BEFORE THE WAITANGI TRIBUNAL

TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

IN THE MATTER OF of the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF An Urgent Inquiry into the Trans Pacific Partnership Agreement

BRIEF OF EVIDENCE OF AMOKURA KAWHARU

Dated 24 February 2016

RECEIVED
Waitangi Tribunal
24 Feb 2016
Ministry of Justice
WELLINGTON
I, Amokura Kawharu, of Auckland, university academic, swear:

INTRODUCTION

1. I am an Associate Professor of Law at the University of Auckland. My research interests include the regulation of foreign investment, international law and disputes settlement. With David Williams QC, I co-authored the leading text on New Zealand arbitration law, *Williams & Kawharu on Arbitration* (LexisNexis, 2011). I have also published on a range of issues relating to international trade and investment law and investor-State arbitration, including with respect to the Trans-Pacific Partnership Agreement (TPPA).

2. I teach or have taught courses on international disputes settlement, commercial and investment arbitration, international economic law, personal property law and land law.

3. Prior to joining Auckland Law School in 2005, I practised as a commercial solicitor in Auckland and Sydney for seven years. I hold a BA / LLB (Hons) degree from the University of Auckland and an LLM (First Class) degree from the University of Cambridge.

Scope of evidence

4. I have been engaged by the Tribunal to provide independent expert legal opinion on the question whether the Treaty of Waitangi exception in art 29.6 TPPA (the Treaty Exception) provides effective protection of Maori interests.

5. I was provided with a set of legal questions proposed by the Crown, together with material from the file for the present claims including case studies proposed by the claimants. In the terms of my engagement, I was given the latitude to develop my brief as I saw fit.

6. In this brief of evidence, I discuss:

   6.1. the legal interpretation of the Treaty Exception;

   6.2. the dispute resolution procedures under the TPPA (these first two sections address most of the Crown’s questions);

   6.3. the obligations imposed on New Zealand in the investment chapter of the TPPA, Chapter 9; and

   6.4. the application of the Treaty Exception to measures that may be inconsistent with New Zealand’s obligations in Chapter 9. This final section includes discussion of the claimants’ case studies and is intended to test the legal effectiveness of the exception.
7. The TPPA is a comprehensive agreement covering a wide range of subject matters. Both the Crown and the claimants have focussed on investment as an area of potential concern. I have likewise focussed on investment issues.

8. Much of the discussion in the legal submissions to the Tribunal is directed at the impact of the TPPA on New Zealand's regulatory autonomy. The claimants' concerns go further, in that their arguments also address the potential influence of the TPPA on how the Government chooses to exercise its autonomy and consistency with the Treaty of Waitangi in terms of its approach to the negotiation and implementation of the TPPA. I have not delved into these concerns, except to the extent that I have considered how deficiencies in the Treaty Exception may be addressed, and discussed the nature of remedies in TPPA disputes settlement. Otherwise, my approach to the question discussed in this evidence is to consider whether the Treaty Exception is legally effective to defend a measure adopted to protect Maori interests, if the measure is adopted.

9. I have read the affidavits of the experts appointed by the parties, Professor Kelsey (for the claimants) and Dr Ridings (for the Crown). I also met with Professor Kelsey and Dr Ridings on 22 January 2016. The purpose of that meeting was to identify any areas of agreement, and areas of particular attention for the inquiry. It was evident from the meeting that a number of matters remained live issues for this inquiry, such as the meaning of the phrase "more favourable treatment" and the effect of paragraph 2 in the Treaty Exception. These matters have been argued extensively in subsequent evidence and my view on them is also discussed here. We agreed that Professor Kelsey would develop proposed measures to focus the analysis of the case studies.

10. In my brief I have not limited myself to commenting on the views of the parties' experts. Instead, I have found it more logical to adopt my own structure (particularly because the parties have approached the issues differently), and then to comment on the views of the parties' experts as part of my analysis of the adequacy of the Treaty Exception. I include material I have relied if it has not otherwise been provided by the parties' experts.

