

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

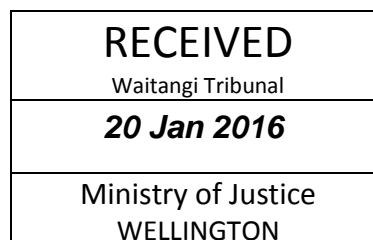
AND

IN THE MATTER OF

**an Urgent inquiry into the Crown's
actions concerning the Trans-
Pacific Partnership Agreement**


Sixth Affidavit of Professor Elizabeth Jane Kelsey

Dated 20 January 2016



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I, **ELIZABETH JANE KELSEY**, of Auckland, Professor of Law, ~~swear~~ affirms that: 

1. This is the sixth affidavit I have given in this inquiry. My credentials and previous publications are set out in my first affidavit (Wai 2522 A1 and Wai 2523 A1). This affidavit should be read alongside my previous affidavits. Where points are of particular significance, or new information has emerged, they have been discussed again and, for the convenience of the Tribunal's expert, the relevant documents have been attached as exhibits.
2. The purpose of this affidavit is to provide expert evidence in support of the claimants' argument that Article 29.6 of Trans-Pacific Partnership Agreement ("TPPA" or "**the Agreement**") entitled Treaty of Waitangi Exception ("**the Treaty Exception**") is inadequate to protect their interests, as illustrated by three case studies on hydraulic fracturing ("**fracking**"), affordable medicines and fresh water.
3. I have treated the case studies as hypothetical, but needing to be based on a credible argument that the Crown has Treaty obligations or other responsibilities to Maori that may be negatively impacted upon by the TPPA. For this purpose, it has been necessary to establish that there are potential grounds for such claims and identify some possible remedies that might be sought, without purporting to establish the validity of those claims or prejudge what other remedies might be sought.
4. This affidavit is structured in six parts:
 - (i) The status of the text of the TPPA, including the potential for changes that are relevant to the claim and the case studies;
 - (ii) The meaning and coverage of the Treaty Exception;
 - (iii) The Case Study on Fracking: (a) its rationale, (b) the impact of the TPPA, and (c) adequacy of the Treaty Exception to protect Maori interests;
 - (iv) The Case Study on Affordable Medicines: (a) its rationale, (b) the impact of the TPPA, and (c) adequacy of the Treaty Exception to protect Maori interests;

(v) The Case Study on Fresh Water: (a) its rationale, (b) the impact of the TPPA, and (c) adequacy of the Treaty Exception to protect Maori interests; and

(vi) Concluding comments.

(i) The TPPA Text

5. Negotiations for the Agreement were concluded at the meeting of ministers in Atlanta, USA on 5 October 2015. The text was formally released on 5 November 2015. The legal scrubbing is now reportedly completed. The New Zealand government has announced that it will host the signing of the TPPA by ministers from all 12 countries in Auckland in early February 2016. The government of Chile has said this will take place on 4 February 2016, but the New Zealand government has yet to confirm the specific date.¹
6. A number of side-letters have been agreed between two or more of the TPPA parties. These are not formally part of the Agreement and are not subject to its enforcement mechanisms, unless the side-letter expressly says so.² However, they modify the terms of the Agreement in relation to those parties; for example, Australia and New Zealand have agreed not to allow their home investors to use the investor-state dispute mechanism against the other country.³ Presumably these side letters will be signed at the same time as the Agreement itself. However, there is nothing to prevent further side letters being agreed after the signing.
7. In an expert paper written as part of a series supported by the New Zealand Law Foundation I have explained the process to be followed from the time negotiations were concluded in October 2015 and the Agreement coming into force.⁴ Assuming the TPPA is signed on 4 February 2016:

¹ 'TPP Countries Plan for Feb. 4 Signing in New Zealand; Legal Scrub Done, *Inside US Trade*, 7 January 2016. Attached as Exhibit A.

² Article 28.3.3

³ Hon Tim Groser to Hon Andrew Robb, undated, <http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand%20%20Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf>. Attached as Exhibit B.

⁴ Jane Kelsey, 'The TPPA: Treaty Making, Parliamentary Democracy, Regulatory Sovereignty and the Rule of Law', Expert Paper #1, December 2015. Attached as Exhibit C.



- (i) The TPPA can come into force once all parties have notified completion of their domestic processes;
 - (ii) If that does not occur within two years of signing, but six or more of the original parties, comprising 85% of the GDP of the parties, have given notification, the TPPA can come into force after 60 days (meaning two years plus 60 days after signing); and
 - (iii) If two years passes without the second option being met, the Agreement comes into force 60 days after the date on which six or more of the original parties, comprising 85% of the GDP of the parties, have given notification.⁵
8. The process is significant for this claim because the US economy comprises 60% of the combined GDP of the parties, which means the Agreement cannot come into force without the US notification of completion of its domestic processes. The US domestic processes include passage of implementing legislation through Congress and the certification of New Zealand's compliance. These will have to be met before the TPPA can become effective for New Zealand.⁶
9. Reports from the US show that leading members of the US Congress whose support is considered essential to the approval of the implementing legislation and completion of certification are seeking changes to the agreed content of the TPPA.⁷ So are the most powerful US business lobbies, which have considerable influence within Congress.⁸
10. Their principal concerns include the exception that allows a party to block an investor or investment's resort to an investor-state dispute over a tobacco control measure, and the period of the marketing monopoly for biologic medicines. The impacts of the TPPA in both these areas form part of this claim, and the biologics issue is discussed further below in relation to the second case study.

⁵ Article 30.5

⁶ It is unclear how individualised certification fits with the formula for the TPPA to come into force.

⁷ 'TPP Faces Uncertain Future, With Lawmaker Objectives, Elections Looming', *Inside US Trade*, 7 January 2016. Attached as Exhibit D.

⁸ 'Donohue: Fixing TPP Issues Vital to Gaining Congressional Support', *Inside US Trade*, 14 January 2016. Attached as Exhibit E.

11. Significantly, those members of Congress and corporate lobby groups do not appear to be seeking the renegotiation of the actual wording of the text, but rather the negotiation of side-letters and implementation commitments from the other parties, which could have an equivalent effect.⁹ This strategy has previous been used in a number of agreements, as the statement from the US Chamber of Commerce in January 2016 points out.¹⁰ A Japanese official has promoted the same approach.¹¹
12. I have discussed this legal and political context because it means, in my opinion, there is a reasonable possibility that the text agreed to in October 2015 and (presumably) signed on 4 February 2016 does not reflect the final obligations New Zealand is required to adopt as a condition for the Agreement coming into force and to which the Treaty Exception would relate. It is necessary to consider, in particular, the potential for changes in the areas that have been targeted by influential players on the US side.
13. It also means that New Zealand could propose its own side letter to the other TPPA countries that could supplement the Treaty Exception and provide comprehensive protection for any measures taken by the Crown to the benefit of Maori.

(ii) The Treaty of Waitangi Exception

14. The Treaty of Waitangi Exception was discussed in paragraphs 85 to 97 of my first affidavit dated 15 June 2015, which assumed it would replicate the exception in previous New Zealand free trade and investment agreements since 2001. Article 29.6 of the final text confirms that assumption.

⁹ 'Biz Groups Voice Qualified TPP Support; Chamber Stresses Implementation', *Inside US Trade*, 7 January 2016. Attached as Exhibit F.

¹⁰ The US Chamber indicated a focus 'up to entry into force and beyond to ensure the deal was properly interpreted, implemented and enforced'. Vicki Needham, 'US Chamber announces support for TPP', *The Hill*, 6 January 2016. Attached as Exhibit G.

¹¹ 'Japanese Official Holds Door Open to TPP Fixes Without Renegotiation', *Inside US Trade*, 24 November 2015. Attached as Exhibit H.



15. I have since analysed the exception further in an expert paper on the TPPA and the Treaty of Waitangi co-authored with Carwyn Jones, Dr Claire Charters and Andrew Erueti and peer reviewed by Moana Jackson.¹²

Scope of the Exception

16. The Agreement is between state parties, although it also uniquely empowers foreign investors from those states in ways not available to others, including Maori. Affected Maori have no standing under the TPPA and are therefore totally dependent on the Crown for the active protection of their rights under its terms and in its application, including the Crown's willingness to take measures that may be challenges and to rely on the Treaty Exception to justify them.
17. It could be argued that the Crown has that status now. But there are terms of the TPPA (for example, in relation to affordable medicines) and liabilities (for example, an investor-state dispute over regulation of fracking or freshwater or enforcement of an investment agreement relating to mining) that did not exist previously, and which the Crown may cite as a new basis for not taking action or which might deter the Crown from implementing its Treaty obligations.
18. The comprehensiveness of the Treaty Exception and the willingness of the Crown to use it are therefore crucially important.
19. Article 29.6 is not a carve out or an exclusion, but rather an exception that provides a legal defence to an allegation that New Zealand has breached the TPPA. The first hurdle for the claimants is that the Crown must be prepared to invoke the exception – a decision that Maori have no right of input into under the Agreement. Nor do Maori have any right of participation in a hearing where the Treaty Exception is, or could be, pleaded, even as an interested party to the dispute.
20. The Treaty Exception has a number of elements that determine whether and when it applies:

¹² Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, 'Maori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement', Expert Paper #3, January 2016. Attached as Exhibit I.

- (i) New Zealand (effectively the Crown) deems it necessary to take some action in relation to Maori;
- (ii) the rationale for such action is the Crown's belief that either;
 - a. Maori have rights, and the Crown has obligations, under the Treaty of Waitangi; or
 - b. given the phrase 'including the Treaty of Waitangi', the Crown is motivated by another rationale, such as compliance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) or other international human rights instruments such as International Labour Organization Convention 169, or to improve social equity; and
- (iii) the Crown's action involves some 'more favourable' treatment of Maori;
- (iv) the Crown's action is arguably inconsistent with its obligations under the TPPA; and
- (v) the action is not protected by some other proviso or exception in the text.

21. For the Treaty Exception to benefit the claimants and other Maori in relation to an interest that is potentially affected by the TPPA the Crown must perceive that interest as legitimate and requiring it to take action, even if that action might put New Zealand in breach of the Agreement. There are numerous areas of dispute between the Crown and Maori where the Crown has denied the legitimacy of an interest, even where the Waitangi Tribunal has held one exists, or refused to take action to remedy it.¹³ In such a situation, the Treaty Exception *ipso facto* fails to provide active protection to Maori and, in my opinion, the Crown is in breach of its Treaty obligations.

More favourable treatment

22. The Treaty Exception only protects Crown action that involves some 'more favourable treatment' towards Maori. Where the Crown deems action is necessary

¹³ eg. Michael Cullen, 'Waitangi Tribunal Report "Disappointing"', 8 March 2004. Attached as Exhibit J; Pete Hodgson, 'Government response to Waitangi Tribunal's Petroleum Report', 21 November 2003. Attached as Exhibit K.

for the above reasons and that action allegedly breaches New Zealand's obligations under the TPPA, but it does not involve more favourable treatment towards Maori, the exception is not available as a defence.

23. That was the situation with the requirement in the TPPA that New Zealand adopt the International Convention for the Protection of Plant Varieties 1991 (UPOV 1991), and which the government belatedly sought to remedy through an alternative provision that is now Annex 18A to Article 18.7.2 of the intellectual property chapter. This was not in the previous leaked draft of the chapter from May 2014. The government's move effectively concedes the inadequacy of the Treaty Exception to excuse New Zealand from complying with a broad obligation through action that is not explicitly more favourable to Maori. I have argued that this new provision still does not provide full protection because it imports some of the problematic elements of the Treaty Exception.¹⁴
24. Identifying the scope of the Treaty Exception requires clarity about the meaning of 'more favourable treatment'. The following discussion is speculative and intended to highlight the uncertainty of meaning. I am happy to discuss the jurisprudential arguments in more detail subsequently if required.
25. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) requires the terms of a provision to be given an ordinary meaning in their context and in the light of their object and purpose.
26. One context is the text of the Agreement. The term 'more favourable treatment' is familiar from the 'national treatment' and 'most-favoured-nation' provisions on trade in goods, cross-border services and investment in free trade and investment agreements like the TPPA.
27. The foreign good, service or service supplier is entitled to treatment no less favourable than that given to 'like' goods, services or service suppliers. An investor or covered investment must receive treatment no less favourable than domestic investors or investments in 'like' circumstances. There is no explicit

¹⁴ in Sanya Reid Smith and Burcu Kilic, 'General provisions – other treaties to join – International Convention for the Protection of New Varieties of Plants 1991 (UPOV91), Public Citizen/Third World Network, pp.3-6. Attached as Exhibit L.

