maori Council* v *Attorney General* [1994]1NZLR 513 (Privy Council)
33 *New Zealand Maori Council* v *Attorney General* [2013]3NZLR 31
34 **Wai 2522 #3.3.22** Closing Submissions for the NZMC para 10 -14
35 **Wai 2522 # 3.3.27** Crown Closing Submissions para [153.5]
36 *New Zealand Maori Council* v *Attorney General* [2013]3NZLR 31 at [89}

the Treaty compliant approach is for the Crown to take action before the TPP comes into force.

PREJUDICE TO MAORI

44. The Crown seeks to narrow down the claimants' concerns to specific issues and discount them as not being significant.[37] Calculations of prejudice need to start by assessing the importance to Maori of the matters in issue, then assessing the potential for the TPPA to constrain the Crown's performance of its obligations. The Crown seeks to reverse that order, so that a low legal risk (based on its flawed legal analysis) is acceptable, even where it affects a fundamental right of Maori.

45. The claimants have shown there are genuine risks to their rights on the basis of legal analysis and academic and empirical evidence. Those constraints take the form of substantive obligations in the TPPA, as with biologics or UPOV 1991, as well as systemic constraints, such as the micro and macro chilling effect of empowering foreign states and foreign investors to influence policy and regulation at all stages of the process, culminating in the threat of or an actual state-state or investor-state dispute.

46. According to the Crown, the TPPA largely confirms existing regulatory policy and practice. That in itself is a major concern to the claimants, as much of that policy and practice does not meet the Crown's obligations to Maori under Te Tiriti and other instruments. To the extent that the TPPA constrains the autonomy of the Crown to address those deficiencies there is a serious prejudice to the claimants. Outstanding obligations at risk of being constrained by the TPPA, and which will not be protected under the Treaty Exception, include:

    a) Ngapuhi claim;

    b) Implementation of Wai 262;

    c) Decisions and implementation of Tiriti rights on freshwater;

[37] **Wai 2522 #3.3.27** Crown Closing Submissions para [64]

d) Enactment and implementation of the Smokefree (Plain Packaging) Amendment and other smokefree 2025 policies; and

e) Review of resource legislation to promote co-governance, free and informed consent, and risk mitigation, and restrictions on resource consents for mining, especially fracking.

47. The TPPA requires the Crown to take decisions in the future that create serious risks of prejudice Maori and will not be protected under the Treaty Exception, notably to:

a) reach agreement within three years on a plant varieties regime that is consistent with both UPOV 1991 and te Tiriti; and

b) negotiate in 10 years on the period of marketing protection for biologics.

48. The US may impose additional obligations as a condition for certifying New Zealand's compliance with the TPPA, especially on biologics and the tobacco exception.

49. Te Tiriti is a living instrument. The claimants believe the TPPA will also prejudice their ability to secure redress for future contemporary Treaty claims, especially where they impact on foreign investors or intellectual property rights; compliance with other international instruments, such as free and informed consent under the UN DRIP; and social equity, such as access to affordable medicines as biologics consume an increasing proportion of Pharmac's budget.

THE ADEQUACY OF THE TREATY EXCEPTION

50. The Crown seeks to defend the adequacy of the Treaty Exception by focusing on its legal terms. In doing so, it ignores important Treaty obligations that fall outside the Exception altogether. Some are relegated to appendices, but not related to the discussion of the Exception, while others are barely mentioned: Annex 18-A on UPOV 1991 and other Wai 262 issues, access to medicines including biologics, the smokefree policies, and natural resources policies, such as the resource management regime, environmental regulation, and fracking. By its silence, the Crown must be assumed to accept that the Treaty Exception does not apply to

these measures. The general exception does not apply to the intellectual property and investment chapters where those issues mainly arise, and the Crown has failed to identify any alternative effective protection. The prejudice is clear.

WAI 262 AND UPOV 1991

51. The Crown has subordinated its protection of interests under Wai 262 to 'what is reasonable and practicable within the international multiparty context of the TPP negotiations'.[38] The Crown's decision whether to enter into negotiations that would circumscribe the Crown's ability to deliver on Wai 262 was a matter of utmost importance to the claimants. The Crown has failed in its Tiriti obligations by failing to seek the informed consent of the claimants and other Maori before embarking on such negotiations, and by concluding an outcome that seriously compromises the Crown's ability to provide redress.

52. While it claims its conduct in the TPPA negotiations has been informed by the findings in Wai 262[39] it has provided no evidence of that, aside from the belated inclusion of Annex 18-A on UPOV 1991.

53. The Crown is correct that Annex 18-A allows New Zealand to define its own compliance with UPOV 1991. However, paragraph 1 still requires New Zealand to comply with UPOV 1991 in one way or another. That poses a fundamental problem for Maori rights under Te Tiriti and the UNDRIP. The claimants set out the legal arguments clearly in their closing submissions.

54. The Crown asserts that its right to adopt domestic measures will prevail where there is a direct conflict with UPOV 1991, but it fails to explain how that would be reconciled with the obligation in paragraph 1. The Crown has not addressed this legal issue at any time during the claim. The failure to do so indicates a lack of confidence in their assertion.

55. New Zealand must find a solution to this quandary within three years. The Crown accepts this requires more intensive consultation and discussion. However, that engagement cannot undo the obligation the Crown has already adopted in the

[38] **Wai 2522 #3.3.27** Crown Closing Submissions paras [218] and [222]
[39] **Wai 2522 #3.3.27** Crown Closing Submissions para [218] and [220]

TPPA. It leaves the claimants and other Maori in the position of having to work with the Crown to find some solution to a contradictory provision over which they were never consulted. There is a high risk that the Crown will consult and then adopt a position that effectively adopts UPOV 1991 into New Zealand domestic law. The alternative is to adopt a law that is not compliant with UPOV 1991, which would be precedent setting and likely to result in the US bringing a dispute against New Zealand. The Treaty Exception would not apply.

56. The Crown says there is no evidential basis for the assertion that the Annex was a direct result of this claim, which was lodged on 3 July 2015. Dr Walker was evasive about the date on which this UPOV Annex was tabled. In an Official Information Act response to Professor Kelsey the Minister of Trade says the Annex was tabled on 31 July 2015.

57. It is not clear why the Crown referred to the Treaty Exception in relation to Wai 262.[40] The fact it included Annex 18-A shows the Crown does not believe the Treaty Exception would have protected a decision not to adopt UPOV 1991 as required by the TPPA, presumably because it is not 'more favourable treatment'. If the Treaty Exception has some other relevance to Wai 262 recommendations it needed to explain what that is.

58. The 'symbolic' value of Article 18.16 and 29.8 provides no benefit or comfort to the claimants.[41]

59. The Crown now proposes to hold a belated and targeted engagement on issues related to the plant varieties regime, including the response on UPOV 1991 and the plant varieties rights in Wai 262.[42]

60. The consultation on other intellectual property measures[43] is occurring when the Crown says nothing can be changed.

[40] **Wai 2522 # 3.2.27** Crown Closing Submissions para [219]
[41] **Wai 2522 # 3.2.27** Crown Closing Submissions para [222.4]
[42] **Wai 2522 # 3.2.27** Crown Closing Submissions para [222.1]
[43] **Wai 2522 # 3.2.27** Crown Closing Submissions para [222.3]

NATURAL RESOURCES

61. The Crown singularly fails to address claimants' concerns over natural resources, which have been articulated with reference to water and fracking.[44]

62. The Crown is correct that these concerns relate to Crown decision making in the domestic sphere, but wrong to say that is not relevant to the TPPA. The 'behind the border' disciplines imposed on government through substantive and process rules in the TPPA have been promoted as one of the landmark new features of the Agreement.[45]

63. It is also correct to say that other countries have no place intervening in these important matters,[46] but the TPPA allows them to do so. The investment chapter in particular imposes constraints through investment rules and investor protections, which the chart from Associate Professor Kawharu shows are more extensive than in New Zealand's previous agreements and involve overall fewer protections. These rules operate as a direct constraint on governments who are required to conform to their obligations. They are enforceable by both foreign investors and states through offshore arbitral tribunals, and have significant potential to chill government policy and regulatory decisions in both the micro- and macro or systemic sense of the term.[47]

64. The potential implications were addressed in case studies drawn from real examples of concerns raised by the claimants and others. While necessarily hypothetical and abstract, they reflect the kind of situations that could arise.

65. The Crown claims that Dr Ridings and Associate Professor Kawharu concluded the case studies on fracking and freshwater would not be circumstances in which an ISDS claim could be lodged.[48] This ignores the fact that the experts' discussion of the fracking scenarios 2 and 3 relied on incorrect information provided by Dr Ridings regarding the term of resource consents for fracking. That wrong

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44 **Wai 2522 # 3.2.27** Crown Closing Submissions para [70-71]
45 **Wai 2522 # A 1** 1st Affidavit of Professor Jane Elizabeth Kelsey dated 19 June 2015 para [24] and [25]
46 **Wai 2522 #3.2.27** Crown Closing Submissions para [71]
47 **Wai 2522 # 3.3.28** Claimants Closing Submissions para [136] to [144]
48 **Wai 2522 #3.2.27** Crown Closing Submissions para [162]

information was later corrected by information tabled by Professor Kelsey at the hearing that shows such consents commonly run from between 7 and 14 years with an annual review.