11. I acknowledge that I have read the code of conduct for expert witnesses in Schedule 4 of the High Court Rules and I agree to comply with it.

Summary

12. The Treaty Exception provides New Zealand with a basis on which it may seek to defend a measure it has adopted to protect Maori interests, if it is established...
that the measure is inconsistent with an obligation that New Zealand has assumed under the TPPA.

13. The TPPA provides two types of dispute settlement procedures for resolving claims arising under the agreement: investor-State arbitration, and State-State dispute settlement.

14. In either kind of proceedings, to defend a measure under the Treaty Exception, New Zealand would have the burden to make a *prima facie* case that:

14.1. the measure accords more favourable treatment to Maori;

14.2. it has deemed it necessary to adopt the measure; and

14.3. the measure satisfies the proviso in paragraph 1 of the exception, including because there is a legitimate policy rationale for the more favourable treatment.

15. The meaning of “more favourable treatment to Maori” is uncertain. This is a serious issue for this inquiry, because the phrase determines the scope of application of the exception to measures adopted by the Government to promote Maori interests.

16. Even taking a broad approach to what constitutes such treatment, it strains language to suggest that all measures for protecting Maori interests also accord Maori preferential treatment. It is conceivable that the application of some such measures could nevertheless be inconsistent with an obligation in the TPPA, and not fall within any other exception.

17. There are other uncertainties in the meaning of the exception. Some of these uncertainties appear to arise from the use of a template text that has not been reviewed or updated to account for New Zealand’s expanding international treaty commitments.

**WHAT IS THE MEANING OF THE TREATY OF WAITANGI EXCEPTION IN ARTICLE 29.6 TPPA?**

**The text and its interpretation**

18. The Treaty Exception reads:

**Article 29.6: Treaty of Waitangi**

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and
investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party’s rights under this Agreement.

19. The meaning of the Treaty Exception is to be ascertained by applying the relevant interpretation principles. The State parties to the TPPA have the competence to interpret the Treaty Exception through the TPPA Commission, as do tribunals established under the TPPA in investor-State and State-State dispute settlement proceedings. The exception deals with the interpretation of the Treaty of Waitangi itself.

**Precision in interpretation versus precision in drafting**

20. The parties’ experts have adopted slightly different approaches as to how the adequacy of the Treaty Exception should be assessed; this was discussed at the meeting of experts and is also noted in their affidavits. There is essentially a difference of opinion between them regarding whether the focus should be on the meaning of the exception applying the relevant principles for interpretation, or on how the exception may (rather than should) be interpreted by international tribunals. I comment on this difference by way of explanation of my own approach.

21. Amongst its list of questions, the Crown asked for an interpretation that gives “the precise meaning” of the Treaty Exception. Professor Kelsey has argued that in light of recent practice it is difficult to predict how the Treaty Exception and the various investor protections would be interpreted in a TPPA proceeding. At one level, this just reflects that credible arguments can be made for a range of interpretations of any legal provision. In a dispute, the claimant State or investor would very likely press for a narrow interpretation of the Treaty Exception and argue against its application to the facts, while New Zealand would respond with a broad interpretation to cover those same facts. Professor Kelsey’s point

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3 The TPPA establishes a Commission with functions including the interpretation of the agreement (arts 27.1 and 27.2.2(f)).
4 TPPA, art 9.25.1.
5 TPPA, art 28.12.3.
6 Sixth Kelsey Affidavit, 19 January 2016 e.g. at [44], [47] and [55].
though is that there is a real likelihood a tribunal would adopt the narrow interpretation of the exception (or a wide interpretation of the applicable substantive protection). Therefore, the lack of predictability makes it difficult to accurately state the law, and the effectiveness of the Treaty Exception should at least be measured against a worst case.

22. For her part Dr Ridings has explained that, while investment treaty tribunals are not bound by any doctrine of precedent, they are increasingly guided by the decisions of other tribunals so that there is now a de facto doctrine of precedent. In other words, the developing practice of tribunals is generally towards increasing consistency and predictability in the interpretation of core investment treaty law concepts.