'likeness' test for more favourable treatment in the Treaty Exception, which raises the question 'more favourable than what or whom?' The legal context, and the need for consistency to reduce the risk of uncertainty, suggests the term should be given a similar meaning to those other provisions by importing a likeness test. That would raise quite complex jurisprudential arguments,¹⁵ complicated further by what 'like' means when comparing with the treatment of Maori.

28. The textual context is also difficult when considering what *kind* of discrimination might be covered by the Treaty Exception. The commercial context of the Agreement suggests the favourable treatment is of a commercial nature. That narrow meaning would be consistent with the original horizontal limitation in New Zealand's schedule to the General Agreement on Trade in Services (GATS) for national treatment, which referred to

future measures at the central and sub-central levels according more favourable treatment to any Maori person or organisation in relation to the acquisition, establishment or operation of any commercial or industrial undertaking.¹⁶

29. However, the objective of the Treaty Exception, and the substitution of a new more substantive exception than in the GATS, implies a broader meaning. That might include non-commercial advantages, such as weighted considerations in a decision making process. But it would be a stretch to interpret it to mean the outcomes are preferential to Maori, even if the treatment itself is not.
30. Article 31.4 of the VCLT allows a term to be given a special meaning if it is established that was intended. Unfortunately, there is nothing to show that intention or what an alternative scope might include. In anticipation of this problem I applied to the Minister of Trade Negotiations on 2 November 2015 under the Official Information Act for the background documentation on the drafting of the Treaty Exception that replaced the GATS limitation in 2001.

¹⁵ eg. Mireille Cossy, 'Determining "Likeness" under the GATS; Squaring the circle?', WTO Staff Working Paper ERSD-2006-08, September 2006. Attached as Exhibit M; see also *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04. Attached as Exhibit N.

¹⁶ 'New Zealand: Schedule of Specific Commitments', GATS/SC/62, 15 April 1994, p.8. Attached as Exhibit O.

However, everything that might be helpful in doing so was withheld or redacted from the documents that were supplied.¹⁷ As it stands, the scope of 'more favourable treatment' is uncertain and would be left to a dispute tribunal to decide.

Other protections

31. The Crown only needs to rely on the Treaty Exception if there is a breach of the rules and the safeguards provided in individual chapters or Chapter 29 Exceptions do not protect the measure. None of those safeguards explicitly refers to indigenous peoples.
32. The Preamble to the TPPA and Article 10.8.2 of Chapter 10 Cross-border Services recognise 'the right to regulate'. However, this does not mean that governments have the right to regulate *as they see fit*. It means the government can regulate in ways that comply with the TPPA rules.¹⁸
33. Article 9.15 of the Investment chapter allows a Party to do what the chapter allows it to do: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."
34. Annex 9-B on Expropriation in the Investment chapter says: '*Non-discriminatory* regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, *except in rare circumstances*.' It does not protect a Crown action that is discriminatory or where another state or investor convinces an arbitral tribunal the action fell within the open-ended phrase a 'rare circumstance'.
35. Article 18.50 of the Intellectual Property chapter allows measures for public health in accordance with the WTO Declaration on TRIPS and Public Health 2001, any

¹⁷ Joana Johnston to Jane Kelsey, 18 December 2015. Attached as Exhibit P.

¹⁸ The panel in the WTO dispute *US-Gambling* (Panel Report, WT/DS/285R), 2004 said: 'Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.' p.209, para 6.316. Attached as Exhibit Q.



waiver granted by the WTO in accordance with the Agreement to implement that Declaration, or any amendment to that Declaration as between the TPPA parties. This is not applicable for the purposes of this claim as it applies to a national emergency or epidemic and has complex implementation requirements that would not apply to the circumstances of Case Study 2.

36. Chapter 29 Exceptions imports the general exceptions from the World Trade Organization's agreements on goods and services.¹⁹ These provisions allow the government to adopt measures that are inconsistent with the TPPA rules for reasons that include public health, environment, conservation, public order or morality. However, they have only fully succeeded in one out of 44 cases where there were invoked as a defence in the WTO.²⁰
37. Both versions contain multi-layered requirements that are very difficult to fulfil. The government's choice of measures must satisfy a 'necessity' test, which requires it to justify the measure adopted when viable and less burdensome alternatives were available. The defence can also fail if the measure is considered 'arbitrary or unjustifiable discrimination' between countries where like conditions prevail, or a disguised restriction on the relevant form of cross-border commerce.
38. Moreover, the General Exceptions only apply to certain chapters, and do not apply to those on investment, intellectual property or government procurement. Again, I am happy to provide more legal argument regarding these exceptions if that would be of assistance.

Legal Challenge to the Treaty Exception

39. The only element protected from legal challenge under Article 29.6.2 is the Crown's interpretation of the Treaty of Waitangi and its assessment of its obligations under the Treaty.
40. However, the exception is also explicitly self-judging in relation to the Crown's assessment of its need to act more generally. The language 'it deems necessary'

¹⁹ Article XX GATT and Article XIV GATS

²⁰ 'Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception', Public Citizen, Washington DC, August 2015. Attached as Exhibit R.



is similar to the security exception (Article 29.2 in the TPPA), which is generally viewed as self-judging.²¹ While the Crown may need to explain its reasons, the decision that it is necessary to take action will be treated purely as subjective, and arguably precludes any examination of a rationale that is based on an obligation other than the Treaty, or whether New Zealand has shown its action was 'necessary' in relation to those obligations.²²

41. On the other hand, because paragraph two only excludes the interpretation of the Treaty from review it could be inferred that the Crown's judgement on non-Treaty obligations, or the necessity of action, might be impugned.

The chapeau

42. Paragraph 2 is explicit that a measure can be challenged as 'arbitrary' or 'unjustified' discrimination or a disguised barrier to international trade. This is standard terminology from the WTO general exception provision. A similar term is found in the chapter on sanitary and phytosanitary measures. Both terms have been developed in slightly different ways in WTO jurisprudence. However, for reasons explained below, there is no guarantee that the WTO interpretations would be applied in a state-state dispute under the TPPA, let alone an investor-state dispute, or that the jurisprudence developed in the WTO is appropriate for assessing discrimination in the context of indigenous rights.
43. The equivalent chapeau in the General Exception refers to measures *being applied in a manner that would constitute* such results. Reference in the Treaty Exception to '*as a means*' to those effects implies intention and a higher level of protection. The chapeau in the Treaty Exception also refers to 'arbitrary or unjustified' discrimination, rather than 'arbitrary or unjustifiable' in the General Exception.
44. For the purpose of this affidavit I consulted the WTO's analytical index. Its discussion of the *US — Poultry (China)* dispute that examined the term 'arbitrary

²¹ eg. Roger Paul Alford, 'The Self-Judging WTO Security Exception', 2011 *Utah Law Review* 697. Attached as Exhibit S.

²² 'Necessary' has a specialist meaning in trade agreements. Panagiotis Delimatsis, 'The Principle of Necessity in the WTO - Lessons for the GATS Negotiations on Domestic Regulation', Tilburg Law School Research Paper No. 04/2014. Attached as Exhibit T.



or unjustifiable' in the General Exception and Agreement on Sanitary and Phytosanitary Measures²³ provides a useful point of reflection.

45. The Panel in *US — Poultry (China)* drew on customary rules for interpretation in the VCLT when examining the terms 'arbitrary or unjustifiable', starting with the ordinary dictionary meaning:

A dictionary definition of the term 'arbitrary' is 'based on mere opinion or preference as opp. to the real nature of things, capricious, unpredictable, inconsistent.' In turn, the term 'unjustifiable' is defined as 'not justifiable, indefensible' with 'justifiable' meaning '[c]apable of being legally or morally justified or shown to be just, righteous, or innocent; defensible' and '[c]apable of being maintained, defended, or made good.'²⁴

46. The panel observed that, when considering the chapeau in the General Exception provision of the GATT, the Appellate Body Reports in *US — Gasoline* and *US — Shrimp* suggested the analysis of whether a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale for its existence. In *Brazil — Retreaded Tyres*, the Appellate Body's analysis focused on whether there might be a legitimate cause or rationale for the discrimination in light of the objectives recognised in the general exception. An assessment of whether discrimination is 'arbitrary or unjustifiable' should be made in light of the measure's objectives and whether there is a rational connection between the stated objective of the measure and the discrimination.²⁵
47. These observations are pertinent to interpreting the chapeau in the Treaty Exception, especially as the objective of the exception is to permit some degree of preferential or discriminatory action. The variation in wording in the Treaty Exception arguably adds the element of intention to this reasoning. That said, it is quite unpredictable how a state-state tribunal might interpret the untested provision outside the WTO.

²³ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_02_e.htm#230

²⁴ *US — Certain Measures Affecting Imports of Poultry from China*, Panel Report, WT/DS392/R, 29 September 2010, p. 131, para. 7.259. Attached as Exhibit U.

²⁵ *US — Poultry (China)* p.131-132, para 7.260-7.261. Attached as Exhibit U.



Interpreting Discrimination in Investment Disputes

48. The interpretation of similar terminology in investment arbitration is different and much more unpredictable. In perhaps the most directly pertinent case, *Piero Foresti v South Africa*, the foreign investor argued the requirements of the post-apartheid Black Empowerment Act were discriminatory.²⁶ Unfortunately, the documents relating to the arbitration, aside from the final award issued after the parties reached a settlement, remain confidential.
49. A recent dispute under NAFTA was brought by US investor Bilcon against Canada over the refusal of a Joint Review Board, comprising federal and provincial levels, to grant a permit for a quarry and maritime outlet. The investor argued that decisions made by both regulators and the Joint Review Panel were arbitrary and discriminatory and that they suffered prejudice as a result.²⁷
50. Bilcon argued discrimination in the context of national treatment pointing to three similar projects that had been granted permits without being subject to the same community panel process. The majority of the arbitrators took a broad approach to 'like circumstances' of the various investments being compared, extending to the treatment of businesses across entirely different sectors or industries.²⁸
51. The investor also claimed the discrimination was a breach of fair and equitable treatment, which incorporated claims to arbitrary and discriminatory treatment. It proposed a broad meaning of discrimination included 'discriminatory and unfair evidence'.²⁹
52. The Tribunal observed with reference to the minimum standard of treatment (Article 9.6 in TPPA) that 'NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis*,^[30] and rather move towards the view that the international minimum standard has evolved over the years

²⁶ *Piero Foresti, Laura de Carli and Others v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01. Attached as Exhibit V.

²⁷ *Bilcon v Canada*, para 387. Attached as Exhibit N.

²⁸ The Tribunal engaged in a lengthy discussion from pp194-215. For analyses see Luke Eric Peterson, '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.

²⁹ *Bilcon v Canada*, para 392. Attached as Exhibit N.

³⁰ Referring to *Glamis Gold Ltd v The United States of America*, UNCITRAL, Final Award 8 June 2009



towards greater protection for investors.³¹ It cited the Tribunal in *Merrill and Ring v Canada*³² as saying that 'Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA Tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention.'³³ Contrary to *Glamis*, the tribunal in *Merrill and Ring* explicitly found that

there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.³⁴

53. That final observation regarding reasonably relied-on representations raises a further concern that an investor might claim arbitrary or unreasonable discrimination where one government has publicly rejected a matter as being a Treaty or other form of obligation on the Crown requiring action and another government disagrees, accepts and acts on that obligation to the detriment of the investor.
54. The *Bilcon* case is especially relevant to Case Study 1, and its criticism of the panel's decision based on community objections, and the concerns of the dissenting arbitrator about the chilling effect of the decision, are discussed there.
55. My purpose in briefly rehearsing the case law is not to assess its application to the Treaty Exception, but to highlight three points. First, differences can be expected between state-state and investor-state tribunals, making interpretation unpredictable. Second, investors have been willing to challenge decisions designed to redress historical discrimination. Third, recent investment tribunals have taken a broad pro-investor approach when interpreting discrimination in the context of both national treatment and a minimum standard of treatment.