66. All the experts treated the short term of two to three years as critical to limiting an investor's legitimate expectations in relation to a dispute over the minimum standard of treatment. Dr Ridings accepted in her oral evidence that there would be a much greater legitimate expectation with a consent period of 14 years.[49] The new evidence was not put to Associate Professor Kawharu, but she had previously concluded that the Treaty Exception would not apply, at least for scenario 2, because there was not 'more favourable treatment'.[50]

67. The description of Associate Professor Kawharu's position is also inaccurate and misleading. The expert opinion was divided. Dr Ridings, the Crown's expert, downplayed the potential for a legal dispute and played up the protections provided by the Treaty Exception. Associate Professor Kawharu considered several of the case studies disclosed a potential for a breach and illustrated the inadequacy of the Treaty Exception to provide protection.[51] Professor Kelsey agreed with the others that scenario 1 on fracking was unlikely to result in a dispute, but scenarios 2 and 3 on fracking and scenario 2 on freshwater raised particular legal risks, and the exceptions, including the Treaty Exception, did not provide protection.

ACCESS TO AFFORDABLE MEDICINES[52]

68. The Crown accepts by implication in paragraph 2 that access to affordable medicines is a legitimate and particular concern for the claimants and other Maori because of the disproportionate impact that new restrictions would have on them.

69. It seeks to undermine Dr Papaarangi Reid's evidence that called for a Health Impact Assessment of the TPPA and similar agreements by saying they are not

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49 **Wai 2522 # 4.1.2** Transcript X-Exam of Dr Penelope Ridings Transcript p 383 lines 20 -25

50 **Wai 2522 # A 35** Affidavit of Associate Professor Amokura Kawharu dated 24 February 2016 para [235]

51 **Wai 2522 # A 35** Affidavit of Associate Professor Amokura Kawharu dated 24 February 2016 paras [232] –[235], [254]-[261] and [263]

52 **Wai 2522 #3.3.27** Crown Closing Submissions paras 75 to 81 and Appendix A: Pharmaceuticals including biologics

currently orthodox practice.[53] That is not the appropriate measuring stick. The reason leading health professionals and their international bodies have called for such an assessment reflects the unprecedented impact of these agreements on people's health.

70. Dr Reid agreed with the conclusion of the Ministry of Health's paper on biologics that New Zealand must not lock in an extended period of data protection for biologics. She also expressed concern about locking in the current regime because of the growing role biologics will play in the health spend.[54]

71. The Crown's dismissal of the claimants' arguments that the provisions on biologics would reduce access to affordable medicines depends on a series of highly improbable assumptions:

    (i) the increased reliance on biologics medicines in the future under the current system of protection will not reduce access for Maori to affordable medicines (which assumes an ever-expanding health budget);

    (ii) locking in of the status quo and removing flexibility to reduce the current period of data and marketing protection, which prevents earlier access to biosimilars and competition in the market, is nothing to do with the TPPA;

    (iii) Dr Walker's interpretation that a combination of 5 years' data protection, other measures and market circumstances is a 'comparable outcome' to 8 years' protection, and that 'comparable outcome' does not mean 'equal to', is accepted by the US;

    (iv) New Zealand will not be required by the US to adopt a stricter regime than it operates at present as a pre-condition to implementing legislation being submitted to the US Congress or as a condition of certification;

    (v) the US will not challenge New Zealand's interpretation of Article 18.51(b) in a state-state dispute. The Crown says there is no evidence that the Crown's interpretation is likely to be challenged.[55] However, the US

[53] **Wai 2522 # 3.3.27** Crown Closing Submission, Appendix A: Pharmaceuticals, para 3
[54] **Wai 2522 #4.1.2** Transcript X-exam of Dr Papaarangi Reid pp 67 – 69
[55] **Wai 2522 # 3.3.27** Crown Closing Submissions, Appendix A: Pharmaceuticals, para 7

challenged compliance with the term of pharmaceutical patent protections under the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), initiating a dispute against Argentina on patents and test data,[56] and winning a dispute against Canada on the term of patent protection[57];

(vi) the inbuilt review in 10 years' time does not result in any further restrictions on market competition for biologics and biosimilars; and

(vii) the Transparency Annex does not affect Pharmac's decision making, despite potential further delays and additional opportunities for leverage by the pharmaceutical industry.

72. The immediate tangible prejudice of the TPPA comes from locking in the current regime for biologics, which Dr Reid warned will create pressures on affordability that impact on human lives, especially of Maori.[58]

73. The Crown is correct that the remaining scenarios are speculative, but there is strong evidence to support the conclusion that some or all of them will occur. In that case the TPPA will have created conditions that jeopardise Maori health. The Crown has not suggested that the Treaty Exception would apply to any measures taken to address that impact.

74. The claimants closing submissions[59] noted there was some risk of an investment dispute. The Crown says an ISDS tribunal would not have jurisdiction to consider New Zealand's violation of that provision. The latter is correct, but an investment dispute would not seek to enforce Article 18.51 directly.

75. The claimants' submissions noted that the rules relating to an investment dispute over intellectual property and licensing were complex, but did not go into detail. Because the Crown has queried the meaning, the argument is set out briefly in a

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[56] *Argentina – Certain Measures on the Protection of Patents and Test Data*, WT/DS171 and WT/DS196

[57] *Canada – Term of Patent Protection*, WT/DS 170

[58] **Wai 2522 #4.1.2** Transcript pp 71 – 72 Questions from Waitangi Tribunal Panel Member Mr Cochrane p 71 line 29 to p 72 line 31

[59] **Wai 2522 # 3.3.28** Claimants Closing Submissions at para [104]- [107]

footnote. [60] This illustrates the interpretive difficulty, which again creates the conditions for a chilling effect.

76. Contrary to the Crown's claim,[61] the other protections for public health are weak. The carefully worded affirmation in Article 18.6 to the WTO Declaration on the TRIPS Agreement and Public Health does not assist.[62] The limited protection of the Article 29.1 General Exception does not apply to the intellectual property or investment chapters. The right in Article 9.16 of the investment chapter to ensure regulation is sensitive to health objectives is circular and cosmetic, because any such measures must be consistent with the chapter. It is not clear what other protections for the right to regulate the Crown considers would provide the protection they assert in paragraph 12.

77. The fact that New Zealand's current regime has remained constant for the past 20 years[63] fails to recognise the reality that new-generation biologics are hugely expensive, constitute a greater and growing proportion of first-choice medicines, and will make an increasingly large demand on the health budget. It is untenable to suggest that increases in costs for medicines under the TPPA will fall 'within the margin of error'.[64]

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60 The most likely scenario would be either a reduction in the period of data and marketing protection to advance the advent to market of biosimilars or compulsory licensing. Both would raise expropriation arguments. The Annex on Expropriation protects from indirect expropriation claims non-discriminatory regulatory actions (except in rare circumstances) for public policy reasons, including with respect to regulation, pricing and supply of biologics. But this could be considered a direct expropriation, in which case the protection would not apply. Where compulsory licensing is used, Article 9.8.5 protects that from a direct expropriation claim, but only where it is consistent with the TRIPS agreement and the intellectual property chapter. Consistency with both is contestable, as compulsory licensing of a biologic does not appear to be permitted if it is not patented, and biologics are often not patented. A pharmaceutical company could also claim a breach of minimum standard of treatment based on legitimate expectations and fair process. The specific protection in the expropriation Annex confirms the risk of an investor dispute over such a measure, but it is not mirrored in relation to minimum standard of treatment. The weak General Exception does not apply to the investment chapter.

61 **Wai 2522 # 3.3.27** Crown Closing Submissions, Appendix A: Pharmaceuticals para [8]

62 The Declaration itself is very limited in its scope and conditions for application. More importantly, it is not incorporated *mutatis mutandi* into the TPPA intellectual property chapter, which means the WTO version is not adapted to the new TRIPS-plus provisions in the TPPA, including the unprecedented new protections for biologics. The understanding in Article 18.6(a) quoted by the Crown is an interpretive tool; it cannot create a protection where there is none.

63 **Wai 2522 #3.3.27** Crown Closing Submissions, Appendix A: Pharmaceuticals para [13.2]

64 **Wai 2522 #3.3.27** Crown Closing Submissions, Appendix A: Pharmaceuticals para [13.3]

SMOKEFREE 2025[65]

78. The claimants are pleased that the Crown has acknowledged the impact of the TPPA on smokefree policies in its Appendix A, but the Crown once fails to address all the issues.

79. The claimants are not solely concerned with plain packaging, but with the entire spectrum of the Smokefree 2020 policies that resulted from the inquiry conducted by the Maori Affairs Committee in 2010.[66] Professor Kelsey examined the potential conflict between each of those policies and the trade and investment agreements in her report for the Ministry of Health and Health Research Council in 2012.[67]

80. The plain packaging law is still important in itself, and as a example of the chilling effect. The Smokefree Environments (Plain Packaging) Amendment Bill was introduced in December 2013 and has been languishing in the House since the select committee report back in August 2014. Despite the Prime Minister's assurances, the government's failure to advance its passage gives the claimants no confidence that it is committed to that measure or other smokefree policies.