23. In my observation recent practice demonstrates greater consistency, and this should narrow the possible range of plausible interpretations of common legal concepts that are found in the Treaty Exception itself and elsewhere in the TPPA. At the same time, in recent years there have been instances of inconsistent approaches by tribunals to interpretations of the same or similar treaty provisions. The law remains unsettled in some areas. It can be useful to refer to recent decisions to illustrate potential outcomes, even if a good argument could be made that a particular decision lacks legal merit. Cases addressing the defence of necessity under the United States–Argentina bilateral investment treaty in the mid-2000s provide examples of different tribunals reaching different interpretations of the same treaty provisions. There also remains scope for the law to develop through improvements in the text of new treaties such as the TPPA. I have taken these factors into account in my assessment of the Treaty Exception.

24. Given the differences of opinion about the meaning of the Treaty Exception and whether it achieves effective protection of Maori interests, perhaps a pertinent question is whether the ordinary meaning of the Treaty Exception is sufficiently clear. If it is not, further questions would include whether better drafting would have minimised the risk of uncertainty, and what if any options there are still available to address that risk.

**Issues / areas of uncertainty**

25. The ordinary meaning of the Treaty Exception is not clear in some respects. It is common ground between the experts that there is some uncertainty regarding the expression of “more favourable treatment to Maori”:

25.1. it is unclear what the comparator should be;

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8 Ridings Affidavit, 19 January 2016 at [15.6].
9 McLachlan “Investment Treaties” at 378-379.
10 McLachlan “Investment Treaties” at 385.
25.2. there is uncertainty about the kind of treatment needed to protect Maori interests and whether it is limited to preferential treatment;

25.3. there is also some uncertainty and disagreement regarding the extent to which some or all Maori should benefit from a measure relative to non-Maori.

26. As noted, the interpretation of this phrase is a key issue, because it relates to the scope of application of the exception to measures adopted by the Government to promote Maori interests.

27. There is disagreement regarding how the proviso or chapeau in the Treaty Exception would or should be interpreted.

28. The second paragraph of the Treaty Exception, dealing with the interpretation of the Treaty of Waitangi, is ambiguous. All experts agree on the existence of the ambiguity.

29. Greater specificity in the text of the Treaty Exception about its intended coverage and operation would reduce the uncertainty and ambiguity. However, the options for addressing these issues in the TPPA are rather limited.

30. Professor Kelsey has noted that various side letters will be signed (now, have been signed) to record agreements related to the TPPA between two or more TPPA signatories. The effect of these letters is to modify the terms of the agreement as between parties to the individual letters. The TPPA contemplates side letters that are entered into in connection with the conclusion of the TPPA. The TPPA was concluded on 4 February 2016. Professor Kelsey has also suggested that further side letters may yet be exchanged and cites the example of the letters exchanged between the parties to amend the United States – Korea Free Trade Agreement after its signature but before its entry into force. Even so, the TPPA side letters have been used as bilateral “side” agreements; they have not been used to effect amendments applicable to all State parties to the treaty.

31. The second option is an agreed interpretation. As a matter of general international law, agreed interpretations by the parties to a treaty after the treaty has been concluded must be taken into account in the interpretive process. The TPPA provides a lex specialis which goes further than this, as interpretations by the TPPA Commission are binding on investor-State tribunals and therefore must be applied by them in investor-State dispute settlement proceedings. The Commission is a body that will be established to provide oversight and carry out a number of other functions in relation to the agreement, including the interpretation of any of its terms. New Zealand could press for an interpretation of the Treaty Exception. An interpretation would be particularly

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11 TPPA art 28.3.3.
12 Seventh Kelsey Affidavit, 3 February 2016 at [85]-[89].
14 TPPA arts 9.25.3, 27.1 and 27.2.2(f).
beneficial in clarifying the intended scope of “more favourable treatment”. An interpretation could not change the scope or effect of the exception. Agreement of all twelve TPPA parties to an interpretation may be difficult to secure, as a practical matter. Another possibility may be an exchange of notes between the State parties (rather than a formal interpretation through the Commission) but again I am unsure of the practicalities in the context of the TPPA.