³¹ *Bilcon v Canada*, para 435. Attached as Exhibit N.

³² *Merrill and Ring Forestry L.P. v Government of Canada*, UNCITRAL, Final Award 31 March 2010

³³ *Bilcon v Canada*, para 435. Attached as Exhibit N.

³⁴ *Bilcon v Canada*, para 444. Attached as Exhibit N.



56. The Treaty Exception can be pleaded in both a state-state and an investor-state dispute. These are quite distinctive forums, but raise a common concern that the arbitrators' expertise is in trade or investment law and practice. They are not required to have expertise in indigenous law, knowledge, or practices of individual, and indeed are unlikely to do so, which will disadvantage a defence that requires an understanding of those nuances, especially in assessing likeness or arbitrary or unjustified discrimination.

State-State Disputes

57. In a state-state dispute, each state party chooses an arbitrator from a list of experts in international trade law or negotiations submitted by the TPPA parties. The disputing parties, and failing that their panellists, are required to agree on a chair. There is a special requirement that arbitrators have appropriate expertise where a dispute involves the labour, environment or anti-corruption chapters,³⁵ but there is no similar requirement for a dispute involving the Treaty Exception.
58. The panels in a state-state dispute are only required to refer to WTO jurisprudence where the rule has been imported from the WTO,³⁶ such as the General Exception. Obviously, there is no WTO jurisprudence on the Treaty Exception. While tribunals can be expected to refer to existing jurisprudence on terms that are familiar, but not identical, to trade agreements, that cannot be directly transposed into a context directed to indigenous peoples and be assumed to carry the same meaning.
59. Non-state actors with an interest, whether a corporation, non-government organization or iwi, can *ask the panel to consider* accepting written submissions to help it evaluate the submissions and arguments. By implication, their contribution is limited to the issues being pleaded and arguments being made.³⁷ Panels can also call on experts where the parties agree.³⁸ But there is no *right* of Maori to participate, even as an *amicus curiae*.

³⁵ Article 28.9.3-6

³⁶ Article 28.11.3

³⁷ Article 18.12.1(e)

³⁸ Article 28.14



60. Hearings will be in public,³⁹ and will be held in the country of the party,⁴⁰ unless the parties to the dispute agree otherwise. This would make it easier for Maori to monitor. Parties must also make 'best efforts' to publish submissions as soon as possible,⁴¹ but no later than the final panel report - when the dispute is over. The right to protect confidential information could undermine this openness.⁴²
61. There is no appeal.

Investor-State Disputes

62. My first affidavit set out concerns with investor-state dispute settlement contained in earlier leaked drafts.⁴³ The final text of the TPPA made some changes, but did not address the fundamental objection that ISDS lacks the characteristics of a credible and independent legal process and effectively subordinates national judicial processes as the appropriate legal forum for a privileged class of foreign investors.⁴⁴ Decisions of domestic courts and tribunals, including action taken on the basis of recommendations of the Waitangi Tribunal or environment court decisions,⁴⁵ can still be challenged under ISDS and domestic appeal and review processes effectively bypassed.⁴⁶
63. There is no formal or reliable system of precedent and no appeal.⁴⁷ The TPP Commission, comprising all the parties, can issue a binding interpretation of a

³⁹ Article 28.12.1(b)

⁴⁰ Article 28.12.1(h)

⁴¹ Article 28.12.1(d)

⁴² Article 28.12.1(f)

⁴³ Paragraphs 38-43.

⁴⁴ See the concerns expressed by Chief Justice RS French, 'Investor-State Dispute Settlement - a Cut Above the Courts?', speech to Federal Court Judges, Darwin, 9 July 2014. Attached as Exhibit X. Referred to with approval by Chief Justice Sian Elias in 'Barbarians at the Gate: Challenges of Globalization to the Rule of Law', speech to the World Bar Association Conference, Queenstown, New Zealand, 4 September 2014, p.3. Attached as Exhibit Y. An Open Letter from more than 100 Jurists to the Negotiators of the Trans-Pacific Partnership Agreement Urging the Rejection of Investor-State Dispute Settlement, 8 May 2012. Attached as Exhibit Z.

⁴⁵ eg. *Eli Lilly v The Government of Canada*, ICSID Case no. UNCT/14/2, Notice of Intention to Submit a Claim. Attached as Exhibit AA; *Bilcon v Canada*. Attached as Exhibit N.

⁴⁶ eg. *Bilcon v Canada*, especially the dissenting opinion of Prof Donald McRae. Attached as Exhibit AB. Discussed by the Canadian government: '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*' in relation to *Mesa Power Group LLC v Government of Canada*, 14 May 2015, at para 13. Attached as Exhibit AC.

⁴⁷ In Article 9.22.11 the parties will merely consider whether any appellate mechanism developed in other institutional arrangements should apply to disputes under the TPPA.



provision,⁴⁸ including the Treaty Exception, which is supposed to bind the investment tribunal. However, the parties may not reach agreement.⁴⁹ Even if they do, arbitrators have disregarded parties' interpretations in the past.⁵⁰

64. Investment tribunals remain ad hoc with the arbitrators selected by the parties.⁵¹ Consideration of a proposed code of conduct for arbitrators is not required until the Agreement comes into force,⁵² so it is impossible to assess whether it will seriously attempt to address the conflicts of interest that arise when practicing investment lawyers also act as arbitrators.
65. From the perspective of regulatory sovereignty and Crown accountability, the other major issue arising from ISDS is known as the 'chilling effect'. Nobel laureate in economics Joseph Stiglitz recently described the chilling effect as not just a by-product of an effort to protect investor capital, but as the underlying design objective:

[T]hose supporting the investment agreements are not really concerned about protecting property rights, anyway. The real goal is to restrict governments' ability to regulate and tax corporations – that is, to restrict their ability to impose responsibilities, not just uphold rights. The (intended) effect is to chill governments' legitimate efforts to protect and advance citizens' interests by imposing regulations, taxation, and other responsibilities on corporations.⁵³

66. I argued this point in the water case. The Crown produced a promise from the Prime Minister that the government would not be chilled by the threat of an investment dispute in that instance. The Crown was wrong in saying the Waitangi

⁴⁸ Article 27.2.2.f

⁴⁹ Article 9.24.3 and 9.25.2

⁵⁰ For example, in *Railways Development Corporation v Republic of Guatemala*, ICSID Case no ARB/07/23, Final award 29 June 2012, a dispute under the Central American Free Trade Agreement (CAFTA), the tribunal suggested in paras 216-18 the interpretation argued by the state parties reflected a wrong understanding of the law, and it chose an alternative interpretation. Discussed in Lori Wallach and Ben Beachy, 'Rebutting Misleading Claims Made by Industry with Respect to *RDC v Guatemala* Award: CAFTA Tribunal Rejected CAFTA Parties' and CAFTA Annex 10-B's Definition of CIL Based on State Practice, Imported Past Tribunals' MST Standard', Public Citizen, 17 November 2012. Attached as Exhibit AD.

⁵¹ Article 9.21

⁵² Article 9.21.6

⁵³ Joseph Stiglitz, *South Africa Breaks Out*, Project Syndicate, 5 November 2013. Attached as Exhibit AE.

Tribunal and court rejected my argument. The Tribunal in the water case was prepared to accept the Minister's assurance, a point that was recognised by the High Court and Supreme Court. But the substantive issues were never addressed. Assurances of that kind cannot be produced for every policy, action or decision in which Maori have an interests and which may potentially be challenged.

67. This is not the place to canvass the growing critique of investor-state arbitration, but it is appropriate to include some extracts from the statement by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, to the UN General Assembly in October 2015. The thematic section of her report analysed the impacts on indigenous peoples of international investment agreements and investment chapters of free trade regimes like the TPPA.⁵⁴
68. Ms Tauli-Corpuz said that those agreements, as currently conceptualised, 'had actual and potential negative impacts in indigenous peoples' rights, in particular on their rights to self-determination; lands, territories and resources; participation; and free, prior and informed consent'. Given the multitude of mining and petroleum projects, agribusiness investments, special economic zones, tourism developments, and infrastructure projects taking place across almost all of the world's continents, often on indigenous lands, she predicted that conflicts between land rights and investment and free trade agreements would become more common with indigenous peoples bearing a disproportionate burden of those conflicts.
69. This impact would compound the unequal power relations between indigenous peoples and corporations and states. The asymmetry of very strong rights and enforcement mechanisms conferred on states and private actors contrasted with 'soft' international law responsibilities and the inability of indigenous peoples to effectively legally challenge corporate practices that violated their rights. She singled out the 'chilling effect' that may constrain a state from acting in the public interest for fear of massive arbitration and settlement costs, which 'could reduce the often already-low political will of States to take actions to fully implement the rights of indigenous peoples'.

⁵⁴ Statement by the Special Rapporteur on the rights of indigenous peoples to the UN General Assembly, 20 October 2015. Attached as Exhibit AF.



70. The Rapporteur recognised there could be benefits from these agreements and proposed to examine those in a later report. She also welcomed the inclusion of exception clauses for indigenous peoples, but noted that little information on them was available.

Case Study 1: Fracking

(i) *Rationale for the Case Study*

71. The practice of hydraulic fracturing or fracking to extract oil and gas from shale rock is increasingly common. Its negative impacts have made it highly controversial internationally, with a growing number of countries adopting bans or moratoria including Wales and Scotland, Germany, France, Bulgaria, South Africa and the Netherlands, numerous states in the USA including Maryland, New York State, Texas, California, Ohio, Hawaii, and the provinces of Newfoundland and Quebec in Canada.⁵⁵ These decisions were principally on a precautionary basis pending more research and resulted from diverse processes including parliamentary votes, judicial and quasi-judicial bodies, and referenda.
72. New research is constantly emerging that supports calls for stronger regulation and either bans or moratoria. A recent example is a major scientific study in Britain released in June 2015, which called for an EU-wide moratorium until widespread regulatory reform was undertaken.⁵⁶
73. Indigenous peoples are opposing mining-by-fracking in a number of countries. Indigenous Mapuche in Argentina sent an open letter to US mining company Apache Corporation in March 2015 detailing the impacts of its activities in their territory on the health and wellbeing of their people, on water and the environment and on their spiritual world, and the price they have paid during years of protest against Apache's operations.⁵⁷ A campaign to stop a proposed coalmine near

⁵⁵ A list of bans with links is maintained on the website of Keep Tap Water Safe, <http://keepapwatersafe.org/global-bans-on-fracking/>. Attached as AG.

⁵⁶ Andy Rowell, 'Fracking poses a "significant" risk to humans and wildlife, says a new report', *The Independent*, 21 June 2015. Attached as Exhibit AH. <http://www.independent.co.uk/environment/fracking-poses-significant-risk-to-humans-and-should-be-temporarily-banned-across-eu-says-new-report-103>

⁵⁷ 'Mapuche resist Apache Corporation in Argentina: An Open Letter', *EarthFirst Journal*, 17 March 2015. Attached as Exhibit AI



Montana tribal land in the USA has raised the question of whether that opposition might trigger an ISDS dispute under the TPPA.⁵⁸

74. There is a long history of Maori opposition to mining in New Zealand. In May 2013 the government amended the Crown Minerals Act 1991 to criminalise various protest activities,⁵⁹ following non-violent direct action by Greenpeace and Te Whanau a Apanui in 2011 against exploration in the Raukumara Basin by the state-owned Brazilian company Petrobras.⁶⁰ More protests by iwi and other New Zealanders, increasing mining activity with a heavy reliance on fracking, and the international trend to stricter regulation, mean future New Zealand governments will face pressure to regulate fracking more intensively, including the adoption of a moratorium or ban.