81. The option in Article 29.5 for a TPPA party to deny an investor access to ISDS to challenge a tobacco control measure is an important development. The claimants have observed that the Australian government has given formal notice that it will exercise this option.[68] The New Zealand government has publicly announced an intention to do so, but has not taken any such formal action.

82. The Crown relies on self-imposed conditions of secrecy to dismiss information about the Malaysian tobacco exception as 'conjecture' and 'hearsay'. The Malaysian carveout was widely reported[69] and Professor Kelsey's personal knowledge indicated in oral evidence.[70] The Crown could have taken a strong position to support Maori health by endorsing that carevout, but seems satisfied

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65 **Wai 2522 #3.3.27** Crown Closing Submissions paras [72] – [74]and Appendix A: pp 83-85, paras [1]-[7]
66 **Wai 2522 #A1** 1st Affidavit of Professor Elizabeth Jane Kelsey dated 19 June 2015, Exhibit BW
67 **Wai 2522 #A1** 1st Affidavit of Professor Elizabeth Jane Kelsey dated 19 June 2015 Exhibit X
68 **Wai 2522 # 4.1.2** Transcript Professor Elizabeth Jane Kelsey pp 87-88
69 **Wai 2522 #A1** 1st Affidavit of Professor Elizabeth Jane Kelsey dated 19 June 2015 para [105]
70 **Wai 2522 # 4.1.2** Transcript Professor Elizabeth Jane Kelsey p 92 lines 20 - 33

that the limited carveout from ISDS in Article 29.7 was 'reasonable and achievable' in the context of the TPPA negotiations. That is a further example of the government and MFAT putting their goal of securing these agreements ahead of their obligations to Maori and the smokefree policy generally.

83. The Crown for the first time seeks to differentiate the TPPA from the WTO provisions that were invoked in the dispute against Australia's plain packaging tobacco law. It fails to address a number of WTO-plus provisions in the TPPA that are enforceable by state to state dispute settlement.[71] The General Exception in Chapter 29.1 of the TPPA does not apply to either the investment chapter (not in the WTO) or the intellectual property chapter (as in the WTO). There is no difference between the TRIPS provisions being relied on in the dispute against Australia in the WTO and the intellectual property chapter in the TPPA.

84. It is therefore incorrect to assert that the legal risks of a State-to-State dispute over tobacco plain packaging is less than under the WTO. In the TPPA the state can choose whether it pursues a matter under the WTO, but it cannot pursue the same legal issues in both. It is therefore possible for a state to pursue a dispute over tobacco in either the WTO or the TPPA, depending on which provides better legal grounds for its argument.

85. The Crown is correct that the public records from the WTO do not show any existing TPPA negotiating party has objected to New Zealand's plain packaging law.[72] However, Japan and Vietnam both have large tobacco industries. The Vietnam National Tobacco Corporation is state owned. Japan Tobacco International (JTI), which was previously state owned, objected to Australia's plain packaging and was party to the constitutional challenge in the domestic courts. JTI has joined others in challenging its introduction in the United Kingdom

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[71] The Agreement on Technical Barriers to Trade (TBT), which relates to labelling and technical standards such as disclosure of product content or tar levels, is more extensive in the TPPA. Article 8.4 only provides protection in the extremely unlikely situation where a dispute relies only on a violation of the TBT Agreement. There is a new rule in Article 9.29.4 of the TBT chapter that permits an accreditation agency to be a for-profit entity, which could see a tobacco industry association accredit a tobacco company to be the conformity assessment body that tests its own products to check they conform to a country's technical standards (eg tar levels). This is a WTO-plus provision and not covered by Article 8.4. The TPPA has an investment chapter, enforceable by states, that is not in the WTO.

[72] **Wai 2522 # 3.3.27** Crown Closing Submissions, Appendix A Tobacco, para [4]

and France. There is a real risk that these countries might press their governments to act on their behalf in challenging new tobacco control measures.

86. The TPPA is also intended to attract new parties, who might well lodge a dispute. Indonesia is one of the countries reported to have expressed an interest in joining the TPPA. In 2012 it won a dispute against the US over a ban on the importation of clove flavoured cigarettes.[73]

87. The Crown fails to acknowledge that the government currently treats the involvement of the tobacco industry in the policy process as a special case.[74] Under Article 5.3 of the Framework Convention on Tobacco Control (FCTC) parties must exclude the tobacco industry from the policy making process and there are extensive guidelines for implementation.[75] As part of its compliance with the transparency obligations New Zealand's Ministry of Health maintains a public record that shows very limited current engagement with tobacco companies.[76] There is a direct conflict with the transparency and regulatory coherence obligations in the TPPA, specifically Chapter 26 Transparency, Article 8.7 of the TBT chapter, Article 10.11 on Cross-border services, and Chapter 25 Regulatory Coherence, which provide opportunities for states and investors to pressure the New Zealand government over proposed smokefree policies. There is no exclusion of the tobacco industry.

88. The Crown objects that the claimants do not detail how tobacco control policies might breach a range of chapters that are not protected by the non-conforming measures annexed to the cross-border services and investment chapter.[77] There is no reference, but it presumably refers to paragraph 213 of the claimants' closing submissions. Anyone familiar with the limited cope of these annexes would recognise that the claimants are making a very specific point: the non-conforming measure that allows the government to act inconsistently with specific rules in the

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73 *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012

74 **Wai 2522 # 3.3.27** Crown Closing Submissions, Appendix A Tobacco, para [5]

75 Guidelines for implementation of Article 5.3. Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry, Adopted by the Conference of the Parties at its third session November 2008 (decision FCTC/COP3(7))

76 http://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/who-framework-convention-tobacco-control/meetings-tobacco-industry-representatives

77 **Wai 2522 # 3.3.27** Crown Closing Submissions Crown Closings, Appendix A Tobacco, para [7]

cross-border services and investment chapter applies only to retail and wholesale distribution of tobacco (and alcohol) products – not to other tobacco control measures (for example, advertising). The potential for the entire raft of smokefree policies to conflict with provisions of the TPPA, among other agreements, has already been set out in the comprehensive report annexed to Professor Kelsey's first affidavit.[78]

89. The claimants' submission is also said to neglect to analyse all the 'inbuilt policy flexibilities and exceptions'. Their inadequacy has been explained at lengthy by Professor Kelsey in numerous affidavits[79] and addressed by Associate Professor Kawharu in her expert evidence.[80]

90. The fact the GATT and GATS exceptions are not at issue in the WTO proceedings against Australia is irrelevant.[81] Those exceptions do not apply to the intellectual property chapter, which is one of the grounds for the WTO dispute. Nor does it apply to the investment chapter in the TPPA.

INADEQUACY OF THE CROWN'S ANALYSIS

91. The section of the Crown's closings on the Treaty of Waitangi Exception makes various claims about what the experts said, but it has been impossible to check those assertions because there are no references to affidavits or oral evidence. These unsourced assertions should therefore be given little, if any, weight.

92. On several matters where the sources can be identified the Crown's account is misleading or inaccurate. The Crown seeks to bolster Dr Ridings' revised view of the self-judging nature of 'more favourable treatment' by invoking Associate Professor Kawharu's description of it as 'reasonable'.[82] This account is self-serving and misleading. It ignores the caveats Associate Professor Kawharu expressed at the time in her oral evidence and her subsequent clarification. An

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78 **Wai 2522 #A1** 1st Affidavit of Professor Elizabeth Jane Kelsey dated 19 June 2015. Exhibit BV

79 **Wai 2522, #A5** 2nd Affidavit of Professor Elizabeth Jane Kelsey dated 21 July 2015 paras [71] to [72]; **Wai 2522 #A15** 6th Affidavit of Professor Elizabeth Jane Kelsey dated 20 January 2016 paras [36] to [38]

80 **Wai 2522, #A35** Brief of Evidence of Associate Professor Amokura Kawharu dated 24 February 2016, para [77]

81 **Wai 2522 # 3.3.27** Crown Closing Submissions, Appendix A Tobacco, para [7]

82 **Wai 2522 #3.3.27** Crown Closing Submissions para [94.1]

accurate account of Associate Professor Kawharu's position is set out in the claimants' closing submissions at paragraphs 64 and 65.

93. The Crown's argument that the Treaty Exception has never had to be invoked in relation to previous agreements[83] is a red herring. The legal risks in the TPPA and the increased risks of enforcement and chilling from participation of the US government and investors are qualitatively different.

94. The notion that 'extensive filters'[84] that would prevent the Crown from needing to invoke the Treaty Exception describe what happens in any legal case: investors have to establish a prime facie case and the respondent argues the available defences, including the Treaty Exception. That does not 'exponentially reduce the risk' that the Crown would need to rely on the Exception. The experts agreed that this risk is highest in an investment tribunal, which considers the issues and relevance of previous decisions on a case by case basis, where the interpretation of key provisions, such as minimum standard of treatment, is uncertain, and where other exceptions, such as the general exceptions, do not apply. Nor do these 'filters' reduce the potential chilling effect, especially of the macro-, systemic or 'psychological' kind.