32. The TPPA could be amended after it has entered into force, but this seems an unrealistic option. The TPPA parties will likely be reluctant to consider changes to the text requested by New Zealand, as it could prompt other States to press for their own changes.

33. In relation to acting on any of the above New Zealand may need to consider the possible impact on New Zealand’s other existing agreements that also contain a similarly worded exception for Maori. Any change to the current TPPA text could be taken as implying that the usual template used in those existing agreements is inadequate.

General principles

Vienna Convention on the Law of Treaties

34. Although discussed in the affidavits of the parties’ experts, it is helpful to begin by re-stating the principles for interpreting the Treaty Exception. Those principles are set out in arts 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT). Some of the TPPA countries are not party to the VCLT (the United States, Singapore and Brunei Darussalam), but arts 31 and 32 are regarded as reflecting customary international law and they are therefore binding on all States whether party to the VCLT or not.

35. They provide, in relevant part:

**Article 31**

**General rule of interpretation**

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

4. A special meaning shall be given to a term if it is established that the parties so intended.

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15 TPPA art 30.2.
Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

36. The VCLT framework thus directs analysis first, to the ordinary meaning of the terms of the Treaty Exception in light of their context and the object and purpose of the TPPA, secondly, to whether any part of the Treaty Exception has a special meaning that needs to be applied, and thirdly, to whether the preparatory work or travaux préparatoires of the TPPA sheds any further light on the meaning of those terms.

Context, object and purpose

37. The context of a provision (which includes the text and preamble\textsuperscript{17}), together with the treaty’s object and purpose, are important factors in the interpretation of the ordinary meaning of its terms. For this reason, it is important in the interpretation of the Treaty Exception to consider the context of the exception and the object and purpose of the TPPA as indicated by the terms of the agreement itself.

38. The TPPA Preamble begins by stating that the parties’ objective is to establish a comprehensive agreement for promoting economic integration to liberalise trade and investment, create opportunities for businesses and promote sustainable growth.\textsuperscript{18} In some investment treaty cases, tribunals have relied on these types of statements about purpose to prefer a pro-investor interpretation of the provision at issue, although conflating the individual interests of investors with the objective of promoting investment and development has also been criticised as simplistic.\textsuperscript{19}

39. In any event, existing decisions may not be a reliable indicator of the general approach that would be taken under the TPPA to determining what the relevant context is. In contrast to many existing free trade and investment treaties, the Preamble of the TPPA explicitly recognises the inherent right of the State

\textsuperscript{17} VCLT, art 31(2).
\textsuperscript{18} TPPA, Preamble.
\textsuperscript{19} See e.g. Zachary Douglas “Nothing if not critical for investment treaty arbitration: Occidental, Eureka and Methanex” (2006) 22 Arbitration Int’l 27 (Douglas “Nothing if not critical”) at 51. Attached as Exhibit #3.
parties to regulate so as to safeguard public welfare and protect legitimate public welfare objectives. This type of recognition is a recent phenomenon, and responds to growing concerns about the potential intrusiveness of trade and investment treaties into the regulatory functions of States.

40. Further relevant context from the Preamble is the recognition of the importance of cultural identity and diversity among and within the parties, and the inclusion of the objective to promote "high levels" of environmental protection.

41. The TPPA Preamble reflects that a range of interests are intended to be promoted and protected by the agreement. The text of the Treaty Exception itself shows that New Zealand accords a high degree of significance to its Treaty of Waitangi obligations to Maori, through the self-judging aspect to the exception and the agreement on the interpretation of the Treaty of Waitangi in paragraph 2. This is relevant context that I have taken into account in my interpretation of the exception and in the framing of what New Zealand's TPPA partners can reasonably expect from New Zealand under the agreement.