Fracking in New Zealand

75. The Petroleum Exploration industry claims that fracking can 'help grow New Zealand's \$3 billion a year oil and gas industry to \$12 billion a year. This means more jobs, taxes, investment, and innovation and a secure energy supply for New Zealanders.'⁶¹
76. The practice has been used in New Zealand since 1989. It has been centred in Taranaki, where oil and gas companies have been undertaking fracking operations in Taranaki since 1993, with increased activity occurring since 2007. During this time more than 43 fracking activities have been undertaken in 28 wells. The depth of these wells varies between 1.15 kilometres and 4 kilometres underground.⁶² Fracking has also been used to extract coal seam gas in Southland, the West Coast

⁵⁸ Sarah van Gelder, 'Will the TPP Set Back This Campaign to Stop a Proposed Coal Mine Near Montana Tribal Land?', *Yes! Magazine*, 5 January 2016. Attached as Exhibit AJ. <http://www.yesmagazine.org/issues/good-health/will-the-tpp-set-back-this-campaign-to-stop-a-proposed-coal-mine-on-montana-tribal-land>

⁵⁹ 'Unlawful interference with offshore petroleum and minerals activities', New Zealand Petroleum and Minerals, Attached as Exhibit AK. <http://www.nzpam.govt.nz/cms/iwi-communities/government-role/unlawful-interference-with-offshore-petroleum-and-minerals-activities>

⁶⁰ Matthew McMenamin, 'Protest at Sea: An analysis of the Crown Minerals Amendment Act 2013', Victoria University of Wellington, undated. Attached as Exhibit AL. Petrobras subsequently withdrew for commercial reasons.

⁶¹ <http://www.pepanz.com/news-and-issues/issues/fracking/>

⁶² 'Hydrogeologic Risk Assessment of Hydraulic Fracturing for Gas Recovery in the Taranaki Region', Taranaki Regional Council, November 2011. Attached as Exhibit AM.



and Waikato between 1997 and 2011.⁶³

77. Fracking is currently regulated through a combination of the Resource Management Act 1991, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, Hazardous Substances and New Organisms Act 1996, Health and Safety in Employment Act 1992, and Crown Minerals Act 1991. The industry notes that whether the fracking technique will be used is not a consideration when the government grants a permit. It is addressed as an environmental matter. Until recent years, fracking operations were not required to gain resource consent. Resource consents for fracking and associated activities like drilling and waste disposal are still not necessarily notified, with local authorities making that decision on a case by case basis.
78. There are markedly different views about its impact. Taranaki Regional Council produced a report in 2011 saying it found no evidence that groundwater was contaminated and concluded the operations posed little risk.⁶⁴
79. Critics point to evidence of longstanding contamination of groundwater in Taranaki.⁶⁵ While there is potential for economic gain and royalties, these are outweighed by concerns about the health of the environment. The toxic waste produced by this process must be stored forever in giant ponds or discharged onto grazing land and/or back into the drill holes. In Taranaki the discharge to land is on paddocks through a process known as land farming. Tangata whenua report destruction of wahi tapu and restricted access to land and gathering of kaimoana.
80. The Kaikoura District, Christchurch City, and Selwyn District Councils have all called for fracking to be fully investigated.⁶⁶

Maori rights and Crown obligations

81. The National-led government has a policy to promote mining as a growth sector in the New Zealand economy. The resulting expansion of mining-by-fracking affects a large number of hapu and iwi. For example, between 2006 and 2009 the

⁶³ 'Hydraulic fracturing', New Zealand Petroleum and Minerals, Attached as Exhibit AN. <http://www.nzpam.govt.nz/cms/iwi-communities/government-role/hydraulic-fracturing>

⁶⁴ 'Hydrogeologic Risk Assessment', Attached as Exhibit AN.

⁶⁵ Clean Country Coalition, 'Apache/TAG Permits'. Attached as Exhibit AO.

⁶⁶ Paul Gorman, 'Fracking Probe Announced', *Stuff*, 28 March 2012. Attached as Exhibit AP.



government sold exploration rights via permits across 1.7 million acres in three East Coast blocks. The blocks cover the tribal areas of at least nine iwi, part of the Conservation estate and thousands of private properties. Extraction was expected to use fracking.⁶⁷ The government's 2013 'block offer' tender process sought expressions of interest from oil and gas explorers for acreage in five offshore areas: the Taranaki, Northland, Reinga, Canterbury and Great South Basins.⁶⁸

82. The industry claims to be committed to proactive engagement with iwi and hapu, and has relationship agreements with some as a result of Treaty settlements. It says: 'We recognise our relationships with iwi and hapū are evolving, and hope that our processes and agreements, both formal and informal, will continue to build healthy, enduring relationships.'⁶⁹ The website refers approvingly to guidelines developed by te Runanga o Ngati Ruanui. These are all soft measures. The Crown has not imposed any obligation on the industry to recognise the rights of tangata whenua to exercise their rangatiratanga or responsibilities as kaitiaki in accordance with te Tiriti and not surprisingly the industry has not taken the initiative to do so itself.
83. The Waitangi Tribunal and the Parliamentary Commissioner for the Environment have yet to address explicitly the issue of Maori rights under te Tiriti and other sources, the Crown's corresponding obligations, and consequent regulation of fracking. However, there are sufficient commentaries from those sources to conclude that the current legal regime and the industry's approach are not consistent with the Crown's obligations under te Tiriti or other international instruments.

Waitangi Tribunal Petroleum report

84. The Waitangi Tribunal's petroleum report establishes a substantial and long-standing concern regarding the regulation of oil and gas mining. The claimants⁷⁰ asserted that 'in terms of customary law, Māori, as part of the natural world, have

⁶⁷ 'Apache/TAG Permits'. Attached as Exhibit AO.

⁶⁸ Patrick Smellie, 'Government risks Northland Maori wrath with new oil and gas exploration offer', *NBR*, 8 November 2012. Attached as Exhibit AQ.

⁶⁹ 'Working with iwi and hapu', New Zealand Petroleum and Minerals. Attached as Exhibit AR.

⁷⁰ Nga Hapu on Nga Ruahine (Wai 796), Ngati Kahungunu (Wai 852) and other Taranaki interests.



proprietary rights in the resources of their universe, including the petroleum within their lands.’ With the nationalisation of ownership under the Petroleum Act 1937, and long before that for many hapū and iwi, Māori had lost ownership of much of their traditional lands. This was often through Crown acts and policies that were inconsistent with the Treaty. The claimants said the Crown’s regime for petroleum permitting and exploration paid too little regard for Māori interests in sites of traditional importance and, more generally, in environmental protection.

85. The Crown denied that any of its conduct or legislation that directly affects petroleum was inconsistent with Treaty principles. The Tribunal disagreed and found that a new ‘Treaty interest’ arose where Māori legal rights to petroleum were extinguished in breach of the Treaty. When such a Treaty interest arises, there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right.
86. The second report in 2010 focused on the Management of the Petroleum Resource, including Māori participation in its management and the process by which the Crown had devised the regulatory framework. The Tribunal found systemic flaws in the operation of the current regime for managing the petroleum resource and made a series of recommendations that would have significantly shifted the balance. For example, amending the Resource Management Act 1991 to require decision-makers to act consistently with the Treaty principles and the Crown Minerals Act 1991 to require decision makers to act consistently with Treaty principles and provide greater protection to Māori land through compulsory notifications for applications concerning Māori land.

Parliamentary Commissioner for the Environment Reports on Fracking

87. The Parliamentary Commissioner for the Environment initiated an inquiry into fracking in March 2012. She remarked on how rapidly the practice was growing, posing challenges that governments and regulators found difficult to keep up with.⁷¹ Campaigns offshore had raised concerns about the potential for contamination of important aquifers, triggering earthquakes, whether regulators

⁷¹ Parliamentary Commissioner for the Environment, *Evaluating the environmental impacts of fracking in New Zealand. Interim report*, November 2012, p.5. Attached as Exhibit AS.



have the capacity to deal adequately with concerns, as well as the impact on climate change.⁷²

88. Both her interim and final report recognise there are particular issues for Maori, but list Māori cultural and spiritual views, and Treaty settlement issues relating to petroleum, as matters not addressed in any depth.
89. Nevertheless, the interim report released on November 2012 recognised that natural resources are *taonga* for Māori because they are a part of *Papatūānuku*, and because they provide food, water and even warmth. This includes resources beneath the Earth's surface such as oil and gas. A paragraph on *Harm to Papatūānuku* recognised a deep spiritual dimension to Maori concerns over mining and fracking. 'For Māori, harming the *mauri* (life force) of the earth mother endangers future sources of *kai* (food) and *wai* (water). Some particular areas are sources of traditional *mahinga kai* for local Māori or are *tapu*.'⁷³
90. The Commissioner also recognised concerns about fracking as an extension of long-standing grievances. Since oil and gas were nationalised by the Crown in 1937, landowners have been unable to stop companies coming on to their land to drill wells. Māori see this as another phase of land confiscation.⁷⁴
91. The interim report concluded that environmental risks associated with fracking can be managed effectively provided "operational best practices are implemented and enforced through regulation". However, the Commissioner was not confident that operational best practices were actually being implemented and enforced in this country. While the government was encouraging oil and gas as a source of economic growth, she questioned whether the same effort was being put into preparing for the impacts it might have.
92. The Commissioner concluded that existing regulation where consumers, workers, and the environment rely on a company being motivated to 'do the right thing' may not be fit-for-purpose in high risk industries like oil and gas.⁷⁵ She remarked

⁷² *Ibid*, p.21

⁷³ *Ibid*, p.28

⁷⁴ *Ibid*, p.29

⁷⁵ *Ibid*, p.6



that 'a "social licence" for fracking has yet to be earned'.⁷⁶

93. Her second report *Drilling for oil and gas in New Zealand: Environmental oversight and regulation* was released in June 2014. The Commissioner concluded that current regulation in New Zealand was insufficient for managing the environmental risks associated with oil and gas drilling. Rapid expansion of oil and gas extraction made possible by fracking had developed so rapidly in some parts of North America and Australia that legislators have been left "scrambling to catch up". New Zealand may find itself in the same position.⁷⁷
94. Although extensive reform of New Zealand's laws, agencies, and processes was not yet required for effective management of the local environmental effects of onshore oil and gas extraction,⁷⁸ the Commissioner suggested it was appropriate to initiate reforms before the fracking process became more established.⁷⁹ The Ministry for the Environment's current guidelines did little more than describe the status quo. The Crown had a particular obligation to support, guide and direct local councils who bear chief responsibility for managing the environmental impacts of oil and gas expansion.
95. A number of the Commissioner's recommendations to tighten the legislative reins on fracking might well form part of a future package to meet the Crown's obligations:
- (i) The Government (assisted by the Environmental Protection Authority ('EPA')) should develop a national policy statement ('NPS') regarding 'unconventional' oil and gas. (However, the Minister had reportedly rejected this recommendation.);
 - (ii) Regional plans should classify the drilling of oil and gas wells as a 'discretionary' activity, to allow councils to consider all relevant environmental effects, impose conditions appropriate to the location, and if necessary to decline applications;

⁷⁶ *Ibid*, p.77

⁷⁷ Parliamentary Commissioner for the Environment, *Drilling for oil and gas in New Zealand: Environmental oversight and regulation*, 2014 p.5. Attached as Exhibit AT.

⁷⁸ *Ibid*, p.73

⁷⁹ *Ibid*, p.75

- (iii) Either the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 2013 should be amended to require that environmental protection be included in the assessment of well design, or regional councils should include the protection of freshwater layers as a condition in consents for drilling oil and gas wells; and
- (iv) The practice of 'landfarming' (disposal of waste from wells by spreading it on farmland) needs review.

96. Again investors would be likely to object.

Tai Tokerau Iwi Chairs on Extractive Industries

- 97. The importance of fracking as a case study is the challenge it poses for iwi and hapu who seek to intervene in a novel, rapidly changing and largely self-regulated zone that has minimal recognition of the Crown's Treaty obligations.
- 98. Te Tai Tokerau Iwi Chairs Forum commissioned a discussion paper on the issue of extractive industries after the government designated several areas in the rohe of Tai Tokerau as potentially suited for mineral and petroleum exploration and offered them for tender.⁸⁰ Its starting point was that customary rights over resources subject to extractive industries are sourced in He Whakaputanga (the 1835 Declaration of Independence), Te Tiriti o Waitangi 1840, and the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP). The Crown had largely ignored Maori efforts to protect those rights, including the petroleum claim to the Waitangi Tribunal.
- 99. The paper said lessons should be learned from the experience of other indigenous peoples. For example, the Tar Sands project in northern Alberta, Canada was "causing devastation on a scale that the planet has never seen before", with devastating effects on the environment and the Indigenous Dene, Cree, Métis and Athabasca Chipewyan peoples.⁸¹ Similar experiences were identified in Australia.