95. The table of matters which the Crown claims were agreed between the experts is unsupported by references, is often ambiguous and glosses over important differences. The claimants do not understand the full intended meaning of points 2, 7, 17, 18 and 19 and cannot therefore agree with them. The claimants reject the claim in point 5, and wonder whether the Crown meant to refer to state-state disputes rather than ISDS, and reject point 20 because good faith is not the only consideration in the chapeau.

96. The Crown then uses this table to finesse the critical issues that expose the inadequacy of the Treaty Exception,[85] suggesting all remaining issues are residual and insignificant. It reframes those issues in ways that avoid addressing the main legal problems.

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[83] **Wai 2522 # 3.3.27** Crown Closing Submissions para [86]
[84] **Wai 2522 # 3.3.27** Crown Closing Submissions para [100]
[85] **Wai 2522 # 3.3.27** Crown Closing Submissions para [102]

THE THRESHOLD REQUIREMENT OF "MORE FAVOURABLE TREATMENT"

97. The Crown has taken a cavalier approach to the arguments around the Treaty Exception and fails to clarify its position or respond to matters raised by the claimants. When giving evidence at the hearing Dr Ridings belatedly and radically changed her interpretation of paragraph 1 of the Treaty Exception. The claimants have never been provided with a written account of Dr Ridings' revised position, the argument was not put to Professor Kelsey in cross-examination, and the legal argument is not explained in the Crown's closing submissions. Indeed, the closing submissions seem to vary from what Dr Ridings argued at the hearing. The Crown's failure to explain its legal argument puts the claimants in an impossible position and suggests the Crown is not convinced by its new position.

98. Dr Ridings argued in oral evidence that the Crown's decision on what was 'necessary' was totally self-judging. This was a means to avoid a tribunal examining the threshold requirement that the measure was 'more favourable treatment', which all the experts had previously identified as problematic. Logically, Dr Ridings' revised position means any discussion of the spectrum of favourable treatment is redundant, except in considering the chapeau. However, the Crown has resurrected the spectrum in its closings, without explaining how that would apply given Dr Ridings' revised interpretation.

99. Professor Kelsey and Associate Professor Kawharu were clear that 'more favourable treatment' is the threshold that determines the application of the Exception. In her final memorandum Associate Professor Kawharu said she still favoured that purposive approach to interpreting paragraph 1 and still had difficulties with Dr Ridings' proposal. As Professor Kelsey[86] and Associate Professor Kawharu[87] have both observed tribunals would not read down their powers lightly.

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[86] **Wai 2522 # 4.1.2** Oral Evidence Professor Elizabeth Jane Kelsey p 95 X-exam by Heron QC of Professor Elizabeth Jane Kelsey p 143 Questions by Presiding Officer of Professor Elizabeth Jane Kelsey p 760

[87] **Wai 2522 # A 35** Brief of Evidence of Associate Professor Amokura Kawharu

100. In addressing the second paragraph of the Treaty Exception,[88] the Crown again fails to address the legal issues and arguments. All the experts agreed there are problems of ambiguity. This dismisses the issue peremptorily, saying 'even if there is an ambiguity it is not sufficiently important to warrant pre-ratification action'. The Tribunal and the claimants are entitled to more robust argumentation to support the Crown's position.

101. The Crown then reduces the chapeau to a broad question of good faith. It fails to address how its new interpretation of broad self-judging powers would increase the importance of the chapeau and affect its interpretation, the significant differences between the Treaty exception and the general exception, and ignores broad meaning given to 'arbitrary' discrimination by recent investment tribunals. Its summary 'remaining matters' then fails to discuss the scenario where the same investor is treated differently on a similar matter, which is an example that could easily arise in a Treaty context.

EVOLUTION OF THE TREATY EXCEPTION

102. The Crown's defence of the evolution of the Treaty Exception since 2001 is obtuse and legally wrong. The claimants have no idea what the 'associated evolution of various contextual provisions' referred to in paragraph 115 means.

103. As Associate Professor Kawharu's chart shows the obligations in the TPPA are not the same in essence as previous agreements. The Crown references most of the comments it attributes to her in this section, but not its claim that she agreed the comparison of New Zealand's various free trade agreements was more complex than the table suggests. Far from discrediting Associate Professor Kawharu's chart, as it sets out to do, the examples given by the Crown to illustrate this shows it is clutching at straws and does not understand the relevant trade and investment law.

104. The Crown says the fact that the Korea NZ FTA's investment chapter refers to the GATS general exception, but not to the GATT exception, is an example of

[88] **Wai 2522 # 3.3.2** Crown Closing Submissions at para [11]

complexity.[89] The GATT exception, which applies to goods, would never apply to the investment chapter.

105. Dr Walker gives the improved safeguards in recent agreements as one reason why only one ISDS dispute has been taken under an agreement signed since 2010.[90] But all US trade and investment agreements, on which the TPPA is modelled and which includes those 'safeguards', were signed before 2010. There have been a significant number of investment disputes under the Central America Free Trade Agreement (CAFTA), signed in 2004, which contains the same 'safeguards' as the TPPA. The Korea agreement was signed in June 2007 but did not enter into force until 2012, so its impact is yet to be felt.

106. Contrary to the Crown's claim,[91] the claimants have shown that numerous practical scenarios fall outside the Treaty Exception, including the implementation of Annex 18-A on UPOV 1991, the prospect of state-state disputes and a chilling effect on smokefree policies, and the Crown's inability to make growing reliance on biologics medicines more affordable.

107. Associate Professor Kawharu used the practical example of *Matauri X*.[92] She and Professor Kelsey identified the risk of a *Bilcon*-like dispute where resource management decisions involving Maori concepts and processes were challenged, and where the Crown's action did not meet the threshold of 'more favourable treatment'. The corrected factual information on resource consents for fracking shows a significant legal risk from a moratorium or ban on fracking, which would not be protected by the Treaty Exception.

RESPONSE ON APPENDIX A: ISDS

108. The Crown attempts to downplay the advantages that ISDS gives to foreign investors by suggesting they make major concessions by losing the right to seek conventional administrative law remedies. This is contrary to widely recognised

89 **Wai 2522 # 3.3.27** Crown Closing Submissions para [120.1]
90 **Wai 2522 # 3.3.27** Crown Closing Submissions para [119]
91 **Wai 2522 # 3.3.27** Crown Closing Submissions para [116]
92 **Wai 2522 #A35** Brief of Evidence of Associate Professor Amokura Kawharu at pp 45 –47 paras [200] – [206]

advantages of investment arbitration over domestic litigation. These advantages include:

(i) investment protection rules in investment treaties and chapters are more favourable to investors than domestic law;

(ii) domestic courts apply public policy considerations that do not constrain investment tribunals;

(iii) ISDS tribunals show a consistent pro-investor bias;[93]

(iv) ISDS interpretations of key provisions have become progressively more pro-investor over time;[94]

(v) there is no appeal from a decision that is wrong in law or the equivalent of judicial review, and mechanisms for annulment or setting aside an award are very limited;

(vi) the state cannot bring counterclaim for a breach of the investment rules (contrary to the Crown's claim);[95] and

(vii) settlements may include government agreement to rescind or modify the measure in dispute, so damages if not the only remedy.

109. The investor only needs to submit a waiver of the right to take or continue domestic litigation at the time it submits notice of arbitration under Article 9.20.2(b). By the time it does so it may well have concluded domestic litigation. The uncertainty of outcomes from investor-state disputes, combined with the potential for very large awards of damages with compound interest, and costly and lengthy litigation means the 'micro-chilling' effect of threatening or lodging an ISDS dispute is greater than the chilling effect of domestic litigation.

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93 **Wai 2522 # A17** 7th Affidavit of Professor Elizabeth Jane Kelsey dated 3 February 2016:Gus van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration', *Osgood Hall Law Journal,* 2016, vol 53(2) forthcoming, Attached as Exhibit C

94 *Merrill and Ring v Canada,* cited in *Bilcon v Canada*

95 The state can only counter-claim where an investor seeks to enforce an Investment Agreement or Investment Authorisation using Section B, not where the claim is for a breach of Section A of the chapter. The relevant provision is Article 9.18.2 not 9.19.2.

110. The serious limitations on the annulment process at ICSID and setting aside under the UNCITRAL rules have already been set out in detail by Professor Kelsey[96] and confirmed by Associate Professor Kawharu in her expert evidence[97] and her contribution to the panel,[98] and are not repeated here.

111. There is no question that the TPPA will be interpreted according to the VCLT. Nor is there any dispute that state-state and investor-state tribunals 'take account of' the way other international courts and tribunals apply these principles, or that 'as a matter of practice ISDS tribunals tend to look at' what other investment tribunals have said as guidance. They are also likely to be referred by counsel to decisions of other tribunals, including the WTO, and will 'look at' them. The claimants also agree it is the practice of ISDS tribunals to look at decisions of other investment tribunals, and explain their reasons for taking a similar approach or not.