"nothing in this Agreement"

42. The Treaty Exception is an exception to the whole of the TPPA. That is, it provides a basis on which New Zealand may defend a claim based on the breach of any other provision of the agreement. This is clear from the words "nothing in this Agreement" in paragraph 1 of the exception, and the placement of the exception in Chapter 29 alongside the other general exceptions to the agreement.

"measure"

43. The Treaty Exception applies to "measures" that are adopted by New Zealand, that is, positive acts to give effect to Maori interests. A "measure" is defined in TPPA art 1.3 as including "any law, regulation, procedure, requirement, or practice".

Application to measures that accord "more favourable treatment to Maori"

"including in fulfilment..."

44. The scope of application of the Treaty Exception is indicated by the following words:

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20 TPPA, preamble.
21 TPPA, preamble.
... measures... to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

45. Although the exception is labelled "Treaty of Waitangi", it potentially applies to any measure giving more favourable treatment to Maori whether required by the Treaty of Waitangi or not. This is clear from the ordinary meaning of "including...". For this reason, the value of the agreement on the interpretation of the Treaty of Waitangi in paragraph 2 of the exception (discussed below) is perhaps lesser than may be thought, given that measures do not need to be justified by reference to the Crown's Treaty of Waitangi obligations.

46. Because of the proviso in paragraph 1 (also discussed below), any discrimination in favour of Maori that the Government seeks to bring within the exception will nonetheless need to have a legitimate policy rationale. In most cases, that rationale will likely be connected in some way to obligations under the Treaty of Waitangi.

"more favourable treatment"

47. The term "more favourable" is a comparative expression, so the ordinary meaning of "more favourable treatment" is that it involves Maori being advantaged by a measure in some way as compared to someone else. It is unclear however who or what the appropriate comparator should be. The parties' experts agree on the existence of this uncertainty. In essence, there is a question whether the phrase means:

47.1. more favourable treatment of Maori as compared to the putative TPPA claimant where both are in like circumstances; or

47.2. more favourable treatment of Maori in a general sense.

48. Both of these interpretations are arguable and I consider them in turn.

More favourable treatment of Maori in like circumstances

49. A possible explanation for the "more favourable treatment" wording relates to the nature of the obligations typically imposed by trade agreements on States, and the use of exceptions for Maori in New Zealand's prior trade agreements.

50. The phrase "more favourable treatment" is the reverse of the phrase "less favourable treatment" which is commonly found in non-discrimination provisions in trade and investment agreements. Non-discrimination is one of the central organising tenets of international trade law. It is intended to promote
access to, and ensure a level playing field for participants in, a given market. In relation to the World Trade Organization (WTO), for example, “[t]he elimination of discriminatory treatment in international trade relations is one of the core values of the multilateral trading system”. The WTO is the umbrella organisation for global trade rules.

51. In the WTO system, the principle is expressed in two ways, through the obligation of “national treatment”, and the obligation of “most favoured nation” (MFN). National treatment requires persons from other State parties to be treated no less favourably than nationals. MFN requires persons from other State parties to be treated no less favourably than persons from third countries. Bilateral and regional trade agreements expand on the commitments in the WTO agreements, and are based on the same general principles.

52. Measures that discriminate in favour of Maori could potentially breach the national treatment obligation unless covered by an exception. New Zealand included an exception expressly allowing more favourable treatment of Maori in the bilateral New Zealand – Singapore Closer Economic Partnership Agreement 2001, and has included the exception in every trade agreement it has concluded since. The language used in these past agreements is substantially the same as the Treaty Exception in the TPPA. A more limited subject-specific exception was included in New Zealand’s schedule to the 1994 WTO General Agreement on Trade in Services (GATS).

53. However, the extent of the obligations that New Zealand has assumed under these agreements has changed. In the 2001 agreement with Singapore, the substantive obligations regarding investment are relatively modest (although they include among them the national treatment obligation), and the provisions on investor-State dispute settlement are limited and non-binding. The Ministry of Foreign Affairs and Trade (MFAT) represents the agreement with Singapore as a trade agreement, with benefits for New Zealand’s trade in goods and services. New Zealand has assumed more extensive obligations in subsequent agreements, particularly in relation to investment. Despite this change, the exception still refers to measures that accord Maori “more favourable treatment”.