⁸⁰ Haami Piripi, 'Extractive Industries Discussion Paper', Te Runanga o te Rarawa, paper to te Tai Tokerau Iwi Chairs Forum, 7 October 2013. Attached as Exhibit AU.

⁸¹ *Ibid*, p.7



100. The paper specifically identified fracking as being relatively high risk and high impact. However, it was only discussed briefly, noting the ban in various locations but that the New Zealand government was still developing guidelines.⁸²

101. Significantly the paper recognised that: ‘Mandated Iwi opinions around the country are diverse and reflect the unique characteristics and circumstances of their ongoing presence in the demographic landscape.’ Yet, consistent with a desire to explore the possibilities of different models of resource extraction, it pragmatically suggested that ‘iwi assertions or objections will inevitably require trade-offs and compromises to gain a foothold in the industry or government oversight of the sector.’⁸³ The action proposals reflected that approach:

In terms of the Government, Māori will need to consider whether the legal, regulatory, policy and bureaucratic frameworks of the day are sufficiently acceptable and fair when measured against our spiritual, environmental, cultural, social and economic values, Te Tiriti and Indigenous Peoples’ rights. Similarly prospective corporate entities (and to a lesser degree, prospective financial partners) will be affected by the Government’s legal, regulatory, policy and bureaucratic frameworks. If found wanting, Māori should then consider whether there is sufficient political will to improve those frameworks to an acceptable standard within a timeframe that works for Māori.⁸⁴

102. Others in Ngapuhi have mobilised against the government’s move to offer a vast tract of offshore Northland for oil and gas exploration.⁸⁵ A hikoī from te Rerenga Wairua to Waitangi in 2014 protested against the grant of a 15-year permit to Statoil to explore for oil in te Reinga basin, and have since held a series of hikoī, with another planned for Waitangi Day 2016.

103. Other Runanga have also taken a strong position. Te Runanga o Ngati Porou has been vocal in opposing high risk activities in its rohe, seeking a moratorium on

⁸² *Ibid*, p.13

⁸³ *Ibid*, p.21

⁸⁴ *Piripi*, p.19

⁸⁵ Smellie, ‘Government risks Northland Maori wrath’. Attached as Exhibit AQ

further offshore permits and all other similar hazardous activities until regulations, based on proper and meaningful consultation, are in place.⁸⁶

104. Sir Mark Solomon, kaiwhakahaere of Te Runanga o Ngai Tahu expressed his hapu's concerns about proposed mining by Anadarko, and the sense that they were being used in many ways as an experiment.

Our opposition is about the government not having the processes to be able to address a spill.⁸⁷ In Kaikōura, they are worried about the effect of seismic surveys on the whale watch companies, the effect of any drilling on the coastal environment, and peoples' ability to collect kaimoana (seafood) if there is a disaster of the type seen with the *Deepwater Horizon* rig, in the 2010 BP oil spill in the Gulf of Mexico.

105. Mark Solomon also highlighted the divergent views across hapu and iwi:

So far Te Rūnanga o Kaikōura remains opposed to any form of offshore exploration within its rohe. Moeraki is taking a different stance, the rūnanga is taking a pragmatic stance in attempting to work with the exploration company to mitigate any possible risks.

106. That diversity, sourced in te tino rangatiratanga of hapu, could generate complaints of inconsistency and arbitrary discrimination if the same or similar investors receive differential treatment across different tribal rohe.

A Mauri-based assessment of fracking

107. Maori critiques of fracking have also promoted alternative Treaty-consistent models for assessing sustainability. A Mauri Model Decision Making aims to shift the focus from the four dimensions of environmental, cultural, economic, and social well-being, but is dominated by economic factors, to a kaupapa Maori based model that recognises mauri as the binding force between the physical and the spiritual. It assesses a broad range of elements of the ecosystem, hapu, community, whanau, public health and safety, land, employment, and evaluates whether the

⁸⁶ Ngati Porou Submission on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill, undated. Attached as Exhibit AV.

⁸⁷ Anadarko had admitted it would take two weeks to get equipment to the site of a spill.

mauri of each dimension is being fully restored, enhanced, maintained, diminished, or destroyed. The use of mauri rather than money as the measure of sustainability allows a holistic approach.

108. Manaia Rehu and Kepa Morgan used the Mauri Model to assess the impacts of mining and fracking on indigenous reserves of the Blood Tribe in Alberta as a basis for projecting potential impacts in New Zealand.⁸⁸ They reported that experience of forming Kainai Energy in 2011 from Kainaiwa Resources Inc resulted in a loss of control. The amount of land available for agricultural production reduced. Water and soil contamination, immediately and longer-term, damaged the life supporting capacity of water and took away from future eco-tourism options. That was compounded by the amount of water used in the fracking process and problems with how the flow back and toxic chemicals and waste/biproducs were disposed of. The tribe were prohibited from carrying out traditional practices, being dictated to by non-natives on their own lands.
109. The model showed that even large economic gains to the economy would not equate to sustainable development if the impacts to ecosystem mauri and the mauri of effected hapū are genuinely taken into account. The long term adverse effects to the environment also risks costing the iwi and its members vast sums of money. Adopting such a method would involve a redistribution of power away from investors and regulators under the current model and challenge the decision making and evaluative processes required in the TPPA.

Implications for the TPPA

110. A future coalition government might well wish to adopt more rigorous policies and regulations wholly or partly in response to the Crown's obligations to Maori. The Maori Party has highlighted the need to maintain the integrity of freshwater and whenua and the safety of communities, for example where toxic fracking fluid is trucked from Gisborne and disposed of in Taranaki, control contamination and land farming practices, and stop the issuing of permits with little change to

⁸⁸ Manaia Rehu and Kepa Morgan, 'Scoping Study of the Impacts of Fracking on Indigenous Reservations in Alberta using the Mauri Model Decision Making Framework', Nga Pae o te Maramatanga, 2012. Attached as Exhibit AW



regional plans or public consultation.⁸⁹ The Greens have called for a moratorium until more is known and a better regulatory regime is in place.⁹⁰

111. Possible regulatory options at a national or local government level would include:

- (i) changes to foreign investment laws to require more intensive vetting, a Treaty of Waitangi assessment, and stricter conditions;
- (ii) numerical restrictions on the number of fracking operators or operations in a particular rohe or nationally;
- (iii) a ban on fracking;
- (iv) restricting the quantity of water drawn and rigorous conditions on its disposal;
- (v) stricter technical standards for regulating fracking;
- (vi) changes to the conditions of individual mining licenses, or licenses in general;
- (vii) rights of veto by tangata whenua on fracking in their rohe; and
- (viii) payment of bonds to fund strict remediation obligations.

112. Without the Treaty Exception, the TPPA forecloses most of those options by restricting regulation under the cross-border services and investment chapters, which apply to both central and local government, and rendering government action open to challenge by investors from TPPA countries.

113. Given the purpose of this affidavit is to test out the Treaty Exception, I simply note the potential application of Articles 9.4 and 10.3 National Treatment, Article 10.5 Market Access and Article 10.8 Domestic Regulation, which apply to a measure adopted or maintained that affects the supply of services by a covered

⁸⁹ 'Maori Party welcomes report on Drilling for Oil and Gas in New Zealand: Environmental Oversight and Regulation', 4 June 2014. Attached as Exhibit AX. <http://maoriparty.org/panui/maori-party-welcomes-report-on-drilling-for-oil-and-gas-in-new-zealand-environmental-oversight-and-regulation/>

⁹⁰ 'Frack No!', Green party. Attached as Exhibit AY.



investment, such as a mining company.⁹¹

114. The non-conforming measures in Annex II, which preserve future policy and regulatory space, provide fragmented protections, mainly from the national treatment obligations. They apply to measures in respect of 'protected areas', the foreshore and seabed, territorial sea, Exclusive Economic Zone and continental shelf, and geological, geophysical and other scientific prospecting services.
115. The Annex also incorporates and expands New Zealand's market access schedule from the GATS, which takes a different and potentially confusing 'positive list' approach. It commits New Zealand to provide full market access for some mining-related services, such as CPC 8672: engineering services and CPC 713: pipeline transport, which includes 'transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas.' I am happy to expand on the legal implications of these non-conforming measures for the case study if required.
116. These annexes do not apply to Article 9.6 (Minimum Standard of Treatment), Article 9.7 (Expropriation), or Article 10.8 (Domestic Regulation).

Investor-state disputes

117. Natural resource policy and decisions are among the most frequent targets of ISDS. Over 85% of the money paid out to date by governments under free trade and investment deals with the US has involved claims over resources and the environment.⁹²
118. The definition of investment under Article 9.1 includes an enterprise, shares in an enterprise, bonds, concessions, licenses, permits and leases, all of which are features of the mining industry.
119. A number of companies involved in mining in New Zealand come from TPPA countries. For example, US based Apache Corporation has an established presence in Taranaki and with Canadian company TAG Oil began exploring for oil and gas

⁹¹ Pursuant to Article 10.2.2(a)

⁹² For descriptions of recent cases and payouts see: 'TPP's Investment Rules Harm the Environment', Public Citizen, Washington DC, undated. Attached as Exhibit AZ



on the East Coast and southern Hawkes Bay.⁹³ Apache subsequently withdrew from that project, but TAG continued.⁹⁴

120. The main provisions of the Investment Chapter that are invoked by investors in disputes and may form the substance of a threatened or actual dispute or request for consultations over the above measures are Article 9.6 Minimum Standard of Treatment in relation to 'full protection and security' and 'fair and equitable treatment', and Article 9.7 Expropriation.
121. The umbrella clause in the Investment Chapter, which allows an investment agreement to be enforced through ISDS could also come into play. The definition of 'Investment Agreement' in Article 9.1 explicitly refers to an agreement 'with respect to natural resources that a national authority controls, such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources, including for their exploration, extraction, refining, transportation, distribution or sale'.

Lone Pine v Canada

122. Two recent NAFTA cases involving investors from TPPA parties illustrate the substantial nature of that risk. In the first case Canadian energy company Lone Pine is suing the Canadian government through its American affiliate for C\$250 million after Quebec introduced a temporary moratorium on all fracking activities under the St. Lawrence River until further studies are completed.⁹⁵
123. Claiming a breach of fair and equitable treatment, including denial of justice, and expropriation, the investor alleges that provincial legislators suddenly reversed existing policy in response to public opposition to fracking, without fully considering the scientific evidence of any environmental concerns.
124. The Canadian government has countered that the decision was not arbitrary, but was backed by solid scientific justifications, particularly in light of the

⁹³ 'Apache/TAG Permits'. Attached as Exhibit AO. <https://nodrilling.wordpress.com/regions/east-coast/apachetag-permits/>

⁹⁴ Patrick Smellie, 'US company Apache pulls out of East Coast oil hunt', *NBR*, 15 January 2013, Attached as Exhibit BA.

⁹⁵ *Lone Pine Resources Inc v The Government of Canada*, Notice of Arbitration under the Arbitration rules of UNCITRAL and Chapter 11 of the NAFTA, 6 September 2013. Attached as Exhibit BB.



environmental and socio-economic importance of the St Lawrence River to the people of Quebec (with more than 60% of the province's population living along its banks).⁹⁶

125. The government argued that fracking suffers from a 'deficit of social acceptability', and that this was an essential consideration which policy-makers must take into account when regulating.' It further argued that the investor should have expected new regulations given the practice of fracking was relatively new.⁹⁷ The case is ongoing.

Bilcon v Canada

126. In 2008 US quarrying company Bilcon challenged the decision of an environment panel to deny it a permit to build a basalt quarry and marine terminal in a sensitive coastal area of Nova Scotia.⁹⁸ The proposed 152-hectare project was located in a key breeding area for several endangered species, including the world's most endangered large whale.⁹⁹ Canada's Department of Fisheries and Oceans determined that blasting activity in this sensitive area raised environmental concerns (similar to Kaikoura) and thus required a rigorous assessment. A joint federal-provincial review panel established under local environmental law heard submissions and denied the permit. The panel criticised Bilcon's poor consultation with indigenous peoples, fishers and other communities and found the project was contrary to 'community core values'.
127. The Clayton family and their company Bilcon of Delaware Incorporated, complained that local officials had encouraged the project and said convening the joint review panel posed a 'rare, cumbersome and costly obstacle' to its investment. Rather than taking the matter on appeal through Canada's judicial process Bilcon brought an investment dispute under NAFTA for C\$300 million. The investors claimed the panel's assessment was arbitrary and unfair, breached

⁹⁶ Jarrod Hepburn, 'On heels of bruising NAFTA loss in Bilcon, Canada offers first sketch of defence to "Lone Pine" fracking case', IA Reporter, 30 March 2015. Attached as Exhibit BC.