112. The Crown accepts the need for caution in assuming there will automatically be consistency in interpretation across investment agreements, especially when their terms may differ. It also agrees there are areas of difference that have emerged and there is controversy over different interpretations.

113. The Crown's claim in para 9 that Professor Kelsey referred to 'extensive inconsistencies' is unreferenced and ignores the well-documented problems of inconsistency in core areas of investment law reiterated in the claimants' closing submissions.[99] Different terminology in the TPPA will create uncertainties and invite tribunals to develop new interpretations. Even where investment tribunals purport to adopt the same underlying concepts, their interpretations and applications differ markedly.

114. The claimants reject the Crown's attempted segue in para 9 from claiming a 'considerable body of consistent reasoning' to asserting that consistency is the norm, and that 'there is no reason to assume … there will be consistency with

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96 **Wai 2522 # A 17** 7th Affidavit of Professor Elizabeth Jane Kelsey dated 3 February 2016 paras [68] – [72]

97 **Wai 2522 # A 35** Brief of Evidence of Associate Professor Amokura Kawharu dated 24 February 2016 para [141]

98 **Wai 2522** Transcript Crown Law Office page 763 lines 1-16

99 **Wai 2522 #3.3.28** Claimants' Closing Submissions paras[150]to [172]

ISDS tribunal interpretations under other investment agreements'. That is most certainly not justified in relation to minimum standard of treatment, especially fair and equitable treatment. There are particular problems with 'customary international law', which is the foundational concept of the minimum standard of treatment, but the Annex does not assist in interpreting that norm.[100]

115. Moreover, consistent application of previous decisions may entrench a problematic interpretation. The US and Canada objected to the application of *Merrill and Ring v Canada* by the majority in *Bilcon* on the grounds that the precedent it applied was bad law.[101]

116. There is no basis for the Crown to claim that differences, which it concedes are likely in the initial stages of interpretation of the TPPA, are likely to give way to a relatively consistent body of case law in these areas of ongoing contention relating to investment.

117. The Crown concedes the Treaty Exception is novel and its interpretation by a state-state or investor state tribunal will be a matter of 'first impression'[102] – an approach that implies unpredictability and subjectivity depending on the observer. Given the three experts in this claim reached different interpretations of key provisions, and that the Crown's own expert changed her interpretation dramatically during the hearing itself, this argument validates the claimants' concerns about unpredictability and potential inconsistency.

118. As noted above, there is no dispute that interpretation under the VCLT combines ordinary meaning of the text (which is problematic) with context and object and purpose, which the Crown relates to the TPPA rather than to the Treaty Exception. Given the essentially commercial objectives of the Agreement, this would militate

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[100] **Wai 2522 #A21** 8th affidavit of Professor Elizabeth Jane Kelsey dated 11 February 2016 Attached as Exhibit B Porterfield; **Wai 2522, #A16** ; Affidavit of Dr Penelope Jane Ridings dated 19 January 2016 UNCTAD, *Fair and Equitable Treatment*, Attached as Exhibit BB

[101] **Wai 2522 # A 15** Government of Canada, 'Observations on the Award on Jurisdiction and Merits in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc, v Canada*, 14 May 2015. 6th affidavit of Professor Jane Kelsey, Exhibit AC, para [17]

[102] **Wai 2522 #3.3.28** Claimants' Closing Submissions. Appendix A ISDS paras [11]-[12]

in favour of a restrictive interpretation of the Treaty Exception, contrary to what the Crown has been arguing.

119. The Crown seeks to substantiate its argument by rejecting an extract from Professor Kelsey that is misleading and misrepresents her argument in the manner it is used. It comes at the end of a careful discussion of WTO case law relating to the chapeau in the General Exception and the extent to which it might and might not apply to the Treaty Exception, especially given certain differences in wording. The quoted extract follows two sentences which acknowledge that WTO case law is pertinent to considering *the chapeau.* The Crown omits the linking words, '*That said*, it is quite unpredictable how a state-to-state tribunal might interpret the untested provision outside the WTO' (emphasis added). The entire point of Professor Kelsey's argument was how significant differences in the chapeau might affect the interpretation of the Treaty Exception.

120. Having created a straw man to knock down, the Crown reiterated its earlier argument. The claimants have no dispute with the Crown's claim[103] that state-state disputes on investment will involve 'first impressions' of the Treaty Exception and that similar interpretive challenges will arise in some other parts of the TPPA that are novel. They also agree that tribunals will look to see how related provisions have been interpreted, although they will decide how to use them.

121. No source is provided for the assertion[104] that ISDS tribunals have shown a willingness to look at WTO interpretations of similar provisions, but the claimants accept that has happened in some disputes. Looking at such interpretations is not the same as accepting them. If the Crown's purpose is to support its claim that state-state tribunals would look to at WTO interpretations, that is not disputed. Professor Kelsey's point was that the wording of the chapeau in the Treaty Exception is different, as its context, and the interpretation of the untested Treaty Exception by a state-state tribunal would therefore be 'quite unpredictable'. That is a perfectly sound conclusion.

[103] **Wai 2522 #3.3.27** Crown Closing Submissions paras [13.1] and [13.2]
[104] **Wai 2522 #3.3.27** Crown Closing Submissions para [13.3]

122. In criticising the foundations for Professor Kelsey's view the Crown has ignored the numerous times Professor Kelsey has explained the differences between state-state and investor-state tribunals, which renders interpretation unpredictable. As the Crown itself concedes, there are few examples of state-state disputes on investment agreements; it is not self-evident how referring to them would have assisted in clarifying how tribunals' interpretations are likely to differ.

123. The highly credible international literature that addresses the fundamental differences between the two types of tribunals is much more pertinent and useful. Those relied on by the claimants include an article by leading academics Robert Howse and Efraim Chalamish,[105] the UNCTAD report on fair and equitable treatment cited by Dr Ridings,[106] and an article by leading New Zealand arbitration lawyer Campbell McLachlan QC,[107] cited by Associate Professor Kawharu with reference to the inconsistency of arbitrations involving Argentina.[108]

124. The Crown dismisses these analyses as 'academic debate' from which conclusions cannot be drawn. But the 'academic debate' it dismisses is sourced in discussions of case law and practice, and explains why and how systemic differences between the two genres of arbitral tribunal are likely to produce different outcomes.

125. In its final sentence in section on ISDS the Crown suddenly broadens this specific discussion of Professor Kelsey's arguments on consistency to the problems with ISDS generally. Yet the extract from Associate-Professor Kawharu[109] it cites does not support the Crown's argument about predictability and consistency. Associate Professor Kawharu was addressing the broader criticisms of ISDS and the extent to which they had been addressed in the TPPA. Indeed, her assessment works against the Crown. One of the most pertinent factors that contributes to the lack

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[105] **Wai 2522 # A 17** 7th Affidavit of Professor Elizabeth Jane Kelsey dated 3 February 2016: Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration. A reply to Jurgen Katz', *European Journal of International Law*, 2010, vol 20, no 4, 1087-1094. Attached as Exhibit B

[106] **Wai 2522 #A 16** Brief of Evidence of Dr Penelope Ridings: UNCTAD, *Fair and Equitable Treatment. A Sequel*, UN, New York, 2012. Attached as Appendix BB

[107] **Wai 2522, #A35** Brief of Evidence of Associate Professor Amokura Kawharu dated 24 February 2016. Attached as Exhibit #1

[108] **Wai 2522 # A 35** Brief of Evidence of Associate Professor Amokura Kawharu dated 24 February 2016 para [23]

[109] **Wai 2522 #3.3.27** Crown Closing Submissions para [15] and footnote [187]

of predictability and consistency in ISDS is the absence of any appeal, which she says has not been dealt with, and that a further problem of arbitrators' independence was only partly deal with.

CHILLING EFFECT

126. The Crown has again played fast and loose with the transcript in relation to Associate Professor Kawharu and the chilling effect. Footnote 85 claims she queried the weight Professor Kelsey accorded to the work of Kyla Tienhaara and Gus van Harten.

127. Professor van Harten's article describes the phenomenon of chilling as bigger than just the threat of litigation, and how new agreements were changing the emphasis of policy making generally because their scope was so all-encompassing. Associate Professor Kawharu said she was very familiar with his work and was currently collaborating with him so did not need to view the article. She then referred favourably to the work of Professor Schneiderman, who has written on the phenomenon of regulatory chill. She said she was less impressed by the work of Tienhaara (a political scientist) because her methodology focused more on chill that arises from specific cases, and considered her evidence base was rather weak and her analysis a 'bit exaggerated'.[110]

128. According to the same footnote Associate Professor Kawharu said the concerns expressed by the UN Special Rapporteur could not be relied on because they inaccurately assess the operations of international trade law. In fact, she said she thought the Rapporteur's concerns were legitimate, although some were poorly informed and the expression of those concerns was overstated.