⁹⁷ Ibid.

⁹⁸ *Bilcon v Canada*. Attached as Exhibit N.

⁹⁹ 'Corporate Rights in Trade Agreements: Attacking the environment and community values', Bilcon Fast Sheet #4, Sierra Club, USA. Attached as Exhibit BD.



the minimum standard of treatment, and was discriminatory.¹⁰⁰

128. In a split decision, the majority of the arbitral panel - the investor's nominee and the chair - said the environmental review panel failed to provide the minimum standard of treatment required, because it denied Bilcon a fair hearing and failed to explore mitigation options short of rejecting the application.¹⁰¹ The concept of 'core community values' relied on was novel and too vague for Bilcon to respond to. The treatment of Bilcon was also discriminatory, because other panels in Canada had approved similar projects but imposed conditions.
129. The dissenting arbitrator described the decision as a 'significant intrusion' into domestic jurisdiction, where decisions about Canadian law end up being made by offshore investment tribunals.¹⁰² He warned the dispute would be viewed a 'remarkable step backwards' in environmental protection and 'create a chill' among environmental review panels that would be reluctant to rule against projects that would cause undue harm to the environment or human health.¹⁰³
130. Damages have yet to be awarded, but the tribunal found both levels of government at fault, so both are expected to foot the bill.¹⁰⁴
131. The Bilcon dispute illustrates the potential risks of an investor-state dispute where a decision of a local or regional authority, or another statutory board, rejects an application from a foreign investor because of community concerns. It is also very easy to see how a similar situation might arise in relation to Māori objections to a

¹⁰⁰ Allegedly breaching both the national treatment and most favoured nation obligations.

¹⁰¹ Luke Eric Peterson, 'Arbitrators in Clayton/Bilcon case align on jurisdictional questions, but fall out over Canada's liability for NAFTA breach in \$300 million quarry right', *IA Reporter*, 21 March 2015. Attached as Exhibit BE; Luke Eric Peterson, '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. Attached as Exhibit W.

¹⁰² *Clayton and Bilcon v Government of Canada*, Dissenting opinion of Professor Donald McRae, p.18. Attached as Exhibit BF; 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. Attached as Exhibit BG. See also 'Bilcon Case leads to broad alarm over ISDS reach into domestic law, *Inside US Trade*, 9 April 2015. Attached as Exhibit BH.

¹⁰³ *Bilcon v Canada*, dissenting opinion, p.18-19, Attached as Exhibit BF. See also Shawn McCarthy, 'NAFTA ruling in Nova Scotia quarry case sparks fears for future settlements', *Globe and Mail*, 24 March 2015. Attached as Exhibit BI, <http://www.theglobeandmail.com/report-on-business/nafta-ruling-against-canada-sparks-fears-over-future-dispute-settlements/article23603613/>

¹⁰⁴ Paul Withers, 'Nova Scotia taxpayers may be on hook for NAFTA defeat', *CBC News*, 24 March 2015. Attached as Exhibit BJ. "<http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-taxpayers-may-be-on-hook-for-nafta-defeat-1.3006319>" <http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-taxpayers-may-be-on-hook-for-nafta-defeat-1.3006319>

planning or resource consent, or in response to a Māori Advisory Board's advocacy, let alone something stronger. The Treaty Exception in the TPPA will not provide effective protection, because it only applies where Maori receive preferential treatment.

Protection through the Treaty Exception

132. The current government has put itself and future governments in a position where regulation of fracking in response to its obligations to Maori would risk a state-state or investor-state dispute. The rapidly changing circumstances and knowledge about fracking means the government may need to rely on the Treaty Exception to defend its actions. Yet there are numerous ways in which the Treaty Exception would provide inadequate protection for Maori.
133. The current government has rejected concerns about the practice of fracking,¹⁰⁵ and declined to adopt recommendations of the Waitangi Tribunal regarding petroleum¹⁰⁶ and the Parliamentary Commissioner for the Environment on fracking. The Treaty Exception cannot apply where it is part of a broader rationale for a measure that would benefit Maori, among others. It would be difficult to differentiate the rationale for the action being performance of Crown obligations to Maori from other environmental, health, community and political considerations where they formed part of such a debate.
134. The government might also indicate or decide that it would not defend a challenge to a local authority policy or decision that triggers a dispute, for example, rejecting a permit to frack on the basis of objections from the local hapu, or imposes a ban or special restrictions based solely or partly on Maori submissions. Any such threat from the government would be likely result in pressure on the local authority not to adopt, or to revoke a policy or decision. If the government opted to defend the measure, it might seek to recover its costs and any award from the local authority,¹⁰⁷ which could again have a significant chilling effect on the

¹⁰⁵ Rob Maetzig, 'PM rejects anti-fracking "nonsense"', *Stuff*, 22 March 2013, Attached as Exhibit BK <http://www.stuff.co.nz/business/industries/8457581/PM-rejects-anti-fracking-nonsense>

¹⁰⁶ Pete Hodgson, 'Government response to Waitangi Tribunal's Petroleum Report', 21 November 2003. Attached as Exhibit K.

¹⁰⁷ Withers, 'Nova Scotia taxpayers may be on hook for NAFTA defeat'. Attached as Exhibit BJ.



relevant local body.

135. If the matter went to a dispute, the qualifications of a state-state or investment arbitrators would militate against an understanding of key concepts such as rangatiratanga, mana motuhake, tikanga, kaitiakitanga, mana whenua and mana moana, the atua, mauri, or he taniwha, when they assessed 'likeness' for national treatment of services or investment, 'rare circumstances' for the expropriation annex, 'reasonable, objective and impartial' administration of domestic regulations on mining, or 'arbitrary or unjustifiable discrimination' in the Treaty Exception, among other provisions.
136. The lack of any right of affected Maori to participate in the hearing, or even to give evidence, heightens that deficiency and they would have no choice but to rely on the Crown to convey the conceptual premises to the tribunal.
137. If the Crown did avail itself of the Treaty Exception to defend the reforms it would face three principal problems:
 - (i) The measures are regulatory and do not constitute 'more favourable treatment' of Maori, except arguably if a right of veto was conferred on tangata whenua over fracking in their rohe;
 - (ii) A future action by a central or local government, in line with those taken recently in other countries, could be challenged as a breach of national treatment or arbitrary or unjustified discrimination, using a similar interpretation to the *Bilcon* dispute, especially where a government has made a statement clearly rejecting such an approach, as the present government has done; and
 - (iii) Because iwi and hapu have different views on fracking there will be local variances that could be challenged as a breach of national treatment or arbitrary or unjustified discrimination, as with point (ii).

Case study 2: Affordable Medicines

Rationale for Crown action

138. The New Zealand Health Survey for 2014/2015 reported that unmet need for primary health care is more common among Māori and Pacific adults and children, and those living in the most deprived areas.¹⁰⁸ Significantly,

Māori have a greater level of unmet need for primary health care than non-Māori, and the disparity is greater for children. One reason for unmet need for primary health care is prescription costs. Māori adults and Māori children are more than twice as likely to have an unfilled prescription due to cost as non-Māori adults and non-Māori children, after adjusting for age and sex differences. Fifteen percent of Māori adults and 9% of Māori children miss out on prescriptions due to cost.¹⁰⁹

139. A recent qualitative study of the impact of prescription charges on people living in poverty, led by academics at the Otago School of Pharmacy and the Maori Pharmacists Association, found that charges and co-payments reduce consumption of medicines and can prevent people living in poverty from accessing medicines they need, resulting in poor health. The research showed people making choices between medicines and food, and filling prescriptions for children but not for the adults. Half of those surveyed were Maori.¹¹⁰

140. Disparities are also evident in prevalence rates for diseases like cancer, diabetes and heart disease. According to Ministry of Health data, Māori adults aged 25 and over had significantly higher cancer registration rates than non-Māori adults for total cancers in 2010–12. The total-cancer mortality rate among Māori adults was more than 1.5 times as high as that among non-Māori adults.¹¹¹ The self-reported prevalence of diabetes among Māori was about twice that of non-Māori in 2013/14

¹⁰⁸ Annual Update of Key Results 2014-15, New Zealand Health Survey, December 2015. Attached as Exhibit BL.

¹⁰⁹ Ibid, p.viii

¹¹⁰ Pauline Norris, June Tordoff, Brendon McIntosh, Kunal Laxman, Shih Yen Change, and Leanne Te Karu, 'Impact of prescription charges on people living in poverty: A qualitative study', *Research in Social and Administrative Pharmacy*, 2015, 1-10. Attached as Exhibit BM.

¹¹¹ 'Cancer', Ministry of Health, Attached as Exhibit BN. <http://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/cancer>

and shows much higher disparities between Māori and non-Māori for diabetes complications.¹¹² In 2010–12 the total cardiovascular disease mortality rate among Māori was more than twice as high as that among non-Māori. In 2012–14, Māori were more than 1.5 times as likely as non-Māori to be hospitalised for cardiovascular disease.¹¹³

The Crown's Obligations

141. To date no Waitangi Tribunal claim or report has directly addressed Maori rights to access to healthcare, although it formed part of the claim on Te Whanau o Waipareira at the time of the Labour government's 'Closing the Gaps' policy.¹¹⁴ While the Tribunal addressed the provision of housing, education and health care, it did not make general findings regarding the application of the Treaty to social policy, including health.¹¹⁵ The Tribunal may well be called upon to do so in the future, producing recommendations to which the Crown must have the policy and regulatory space to respond. Knowingly to foreclose that space would be a breach of good faith obligations of active protection.
142. The Crown's obligation to ensure Maori have access to affordable medicines and equality of healthcare outcomes is derived from a number of complementary sources.
143. Dr Papaarangi Reid, one of the claimants, and Bridget Robson, Director of Te Ropu Rangahau Hauora a Eru Pomare, stress that it is impossible to understand Māori health status, or intervene to improve it, without understanding colonial history and the unequal distribution of power and resources. They note that differential access to healthcare is one of the three pathways that contributes to

¹¹² '2014 Virtual Diabetes Register results', Ministry of Health, Attached as Exhibit BO.
<http://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/diabetes>

¹¹³ 'Cardiovascular disease', Ministry of Health, Attached as Exhibit BP.
<http://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/cardiovascular-disease>

¹¹⁴ Waitangi Tribunal, *Te Whanau o Waipareira Report* (WAI 414), 1998.

¹¹⁵ Mark Barrett and Kim Connelly-Stone, 'The Treaty of Waitangi and Social Policy', Ministry of Justice and Te Puni Kokiri, undated, p.12. Attached as Exhibit BQ.

ethnic inequalities in health, and conclude that ‘the evidence suggests that Māori are receiving lower levels of health services and poor quality of service’.¹¹⁶

144. Māori rights health and wellbeing and Crown obligations to ensure that outcome are, in their opinion, sourced:

Firstly, from our indigenous rights embodied in the United Nations Declaration on the Rights of Indigenous Peoples and reinforced by the Treaty of Waitangi. The primary right of indigenous peoples is to self-determination, which includes to name ourselves as tangata whenua and be recognised as such. As tangata whenua, our duty includes ensuring the wellbeing of all people in our territories, Maori and tauiwi.¹¹⁷

145. The Ministry of Health’s application of the Treaty of Waitangi Principles to health recognises that:¹¹⁸

Protection involves the Government working to ensure Māori have at least the same level of health as non-Māori, and safeguarding Māori cultural concepts, values and practices.

146. Several articles of the UNDRIP, to which New Zealand is a party, establish rights to health, including equality of health outcomes:

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

¹¹⁶ Papaarangi Reid and Bridget Robson, ‘Understanding Health Inequities’, in Hauora: Maori Standards of Health IV, p.7. Attached as Exhibit BR.

¹¹⁷ *Ibid*, p.1

¹¹⁸ <http://www.health.govt.nz/our-work/populations/maori-health/he-korowai-oranga/strengthening-he-korowai-oranga/treaty-waitangi-principles>

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services [sic].
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

147. In a paper on The Treaty of Waitangi and Social Policy two government officials, Mark Barrett from the Ministry of Justice and Kim Connelly-Stone from Te Puni Kokiri, have articulated more detailed Treaty-based arguments for the Crown's obligation.¹¹⁹

148. At a fundamental level, Article 2 affirms te tino rangatiratanga o ratou taonga katoa, which includes intangibles such as health and wellbeing.¹²⁰

149. 'Article 3' rights as equal citizens are of little use without 'equitable access to all of society's goods, including health, education and all the necessities of a good standard of living.' Social indicators show that Maori have not enjoyed such reciprocal benefits guaranteed to all citizens. 'Under this analysis, Article 3 requires the Crown to recognise where disparities exist between Maori and non-

¹¹⁹ Barrett and Connelly-Stone. Attached as Exhibit BQ

¹²⁰ *Ibid*, p.8



Maori, and to attempt to address them to the best of its current capacity',¹²¹ taking into account the Crown's other responsibilities, fiscal restraints and the need for Maori to take their own responsibility. This imposes an obligation on the Crown to take proactive steps to reduce disparities.

150. Barrett and Connelly Stone report that the then Labour government's key statement on the Treaty of Waitangi as it relates to health, *Whaia Te Ora Mo Te Iwi*, had rejected any additional responsibility to protect the health of Maori over general protections to all citizens.¹²²
151. Were a future government to decide otherwise, potentially in response to a Waitangi Tribunal report and recommendations, the Crown may well need to rely on the Treaty Exception to meet its obligations under the Treaty and other instruments.

The impacts of the TPPA

152. Compliance with the TPPA is expected to have an immediate and continuing impact on affordability, which is expected to increase over time. The potential for enforcement would also inhibit the government from adopting many of the available measures to provide more equitable health outcomes for Maori by making medicines more affordable.
153. There are three parts of the TPPA that threaten Maori access to affordable medicines:
- (i) the intellectual property chapter in relation to patent term extension and biologics medicines;
 - (ii) the Transparency Annex that affects the processes of Pharmac; and
 - (iii) the potential for an ISDS challenge to policies or decisions that adversely affect pharmaceutical companies' commercial interests.

¹²¹ *Ibid*, p.4

¹²² *Ibid*, p.9



154. As I stressed earlier, the 'final' terms agreed to in Atlanta are now under pressure, in particular on the question of biologics.¹²³ The need for Congressional approval and the certification process provide significant leverage for the US to demand further costly changes to New Zealand's current medicines regime.
155. Public health experts Deborah Gleeson, Ruth Lopert and Papaarangi Reid identified three possible outcomes when considering the leaked US Annex on transparency in healthcare from 2011. These outcomes also apply to the impact of the TPPA more generally:¹²⁴
- (i) a rise in co-payments, meaning higher out of pocket costs for prescriptions, which will impact most on those least able to pay, in particular communities in which Maori are disproportionately represented;
 - (ii) increasing government health funding (which is unlikely in the current fiscal climate) or increasing the proportion of Vote Health allocated to pharmaceuticals, potentially decreasing funding to essential public health services targeted to high needs population groups; or
 - (iii) increased rationing by restricting the range of medicines subsidised or imposing more restrictive criteria for access.¹²⁵
156. The Prime Minister ruled out an increase in prescription prices as a result of the TPPA.¹²⁶ The government has also declined to provide Pharmac with the additional funding it said it needed in 2015.¹²⁷ That suggests the rationing option may be the most likely, which would advantage those with health insurance and penalise those, especially Maori, who depend on publicly subsidised medicines.

¹²³ For example, the chair of the Congressional Ways and Means Committee, which will lead the TPPA process in the House of Representatives, has indicated that the agreement faces an uphill battle but could be approved if problem areas such as tobacco and pharmaceuticals are addressed. Alex Lawson, 'Sen. Hatch Says Drug IP Provisions May Doom TPP', *Law360*, 6 November 2015. Attached as Exhibit BS; Doug Palmer, 'Brady: TPP approval "difficult but doable" this year', *Politico*, 11 January 2016. Attached as Exhibit BT.

¹²⁴ Deborah Gleeson, Ruth Lopert and Papaarangi Reid, 'How the Trans Pacific Partnership Agreement could undermine PHARMAC and threaten access to affordable medicines and health equity in New Zealand', *Health Policy*, 112 (2013) 227-233, at 231-22. Attached as Exhibit BU.

¹²⁵ *Ibid*, p. 232.

¹²⁶ Audrey Young, 'TPP won't lead to higher prescription prices – PM', *NZ Herald*, 11 June 2015, Attached as Exhibit BV.

¹²⁷ Stacey Kirk, 'Pharmac plea for more money rejected by government', *Stuff*, 18 August 2015. Attached as Exhibit BW.

Intellectual property rights: biologics

157. The first significant issue for this case study is the rules related to biologic medicines, which are the cutting edge technologies for treatment of diseases like cancer and diabetes that affect Maori disproportionately.¹²⁸
158. Every additional year of market exclusivity will add tens of millions of dollars to Pharmac's bill for subsidising medicines, meaning fewer medicines are subsidised, more money has to be allocated, or people must pay more as co-payments. According to Dr David Menkes in a letter to the Minister of Health on 3 October 2015 seven of Pharmac's twenty highest-expenditure medicines are biologics, costing \$134 million in 2014. The potential inflation of costs just for those medicines under the TPPA would stretch the existing Pharmac budget, without considering new biologics that would become first preference treatments for diseases like diabetes and cancer. Dr Menkes warned the Minister that 'new biologics would be extremely – perhaps prohibitively – expensive. Moreover, additional pressure on the New Zealand drug budget would accrue over time, as medications remain more expensive for longer, due to delayed market entry of generics and biosimilars.'¹²⁹
159. During the negotiations the US sought 12 years marketing exclusivity for biologics consistent with its domestic law. Leaked texts showed that other parties had proposed 8, 5, and 0 years. This was the final issue to be resolved at the Atlanta ministerial meeting, with Australia brokering a compromise. The resulting text of Article 18.52 Biologics contains two means of delivering a 'comparable outcome'. One provides a minimum standard of eight years from the date of the first marketing approval of that product. The other is to provide 'effective market protection':
- (i) using the same mechanism for a minimum of five years from the date of the first marketing approval of the product, and

¹²⁸ Other changes to patent law will also be relevant, but not necessary to discuss for the purposes of establishing the argument.

¹²⁹ Dr David Menkes, Associate Professor of Psychiatry, University of Auckland to Dr Jonathan Coleman, Minister of Health, 3 October 2015. Attached as Exhibit BX.



- (ii) 'through other measures' (meaning measures such as regulatory procedures and administrative actions), and
- (iii) 'recognising that market circumstances also contribute to effective market protection to deliver a comparable outcome in the market.'

160. The Parties also agreed to consultations 10 years after the TPPA comes into force, or otherwise as agreed, to review the period of exclusivity with a view to providing 'effective incentives' to manufacturers of biologics and facilitating 'timely' availability of biosimilars (the generic form of biologics), so as to ensure the provision is consistent with international developments on approval of biologics. By that time biologics will be a much bigger share of New Zealand's medicines budget.

161. New Zealand law currently provides 5 years marketing protection for biologics. Footnote 159 lists countries that have determined they would need to change their laws to implement Article 18.52.1. New Zealand is not one of them. However, this states those countries' own assessments and does not indicate that another party agrees.

162. Chile has negotiated an additional annex that allows it to maintain current exceptions to data exclusivity in its domestic law for the purposes of a public health or other emergency, issuing a compulsory license, or where the medicine has not been commercialised within 12 months of receiving marketing approval.¹³⁰ All these are options the Crown could adopt to ensure that biologic medicines are affordable for Maori, but are not covered by an equivalent Annex.

163. The two-tier approach of Article 18.52 has been rejected by prominent members of the US Congress¹³¹ and corporate lobby groups,¹³² for whom biologics remains a key issue in the processes prior to ratification and entry into force, as well as enforcement and review.

¹³⁰ Annex 18-B

¹³¹ Thomas Burr, 'Once an Obama ally on trade deal, Utah's Hatch may fight latest proposal', *Salt Lake Tribune*, 26 November 2015, <http://www.sltrib.com/home/3207547-155/once-an-obama-ally-on-trade>. Attached as Exhibit BY

¹³² eg. 'U.S. Chamber Statement of Support for the Trans-Pacific Partnership', 6 January 2016. Attached as Exhibit BZ; 'Biz Groups Voice Qualified TPP Support; Chamber Stresses Implementation', *Inside US Trade*, 7 January 2016. Attached as Exhibit CA



164. At a briefing on the TPPA in Auckland on November 2015 which I attended, New Zealand's Chief Negotiator David Walker said New Zealand and Australia believed their current system satisfied the requirements of the provision. When I asked him what would happen if the US said it did not agree with that agreement and made it a certification issue, he replied that New Zealand had no control over what the US might do. David Walker stopped short of saying New Zealand would remain resolute, as the Australian trade minister has done.¹³³ Malaysian opposition parties have expressed concern that the US will use certification to dictate their approach to biologics.¹³⁴
165. Even if New Zealand stands firm against those pressures, future negotiations could impact dramatically on Maori access to affordable medicines. Presuming the current Pharmac regime of a capped budget is maintained, the government would need to deviate from the intellectual property rules in the TPPA, and the applicability and adequacy of the Treaty Exception would be crucial to defending those actions.

The Transparency Annex

166. The US pharmaceutical industry sought an Annex on Transparency that would expand their market access at monopoly prices by allowing them to wield more influence on the processes used by New Zealand's pharmaceutical purchasing agency Pharmac when it decides which medicines and medical devices to subsidise and by how much.¹³⁵
167. Several versions of the Annex were leaked during the course of the negotiations, which allowed for expert analysis. Gleeson, Lopert and Reid predicted in 2013 that the US agenda for the TPPA would likely increase costs and reduce access to

¹³³ 'Robb Rejects TPP Changes on Biologics, Citing Strong Market Protection', *Inside US Trade*, 19 December 2015. Attached as Exhibit CB.

¹³⁴ 'Malaysian Lawmaker says Parliament Likely to Endorse TPP in Late January Vote', *Inside US Trade*, 13 January 2016. Attached as Exhibit CC.

¹³⁵ Gleeson, 'Preliminary Analysis of the Final TPPA Transparency Annex 26-A: Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices', School of Psychology and Public Health, La Trobe University, 12 December 2015, p.1. Attached as Exhibit CD.



affordable medicine for New Zealanders, exacerbating existing inequities with a disproportionate impact of Maori and Pacific peoples.¹³⁶

168. Dr Gleeson updated that analysis following the release of the final text.¹³⁷ She observed that changes to the final version mean the Annex no longer poses as serious a threat, especially as it is not directly enforceable by the other parties or investors through ISDS. She sees the intellectual property and investment chapters as likely to pose more of a threat to Pharmac than the Annex. However, there are still concerns about the pressure that other parties and the pharmaceutical industry could bring to bear on Pharmac, including through threats of investor disputes (discussed below).
169. Dr Gleeson identifies four potential impacts from Paragraph 26-A-2(a) of the chapter, which requires consideration of listing of medicines within a specified period of time. These are:
- (i) reduced flexibility and autonomy on some decisions;
 - (ii) new and unnecessary administrative costs (estimated at \$910,000 annually);
 - (iii) potential for increased lobbying by the pharmaceutical companies, and
 - (iv) requests for consultations especially by the US.
170. While the provision has some flexibility, notably that New Zealand can specify the time period, US pressure during the implementation and certification phases remain a problem, as they are throughout the Annex.
171. The New Zealand government has estimated the initial implementation costs of the Annex at \$4.5 million, with a further \$2.2 million each year. Pharmac's total operating costs were \$28.7 million in the 2014-15 financial year.¹³⁸

¹³⁶ Gleeson, Lopert and Reid, at 227. Attached as Exhibit BU.

¹³⁷ Gleeson, 'Preliminary analysis of the final TPP Healthcare Transparency Annex', Attached as Exhibit CD.

¹³⁸ *Ibid*, p.12.