129. The Crown then describes Professor Kelsey's claims on the chilling effect as simplistic on causation and highly abstracted. The explanation that follows suggests the Crown has not read the discussion on chilling in Professor Kelsey's affidavits, listened to the oral evidence from her or Associate Professor Kawharu, read the exhibits from van Harten and Tienhaara that were tabled during the hearing, or read the claimants closing submission where various typologies of

[110] **Wai 2522 #4.1.2** Transcript Associate Professor Amokura Kawharu, Opening Statement, pp CLO 696 27-30

chilling were spelt out. The description of Professor Kelsey's 'thesis' in paragraph 142 that the Crown would be deterred from adopting Treaty compliant measures that may adversely affect an overseas investor 'by claims being made under ISDS' again misrepresents her argument.

130. The evidence already adduced on typologies of the chilling effect, whether it is described as micro and macro, systemic, institutional or psychological, makes it clear that the influences are much broader than the risks of fiscal awards the Crown refers to,[111] and that the scale of the risks involved cannot be quantified. The work of van Harten and others in Canada is seeking to draw on several decades of experience under NAFTA to identify the dynamics. Professor Schneiderman's work, which Associate Professor Kawharu referred to the Tribunal, describes agreements like NAFTA as having constitution-like features that can limit governmental capacity in constitution-like ways.

131. In discussing the powers of the investors, the Crown suggests that nothing in the TPPA arms investors of TPPA parties with injunctive powers.[112] This is wrong. Article 9.21(c) of the TPPA says investor claimants can initiate or continue an action that seeks interim injunctive relief, provided it is for the purpose of preserving the claimants' position during the course of the arbitration.

132. Claimants 2523 are said to be over-simplistic in attributing New Zealand's position on the plain packaging tobacco law to the investment arbitration, and ignoring the WTO dispute.[113] While the cited reference actually talks about UPOV 1991, the discussion on plain packaging in paras 211 and 212 refers to both the investment and WTO disputes.

133. It appears that the Crown does not understand the issues, legal analysis and evidence presented to the Tribunal on the chilling effect.

134. The Crown has also misrepresented the treatment of 'chilling' in the decisions of the Waitangi Tribunal and the Supreme Court in the Water case from the start of the hearing to its closing submissions in para 158.4.

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[111] **Wai 2522 #3.3.27** Crown Closing Submissions para [145]
[112] **Wai 2522 #3.3.27** Crown Closing Submissions para [146]
[113] **Wai 2522 #3.3.27** Crown Closing Submissions para [148]

135. The Crown wrongly claimed that the Waitangi Tribunal and the courts rejected Professor Kelsey's argument on the chilling effect. The Tribunal in the water dispute was prepared to accept the Minister's assurance that the government would not be chilled on that issue, a point recognised by both the High Court and Supreme Court. The substantive argument was never addressed. Professor Kelsey corrected the Crown's error in her 6th affidavit.

136. In this submission the Crown misrepresents the position again.[114] It claims that 'evidence as to the supposed "chilling effect" was presented in the Fresh Water Inquiry … but not made out and were subsequently rejected as constituting any material impairment in Might River Power'. No reference to the court's decision is provided. This continued misrepresentation, having been politely corrected once, is unprofessional.

MINIMUM STANDARD OF TREATMENT

137. The experts were agreed that Article 9.6 Minimum Standard of Treatment is the provision most likely to be invoked by investors in a challenge to a measure relating to te Tiriti or other Crown obligations to Maori. It is also the provision for which application of the Treaty Exception is most problematic. The Crown has proposed an abstract legal interpretation of the standard which it says is based on customary international law and the Tribunal should not question because that would validate an approach that 'flouts customary international law' or 'well established legal thresholds in international trade law'.[115]

138. However, customary international law is a contested concept and even when tribunals say they are applying it, can interpret and apply the rule differently. The interpretive Annex 9-A on Minimum Standard of Treatment refers back to customary international law, so it does not solve the problem. The literature documenting the legal and practice problems the rule is set out in paragraphs 160 to 172 of the claimants' closing submissions.

139. The Crown tries to deny this reality and demands that the Waitangi Tribunal does so to. It says the Tribunal cannot consider how minimum standard of treatment is

[114] **Wai 2522 #3.3.27** Crown Closing Submissions para [158.4]
[115] **Wai 2522 #3.3.27** Crown Closing Submissions para [132.1] and [137]

applied by investment tribunals in the real legal world, but must accept the Crown's technical interpretation and assume, contrary to the evidence, that this is what an investment tribunal will apply. In doing so, the Crown seeks to make the well-documented problems with the minimum standard of treatment disappear.

140. The Crown has another problem with the lack of alternative defences where a breach of a minimum standard of treatment is shown and there is no recourse to the Treaty Exception. The General Exception does not apply to the investment chapter. The practical limits on how a claim can be framed, referred to in paragraph 140, can be easily circumvented.

RESPONSE TO APPENDIX B: RELEVANCE OF THE *BILCON* CASE

141. The Crown has not provided any references from Professor Kelsey's affidavits or transcript or the claimants' submissions to support its sweeping assertions that Professor Kelsey and the claimants have 'misrepresented the finding' of the *Bilcon* decision,[116] and that this was largely used to demonstrate opposition to ISDS more generally. Given the inaccuracy of many other Crown attributions to Professor Kelsey and Associate Professor Kawharu, the Tribunal should pay little regard to assertions in this Appendix.

Relevance of *Bilcon*

142. *Bilcon* is highly relevant to this claim. It is a very recent NAFTA award whose substantive subject matter involved an application for a quarry and harbour outlet. The investor from the US successfully challenged the process and outcome of an environment panel review that heard and acted on community concerns and values, including those of indigenous peoples.

143. The approach by the *Bilcon* majority to the interpretation of customary international law has been strongly criticised for not reflecting state practice and

[116] **Wai 2522 #3.3.27** Crown Closing Submissions, Appendix B. Bilcon, p. 96, para [1]

opinio juris, including by the governments of the United States[117] and Canada [118]. Whether or not that interpretation was considered 'wrong', it is a prior decision that would be considered and applied by other tribunals and represents authority that national regulators will be expected to take into consideration.

144. Concerns that the decision usurped the jurisdiction of Canada's domestic courts are also highly pertinent, given similar concerns expressed by judges and lawyers over the consequences of ISDS for domestic judicial processes more generally.[119]

145. The *Bilcon* majority's interpretation is directly relevant to the interpretation of phrases in the Treaty Exception, notably the comparator for 'more favourable treatment' and the interpretation 'arbitrary or unjustified discrimination' in the chapeau.

Interpretation of Minimum Standard of Treatment in *Bilcon*

146. None of the Crown's points seem substantial to the claimants, but they reject the Crown's interpretation of Professor Kelsey's argument. Again its assertions are not referenced, so the claimants have assumed what it refers to.

147. The Crown may be referring to a section on the interpretation of 'discrimination' in investment disputes in Professor Kelsey's 6th affidavit.[120] That highlighted the *Bilcon* tribunal's statement that the 'minimum standard of treatment' had evolved away from the position in *Glamis* towards greater protection for investors, which the *Bilcon* tribunal illustrated in a quotation from *Merrill and Ring v Canada*. The Crown appears to be objecting that Professor Kelsey did not then address the

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[117] **Wai 2522 # A17** Second Submission of the United States of America, *Mesa Power Group and Government of Canada*, PCA Case No. 2012-17, 7th Affidavit of Professor Jane Kelsey paras [6]-[8].

[118] **Wai 2522 # A 15** Government of Canada, 'Observations on the Award on Jurisdiction and Merits in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc, v Canada*, 14 May 2015. 6th affidavit of Professor Jane Kelsey, Exhibit AC

[119] **Wai 2522 #A15** Chief Justice RS French, Investor-State Dispute Settlement – a Cut Above the Courts?, speech to the Federal Court Judges, Darwin, 9 July 2014, and Chief Justice Sian Elias, Barbarians at the Gate: Challenges of Globalization to the Rule of Law, World Bar Association Conference, Queenstown, New Zealand, 4 September 2014. 6th Affidavit of Professor Jane Kelsey dated 20 January 2016, Exhibits X and Y.

[120] **Wai 2522 #A15** 6th Affidavit of Professor Elizabeth Jane Kelsey dated 20 January 2016 para [48] - [55]

majority's adoption of the test from *Waste* Management – but that was not the point being made in that discussion.[121]

148. Alternatively, the Crown may be referring to Professor Kelsey's detailed explanation in her 6th affidavit of the uncertainty over how the 'minimum standard of treatment' might be interpreted by an investment tribunal. [122] This refers again to its evolution in a pro-investor direction, contrasting the minimum standard of treatment in *Neer* in 1926 to the 'reasonableness' approach in *Merrill and Ring v Canada* in 2010. Professor Kelsey then disputed Dr Ridings' argument that a tribunal that followed due process and adopted the standard in *Waste Management II* was unlikely to be found in breach of fair and equitable treatment. The issues around the *Bilcon* tribunal's interpretation of *Waste Management*, and subsequent US objections to that interpretation in the *Mesa* dispute, are addressed in paras 36 and 37 of the affidavit.

149. The Crown agrees that the majority in *Bilcon* used 'legitimate expectations' to bolster fair and equitable treatment, but takes issue with its approach.[123] The fact that Professor McRae's dissent contested the majority's basis for concluding the investor had legitimate expectations does not alter the majority's decision itself, even if it were accepted as being legally flawed. Nor does it alter the potential for a future tribunal to draw on that analysis and/or take a similar approach when considering legitimate expectations.

150. Indeed, the Crown agrees there is controversy over the scope of 'legitimate expectations'. The attempt to limit its application in Article 9.6.4 of the TPPA is weak, as it only applies where that is the only basis of the investor's argument. However, the investor might simply reframe its arguments or include concerns about due process.

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[121] **Wai 2522 #A17** 7th Affidavit of Professor Elizabeth Jane Kelsey dated 3 February 2016, where Professor Kelsey also clearly acknowledges the adoption of the Waste Management standard by all the arbitrators in Bilcon in para [45]

[122] **Wai 2522 #A 21** 8th Affidavit of Professor Elizabeth Jane Kelsey dated 11 February 2016 para [28] to [37]

[123] **Wai 2522 #3.3.27** Crown Closing Submissions. Appendix B. Bilcon, para [3]

151. This issue is highly relevant to this inquiry. All experts in this claim agree that the minimum standard of treatment is the most likely grounds for an investment dispute, which if successful would lead to consideration of the Treaty Exception.

152. The uncertainty over the interpretation of legitimate expectations is especially important where different governments have taken inconsistent positions over the Crown's obligations to Maori under Te Tiriti or other sources. The investor may source claims to legitimate expectations in a combination of public statements, legislation that reflects those expectations, policy documents, general encouragement to investors to invest under the existing regulatory regime, and specific assurances.

153. This uncertainty also creates conditions for both micro- and macro-chilling of government decisions.

National treatment

154. The Crown agrees with Professor Kelsey that the majority in *Bilcon* used a broad comparator for national treatment, being the equivalent treatment of similar applications in other parts of Canada, and that this potentially expands the range of potential comparators in the application of that rule.[124] It also notes this is consistent with concerns about the unreliability of ISDS arbitration.

155. The Crown's dismissed this as irrelevant, based on its flawed argument on 'more favourable treatment' in the Treaty Exception. If that interpretation is not accepted, this expansive reading of the comparator becomes critical when interpreting the threshold of 'more favourable treatment' and 'arbitrary or unjustified discrimination' in the chapeau.

156. Even were the Crown's tenuous interpretation is accepted by either a state-state or investor-state tribunal there still needs to be a comparator for 'discrimination' in the chapeau. As pointed out by Professor Kelsey, the comparator when 'like conditions prevail' is used to assess discrimination in the General Exception.

[124] **Wai 2522 #3.3.27** Crown Closing Submissions. Appendix B. Bilcon, para [4]

Because there is no such comparator in the chapeau, there is a real prospect that the *Bilcon* majority's expansive approach could be adopted.

Chilling effect in *Bilcon*

157. The Crown seems intent on neutralising Professor McRae's clear and strong warning about the potential chilling effect of the majority's decision in *Bilcon* on future environmental panels.

158. Despite the Crown's (again largely unsourced) assertion that Professor Kelsey has not looked closely at Professor McRae's dissent in *Bilcon*, there is nothing inconsistent in paragraphs 7 and 8 of Appendix B with what Professor Kelsey has argued.

159. In seeking to challenge a comment by Professor Kelsey (the one explicit reference provided in the Appendix[125])[126] the Crown ignores the context of that comment, which was to highlight the difference between Dr Ridings' narrow focus on specific risk assessments of successful challenges to proposed policies, and the more 'systemic' nature of chilling - what the claimants have referred to as 'micro-chilling' and 'macro-chilling',[127] or what Associate Professor Kawharu calls the 'psychological' chilling effect.[128]

160. The broader forms of chilling are at the heart of Professor McRae's warning in the closing section of his dissent in *Bilcon*:

> *This result may be disturbing to many. In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and concluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual. Neither such a result nor the process by which it was reached in this case could ever be said to "offend*

[125] **Wai 2522 # A 17** 7th Affidavit of Professor Jane Elizabeth Kelsey dated 3 February 2016 see para [39]
[126] **Wai 2522 #3.3.27** Crown Closing Submissions, Appendix B. Bilcon para [9]
[127] **Wai 2522 # 3.3.28** Claimants Closing Submissions at [142] to [144]
[128] Transcript, Professor Kawharu, CLO 710 lines 21 to 26

judicial propriety". Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection.[129]

161. Associate Professor Kawharu considered the concerns of Professor McRae in *Bilcon* about the chilling effect were valid.[130]

162. Far from misrepresenting the *Bilcon* findings and failing to consider closely Professor McRae's dissent, Professor Kelsey's analysis of both the majority and minority decisions accords with numerous expert commentaries on the case that were previously annexed to her affidavits, notably in the *Investment Arbitration Reporter*, a major source of commentary on investment arbitration disputes[131] and the specialist trade publication *Inside US Trade*. It also accords with commentaries in Canadian national media and by the Sierra Club, the largest environmental non-government organisation in the USA.

FIT FOR PURPOSE EXCEPTION AND REMEDIES

163. The Tribunal faces the task of identifying practical options that may be taken in relation to the TPPA, with the Crown have ensured that this question can only be considered once the negotiations are concluded. The Crown claims the text cannot be changed, and the claimants accept that may be a political reality. However, it

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[129] *Bilcon v Canada*, Dissenting Opinion of Prof Donald McRae, para 51 (footnote omitted)

[130] **Wai 2522 #4.1.2** Professor Kawharu, Transcript of hearing day 4 session 3 (17 March 2016)X-exam by Sykes p 649 lines 20 and onwards concluding at p 651 lines 15 and p 662 Questions by Doogan J lines 10 – 27

[131] **Wai 2522 #A15** 6th Affidavit of Professor Jane Kelsey: 'Majority of NAFTA Chapter 11 Tribunal Finds National Treatment and Minimum Standard Breaches in Environmental Review of Controversial Nova Scotia Quarry', IA Reporter, 21 March 2015, pp. 3-4. Attached as Exhibit W to 6th affidavit; Jarrod Helpburn, 'On heels of bruising NAFTA loss in Bilcon, Canada offers first sketch of defence to "Lone Pine" fracking case, IA Reporter, 30 March 2015, Exhibit BC to 6th affidavit; Luke Eric Peterson, 'Arbitrators in Clayton/Bilcon case align on jurisdictional questions, but call out over Canada's liability for NAFTA breach in $300 million quarry right', IA Reporter, 21 March 2015, Exhibit BE to JK 6th affidavit; Luke Eric Peterson, 'In NAFTA Dissent, Donald McRae sees chilling effect – and "Remarkable step backwards in environmental protection due to majority ruling', IA Reporter, 21 March 2015, Exhibit BG to 6th Affidavit

does not preclude the Crown taking other steps to address the deficiencies in the protection for the rights and interests of the claims and other Maori.

164. On several occasions the Crown claims that Associate Professor Kawharu agreed with Dr Ridings that 'there was no need to take any steps in terms of the text of the Treaty exception prior to ratification'.[132] The Crown has again cherry picked parts of the transcript to suit its argument. Associate Professor Kawharu was commenting only on paragraph 2 of the Treaty Exception, not the entire provision, in the context of a specific question put to the panel of experts by the Tribunal. She said she did not know what the response would be to dropping the final two sentences. Dr Ridings said she considered it would carry risks of other states seeking more in return. Professor Kelsey proposed a memorandum of understanding that would provide an interpretive tool and stressed the importance of doing so for this agreement because of its scale and the involvement of the litigious US as a party.

165. Again, the Crown cites Associate Professor Kawharu's comment that Dr Ridings revised interpretation was 'reasonable rather than unlikely' but ignores her caveat and later memorandum.[133]

166. The Crown suggests that the phrase 'more favourable treatment' could be 'misconstrued by readers without international trade law expertise as referring only to positive discrimination'.[134] Yet all three experts, who collectively have many decades of expertise in international trade and investment law, held that opinion until Dr Ridings belatedly changed her opinion after receiving external advice.

167. The Crown again misrepresents[135] Professor Kelsey's 'fit for purpose' clause. It ignores the core issue of whether the Treaty should be protected by an exclusion, so as to minimise litigation, or an exception that can be argued as a defence, explained in the commentary to the memorandum submitted by Professor Kelsey and referenced in the Crown's footnote 114. The Crown ignores the square

[132] **Wai 2522 #3.3.27** Crown Closing Submissions, paras [7], [166] and [227]
[133] **Wai 2522 #3.3.27** Crown Closing Submissions para [174]
[134] **Wai 2522 #3.3.27** Crown Closing Submissions para [175]
[135] **Wai 2522 #3.3.27** Crown Closing Submissions paras [168] and [169]

brackets denoting two options for wording and her suggestion that further discussion would be useful, presumably so it could claim Professor Kelsey adopted Dr Ridings criticism that the provision was not self-judging.