Investor-State disputes

172. Measures adopted by New Zealand, including any rules, processes or decisions, relating to pharmaceuticals, including those that affect patented medicines, biologics, or Pharmac's operations, are potentially open to challenge if they adversely affect the commercial interests of the pharmaceutical industry from any TPPA country other than Australia.
173. The first dispute challenging a medicine patent was lodged in 2012, when the fifth largest US pharmaceutical company Eli Lilly initiated a dispute against Canada under NAFTA. Eli Lilly is claiming \$500 million¹³⁹ compensation for a Canadian Supreme Court decision to revoke a patent for a medicine that failed to satisfy the 'utility doctrine' under Canadian domestic law.¹⁴⁰
174. While an investor cannot enforce the TPPA's Transparency Annex directly or claim a breach of the minimum standard of treatment solely because of a breach of another provision in the TPPA, a pharmaceutical company could incorporate those arguments into a broader claim. The processes in the Transparency Annex could be used to collect evidence to support the claim.
175. Australia recognised the potential threat of ISDS to decisions on medicines when it proposed a carve-out for certain Australian health programmes and agencies, including the Pharmaceutical Benefit Scheme, as revealed by a leaked text of the investment chapter from January 2015.¹⁴¹ That protection was not in the final agreement.
176. Gleeson points to the risks that pharmaceutical companies could bring, or as significantly threaten, an investment dispute if a government introduced tighter

¹³⁹ The initial claim of \$100 million, explain in Exhibit x, was increased to \$500 million in 2013 when it added a second pharmaceutical to the claim. 'Eli Lilly adds \$400 million to NAFTA lawsuit against Canada's patent norms', Council of Canadians, 17 July 2013. Attached as Exhibit CE.

¹⁴⁰ 'U.S. Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada's Patent Policy, Demand \$100 Million for Invalidation of a Patent', Public Citizen, Washington DC, March 2013. Attached as Exhibit CF.

¹⁴¹ 'Investment', Annex II-M, 20 January 2015. Attached as Exhibit CG.



cost controls for patented products or redirected research and development funding in ways that reduced expected profits.¹⁴²

177. A letter from 27 international health leaders published in *The Lancet* in February 2015 stressed their concerns about the potential chilling effect of investor-state disputes on health policy and decision.¹⁴³
178. The general exception is not available for disputes under the investment chapter. Other provisions that appear to protect health measures are either self-cancelling, as with Article 9.15, or allow an investment tribunal undesirable interpretive flexibility, notably the reference to 'rare circumstances' in paragraph 3(b) of Annex 9-B on Expropriation.¹⁴⁴
179. The Crown could not rely on the Treaty Exception unless its measure was specifically restricted to provision of medicines only to Maori, and that was considered to fall within a non-commercial meaning of 'more favourable treatment'. The investment tribunal's interpretation of arbitrary or unjustified discrimination might invoke broad comparators, for example that the government has not taken similar steps for threats to Maori health, such as restricting high fat or sugar 'fast foods'.

Case Study 3: Freshwater

Rational for the Case Study

180. The freshwater issues have already been canvassed by the Waitangi Tribunal, so the rationale for this case study is stated more briefly.
181. As at 1840 Maori had rights in relation to water (rivers and lakes) and geothermal energy, which were guaranteed under Article 2 of the Treaty and were broadly equivalent to ownership. Legislation and crown practice removed the resources from Maori without their consent. In doing so the Crown failed to protect Maori in their tino rangatiratanga or full, exclusive and undisturbed possession of their

¹⁴² Gleeson, 'Preliminary analysis of the final TPP Healthcare Transparency Annex', p.4. Attached as Exhibit CD.

¹⁴³ 'Call for transparency in new generation trade deals', *The Lancet*, vol 385, 14 February 2015, pp.604-605. Attached as Exhibit CH.

¹⁴⁴ Footnote 37 makes it explicit that health products are covered by that provision.



water properties or taonga as guaranteed by Article 2. As a result, Maori have been deprived of the right and ability to develop these resources for their own purposes.

182. Maori claims relate not just to a share in the economic benefit of the resource but also include claims for cultural and spiritual deprivation.¹⁴⁵
183. Maori have traditionally viewed a river or lake as a single entity with tribal authority over the resource as a whole.
184. A primary concern of the claimants in the freshwater dispute is the way that water is currently managed under the Resource Management Act 1991. Their claims relate both to general governance and management (largely vested in regional Councils) and the lack of ability to derive income from exploitation of their water resources.¹⁴⁶
185. In its *Stage I Report on the National, Freshwater and Geothermal Resources Report (Wai 2358)* the Waitangi Tribunal rejected the submission of the Crown that Maori rights in freshwater were limited to the exercise of kaitiakitanga. The generic finding of the Tribunal was that Maori had rights and interests in their water bodies for which the closest English equivalent was ownership rights and that such rights were confirmed and protected by the Treaty. The nature and extent of the proprietary right was the exclusive right to control access to the use of the water while it was within their rohe.¹⁴⁷ The customary authority includes the right to economic benefit from use of the resource. The Tribunal emphasised that Maori also value waters for spiritual and cultural reasons.¹⁴⁸ How Maori rights are to be recognised in modern circumstances is the subject of the second stage of the Tribunal inquiry.
186. The claims have not yet been settled.
187. The claimants seek a range of remedies that reflect the nature of their Treaty rights in the resource. This might include payment for on-going use of the resource, compensation for historical loss and or control or veto over use of the resource by

¹⁴⁵ see *New Zealand Maori Council v Attorney-General* [2013] NZSC 6 at [102]

¹⁴⁶ see *NZMC v AG* at [142]

¹⁴⁷ *NZMC v AG* at [21]

¹⁴⁸ *NZMC v AG* at [10]



others. The claimants seek remedies which will allow them future commercial exploitation of the resource by themselves as well as instruments that give them the right to protect the spiritual and cultural values.

188. The Supreme Court noted that the Crown acknowledged that Maori have rights and interests in water and geothermal resources. It referred to the affidavit of the Minister of Finance as follows.

The crown position is that any recognition must “involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues.” The Court should accept that it is not an empty exercise.¹⁴⁹

Issues under the TPPA

189. The claimants in the freshwater case who are participating in the present claim are concerned that addressing these issues will require changes to the RMA and that the TPPA will increase the number and power of commercial stakeholders in the current water control regime. This will limit the likelihood of more general recognition of Maori rights in water.
190. In particular, there is potential for an investor state dispute where remedies impact on the value of an investment, including shares or an asset, and its future profitability.
191. I gave evidence on this matter to the Waitangi Tribunal in the Freshwater claim, specifically relating to the potential chilling effect of a threat to bring an investment dispute on the Crown’s willingness to provide redress. The Crown responded with an assurance that it would not be chilled. The Crown has asserted in a document filed in this claim that the Tribunal rejected my argument regarding the chilling effect.¹⁵⁰ That is not true. The Tribunal accepted the Crown’s

¹⁴⁹ *NZMC v A G* at [145]

¹⁵⁰ ‘Further memorandum regarding inquiry planning’, Wai 2522, R Ennor / G Gillies (Crown), 3 December 2015, paras 12-13

assurance,¹⁵¹ and concluded that ‘ultimately it may not be necessary for The Tribunal to determine the issue about the impact of investor tribunals’.¹⁵² A subsequent reference in the Supreme Court to the matter merely noted that acceptance.¹⁵³

192. Since that evidence, the TPPA has been concluded and greatly expanded New Zealand’s exposure to an investor-state dispute through new rules and empowerment of investors from the US and Japan especially to bring such disputes. There is also a flow-on expansion of the investor protections for investors under existing New Zealand agreements, notably with China, Taiwan and South Korea, pursuant to the most-favoured-nation rule in those agreements.
193. Moreover, the assurance from the Crown in the Freshwater dispute was very specific to the circumstances under discussion at that time. It would be impractical for the Crown to issue such an assurance on a broader scale and for an indefinite period of time, and unconstitutional for it to bind the hands of future governments by purporting to do so.

Adequacy of the Treaty Exception

194. The application of the Treaty Exception in this case study, assuming the Crown was prepared to provide remedies, would depend firstly on the nature of the remedy. If the Crown provided preferences for Maori in relation to the resource, such as the issuing of new entitlements only to Maori, that may be protected, provided it was not of such a scale that it was considered unreasonable. The chapeau would be more likely to be invoked by an investor, and supported by a tribunal, if the redress involved reallocation of existing entitlements that significantly impacted upon an existing investment.
195. Extending the Treaty Exception to protect changes to the RMA to provide more effective control by Maori over decisions affecting the freshwater resource would require an investment tribunal to adopt an uncharacteristically broad and non-commercial interpretation. As noted earlier, the qualifications and experience of

¹⁵¹ *Stage 1 Report on the National, Freshwater and Geothermal Resources Report (Wai 2358)*, para 3.9.2 at page 142

¹⁵² Waitangi Tribunal, *Wai 2358*, para 3.8.3(3) at page 134

¹⁵³ *NZMC v A-G* [105]

investment arbitrators, and the limited rights of input of affected Maori in an arbitral hearing, would suggest that is unlikely.

196. More general remedies that did not involve directly preferential treatment to Maori would face the same impediments discussed earlier.
197. A decision by a subsequent government when a previous government has publicly rejected the validity of claims and the need for action could be impugned as arbitrary.
198. The potential chilling effect of threats to bring such a dispute remains a major concern, especially where a government has been reluctant to act on previous Tribunal recommendations.

Conclusion

199. The three case studies reflect different contexts in which the TPPA can negatively impact of Maori rights and the ability of the Crown to meet its obligations to deliver them:
 - (i) *Case Study 1: Fracking* illustrates the problems where the Crown has constrained its own policy and regulatory space to respond to changing circumstances and new forms of violation of Maori rights that are not adequately dealt with. It also shows the issues that arise when a future government seeks to make changes to the policies of a former government, when policy changes are required due to developments in scientific consensus, or when different hapu and iwi exercise their tino rangatiratanga in different ways.
 - (ii) *Case Study 2: Affordable medicines* illustrates the negative impact on Maori of the TPPA rules already agreed to by the Crown and the potential for that impact to worsen over time, compounding the existing failure of the Crown to meet its obligations under te Tiriti, the UN Declaration and other sources.
 - (iii) *Case Study 3: Freshwater* illustrates the negative impact of the TPPA where Crown obligations remain unresolved. The TPPA has greatly expanded New Zealand's exposure to an investor-state dispute through new rules and



empowerment of investors, without any tested and Treaty-compliance protections for Maori.

200. In my assessment the risks are highest for all three case studies with investor-state disputes and the potential for chilling a government's decision, in circumstances where, as the UN Rapporteur on Indigenous Peoples observed, governments are already often reluctant to act. Parties to the TPPA and their investors are effectively gifted greater rights than Maori are accorded in domestic law. Self-censorship by government as well as active chilling are both real possibilities. The potential for additional side letters heightens this risk.
201. State enforcement is still relevant, especially in relation to biologics, with pressures from governments during the certification phase and consultations once the agreement comes into force. Maori have no role in those processes and no ability to ensure that the Crown actively protects their interests and its capacity to meet to its Treaty obligations. The Crown's lack of consultation to date and the willingness to ignore or disagree with part Tribunal findings and recommendations regarding international treaty making makes that a real risk.
202. There are particular concerns in relation to Case Study 2 in relation to marketing exclusivity for biologics, where the Crown will come under pressure to accept further obligations during the US Congressional process and certification, and in the scheduled further negotiations on marketing exclusivity after 10 years.
203. Case studies 1 and 2 are hypothetical, yet real world examples where the Treaty Exception is inapplicable. In Case Study 3 the Treaty Exception has the potential for only partial application, with other remedies falling outside its scope. The Crown has already implicitly acknowledged those deficiencies with the last-minute changes it made to the obligations to adopt UPOV91.
204. Finally, I have concerns that in concluding the TPPA on the current terms the current government is binding the hands of future governments and effectively precluding them from being able to meet what they may accept are their Treaty



obligations, whether that be regarding policy, settlements or otherwise, even if the current government does not. That is, in itself, a failure of active protection.

[Handwritten mark] SWORN / AFFIRMED at: Auckland)

On: 20th January 2016)

Before me:)

[Signature]
A Solicitor of the High Court of New Zealand

[Signature]
Professor Elizabeth Jane Kelsey

CORAL M T LINSTEAD-PANOHC
SOLICITOR
AUCKLAND