168. Likewise, the Crown suggests that by removing a list of specific areas of Crown actions that would be protected by the exception Professor Kelsey accepted another of Dr Ridings' criticisms, when it was based on the drafting of the comprehensive tobacco carveout from Malaysia that avoids the need to specify any policy areas.

Options for the TPPA

169. A number of options emerged in the evidence to deal with the present predicament Maori are faced with and we have set them out in order of preference for our claimants:

1. No ratification unless and until proper protections, including a carveout, are included in the TPPA, as developed through a Treaty-compliant process.

2. Seek bilateral undertakings from other TPPA parties not to dispute the Crown's reliance on the Treaty exception.

3. Seek bilateral memoranda of understanding on interpretation along the lines the Crown contends …

   eg. "in any dispute under Chapter 9 Section B or Chapter 28 relating to actions taken or measures adopted by New Zealand for which New Zealand relies on Article 29.6 Treaty Exception as a defence, the dispute body shall shall only consider whether New Zealand has acted in good faith."

   and an equivalent provision for Annex 18-A on UPOV 1991:

   eg. "in any dispute under Chapter 9 Section B or Chapter 28 relating to Article 18.7.2(d) and Annex 18-A the dispute body shall only consider whether New Zealand has acted in good faith."

Options for future agreements

170. The claimants closing submissions set out the range of ongoing negotiations that need to be engaged with. Multiple avenues of protection need to be considered including:

    a) A carveout as proposed by Professor Kelsey.

    b) Non-conforming measures in Annex II of chapters on cross-border services, investment, financial services and other chapters using a similar mechanism.

    c) Prior and informed consent regarding intellectual property rights.

    d) No ISDS, or at least a requirement of positive consent by the state and affected Maori where a dispute involves measures or actions taken (or not taken), in whole or part to fulfil obligations to Maori.

    e) A guarantee of effective rights of participation by Maori (and other indigenous peoples) in processes of transparency, monitoring consultation, enforcement and future negotiations on matters they consider affect their rights and interests.

    f) An environment chapter with enforceable protections.

    g) Requirements on parties to adopt international instruments that recognise and protect indigenous rights.

    h) Strong preambular reference to rights of indigenous peoples.

171. The claimants do not support the minimalist amendment to the existing Treaty Exception proposed by Associate Professor Kawharu as it does not provide adequate protection.

172. There are two outstanding areas where there is no protection for the Treaty of Waitangi and effective protections need to be inserted:

    (i) The Australia NZ Closer Economic Relations Trade Agreement; and

(ii) The World Trade Organization (there is only the horizontal limitation to National Treatment in the GATS for Maori commercial and industrial undertakings).

MAORI CROWN ENGAGEMENT PROCESS MOVING FORWARD

173. The Claimants consider that the broad range of issues raised in this inquiry require further investigation, feedback from other iwi and Maori groups, as well as feedback and input from other interested parties as a matter of urgency. Although a small proportion of the work identified is currently being undertaken by different government departments, it is submitted that the issues are too important and have been neglected for far too long for them to continue to be left to the Crown to address by itself through an indeterminate and uncertain policy review process.

174. In addition, it will be important for Maori, together with other parties, to play a central part in the solutions to be developed in order to ensure that such solutions are appropriate to address the concerns raised by the claimants, are achievable, and importantly, are both robust and enduring. As a starting point for undertaking the development of a new framework for addressing the interface between tino rangatiratanga and the existing legislative system the following principles are apposite:

a) The broad and active participation of Maori in policy development is necessary:

b) That policy development should be guided by aspirations and expectations expressed directly by Maori; and

c) That there needs to be respect for the rights of traditional communities under national and international law.

175. To achieve this, the establishment of a two tiered process may be considered appropriate requiring the establishment of:

(i) A coordinating Body or Taumata ; and

(ii) A series of Working Groups.

176. The Claimants assert that it is important that any process be open and transparent both in the participation and ongoing accountability to Maori of such bodies as may be established to formulate and articulate the Maori position or positions.

177. As Associate Professor Kawharu cautioned it must be recognised that there is real doubt about whether Maori aspirations, for the purpose of drafting protections for a trade and investment treaty, can be ascertained through roadshows and other forms of consultation. A combination of expertise is needed.[136] There is no doubt this will be a component part of the overall approach and would best be conducted by a working party with relative expertise in Tikanga Maori, the Treaty of Waitangi and its underpinnings, and International law to undertake.

178. The Crown refers to ongoing developments in relation to the engagement strategy between now and ratification of the TPPA, but are bereft of any detail of how that might be achieved.[137]

179. To date the claimants note that the Crown has cherry picked those they have engaged with. While there has been a well documented evidence trail from the Iwi Chairs Forum of their efforts to engage with the Crown following the confirmation of the Crown's intention to formally sign and then ratify the TPPA, no such documentation is available on the public record of the consultation processes that have been effected with other groups like FOMA, Ngati Kahungungu and Te Ora who have also met with Crown representatives on the TPPA and other trade initiatives, although there is very little evidence of any such engagement before this inquiry.[138]

180. Sadly as this Tribunal itself noted:

> *...what is clear is that the extent of engagement with Maori had been limited to selected Maori organisations regarded as stakeholders rather than Maori more generally as Treaty partners. The Crown's decision not to respond to relevant recommendations in the Tribunal's Wai 262 report was*

[136] **Wai 2522 #3.3.12** Introductory Remarks Associate Professor Amokura Kawharu
[137] **Wai 2522, #3.3.27**, Crown Closing Submissions para [67]
[138] **Wai 2522 # A1** 1st Affidavit of Professor Elizabeth Jane Kelsey dated 19 June 2015 pp23- 24 para [64]

also a policy choice but one which heightened our concerns as to whether the Crown had indeed taken steps to properly inform itself of what was required in order to meet its Treaty responsibilities in the negotiation of the TPPA.[139]

181. The claimants maintain that the issues in this claim like the Wai 262 matters before it are so complex and significant that they cannot be addressed in a piecemeal fashion nor in a manner which simply sees the "tinkering" with existing Crown legislation and policy. Finding the way forward must involve good faith and measured negotiation between the Treaty partners, starting from first principles, and according the perspective of tangata whenua an equitable voice, as required by the Treaty relationship.

182. The claimants propose that the Tribunal recommend the immediate commencement of a Communication and Consultation Strategy amongst whanau, hapu and iwi on issues raised by the Wai 2522 claim. UPOV 1991 and the issues raised by the potential privatisation of water are urgent in this respect.

183. The claimants recommend that the Wai 2522 claimants form the nucleus of a group responsible for the Consultation and Communication strategy, with general responsibility for:

a) The raising of awareness among Maori of the key issues;

b) The canvassing of kaitiaki Maori drawn from iwi and hapu to determine foundational principles;

c) The appointment of a "Taumata" representative of kaitiaki Maori drawn from iwi and hapu who can engage with the Crown.

184. The claimants seek a recommendation from the Tribunal that the Crown meet the actual and reasonable costs of the Consultation and Communication Strategy. This is on the basis that the need for appropriate protection in international agreement

[139] **Wai 2522 # 2.5.19** Memorandum of Directions addressing issues for the Inquiry, proposed case studies, Tribunal commissioned expert, disclosure and the inquiry timetable para [16]

arises directly from the Crown's Treaty obligation to guarantee to Maori their tino rangatiratanga over their taonga.

185. The claimants would be open to general discussion with the Tribunal about details of the strategy, such as budget parameters, about how whanau, hapu and iwi are to be grouped for the purposes of consultation hui, and whether an independent facilitator or facilitators are required to assist in the process. Additionally, the claimants would be amenable to continued Tribunal oversight of the Strategy, if that was considered necessary given the inaction by the Crown since the Wai 262 findings in 2008.

186. The claimants believe that such a strategy, if supported by an urgent Tribunal recommendation and subsequent Crown funding, could be commenced in the middle part of 2016. The Crown should provide a good faith undertaking not to advance its further engagement on such international agreements, including those presently in train with the European Union, the Trade in Services Agreement, and the Regional Comprehensive Economic Partnership, among others, until this has been concluded.

187. Following closely behind this strategy the claimants believe that a 'Process of Engagement' between the Taumata and the Crown must be designed and implemented with some immediacy. That should be designed in a way that they would have avenues of recourse to this Tribunal for guidance and facilitation, where necessary, if agreement between the Crown and Maori cannot be found on issues like

    a) the frequency of meetings between the Taumata and Crown representatives:

    b) funding parameters;

    c) issues which are to have primacy in negotiations to ensure active protection of te Tiriti guarantees, and others to which solutions are not so pressing;

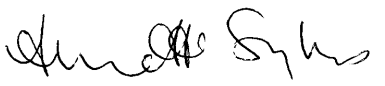
    d) consideration of a "suite of options" for protection such as existing customary law mechanisms, IP mechanisms, legislatives amendments,

certificates of origin, protecting matauranga in public domain (against misappropriation), and other sui generis mechanisms;

e) structural/administrative requirements at local, national and international levels; and

f) processes for the involvement of stakeholders other than the Treaty partners and particularly Crown Research Institutes, and involvement where appropriate of international expertise in this.

Dated at Rotorua this 13th day of April 2016



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