54. The national treatment obligation is usually expressed to require no less favourable treatment of foreigners, or their goods or services, who are in “like” circumstances to nationals or their goods or services.

55. In the TPPA, with respect to trade in goods (for example), the national treatment language of the WTO General Agreement on Tariffs and Trade

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23 New Zealand – Singapore CEP, art 74. Attached as Exhibit #5.
24 New Zealand – Singapore CEP, art 29.
25 New Zealand – Singapore CEP, art 34.
(GATT) is incorporated into Chapter 2 by cross reference. Article III.4 GATT relevantly provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin...

(emphasis added)

56. In Chapter 9 on investment, the national treatment obligation relevantly provides:

Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors...

(emphasis added)

57. Given the style of the language and the historic use of the Treaty Exception in New Zealand’s trade agreements, it could be argued that the exception is a response to these non-discrimination obligations, and that it therefore deals with discrimination between Maori and TPPA claimants who are in like circumstances, i.e., economic competitors. If adopted, this interpretation would limit the scope of application of the exception to laws and regulations concerning Maori in a narrow, commercial context.

58. Professor Kelsey has also suggested that importing a likeness test is a possible interpretation on the basis it would maintain consistency with the non-discrimination obligations and reduce the risk of uncertainty. As explained, I agree this view is arguable. On the other hand, it is premised on the use of similar language in provisions that have different purposes. Terms used in affirmative obligations do not necessarily have the same meaning as they have when used in exceptions, even if they are expressed in the same or similar language. This was recently re-affirmed in the WTO setting by the Appellate Body (which sits above first instance panels) in the US - Tuna case, where it noted that due account must be taken of the more immediate context and function of each provision.

59. Another factor suggesting that “more favourable treatment” should not be tethered to meanings associated with non-discrimination obligations is that there is no single meaning of “like” treatment. Likeness for the purpose of non-discrimination obligations may properly be interpreted differently, depending on whether the discrimination at issue arises in the trade or investment context.

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27 TPPA, art 2.3.
28 Sixth Kelsey Affidavit, 19 January 2016 at [24]-[27]. Professor Kelsey also refers to the alternative interpretation at [29].
29 Appellate Body report, United States - Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/AB/RW (20 November 2015) (US - Tuna) at [7.88]-[7.89].

Attached as Exhibit #7.
(and the particular wording used). This difference is illustrated by the TPPA itself, as the parties have agreed to a Drafters’ Note setting out how “like circumstances” for the purpose of the national treatment and MFN obligations in the investment chapter should be interpreted. The Note only applies to national treatment and MFN in the investment chapter.

**More favourable treatment of Maori generally**

60. The alternative and broader view is that there is no express limitation to Maori and TPPA claimants in like circumstances in the text of the Treaty Exception, and the context of the exception within the TPPA described earlier does not indicate that any such limitation should be implied. If New Zealand had intended to propose an exception that was limited to specific circumstances, then it could have done so expressly. On this view, while the exception only applies to discriminatory treatment, all measures giving more favourable treatment to Maori would be covered.

61. The argument for this second alternative is stronger given the VCLT’s emphasis on the text. That said, the lack of a direct comparator for assessing preferential treatment may prove challenging, in the sense that comparing like with unlike to determine whether a measure accords more favourable treatment will often not be straightforward. This difficulty could lead a tribunal to prefer the first interpretation, in order to make the Treaty Exception more workable and less abstract. Indeed, a tribunal could decide that arguments for a broad interpretation of the exception according to whatever substantive obligation is at issue are really arguments for the exception to cover everything it needs to cover, rather than what it has been written to cover.

62. I respectfully disagree with Dr Ridings that the comparison of more favourable treatment could relate to treatment of Maori only, or that the comparator could be any non-Maori (including New Zealanders). The thrust of the exception is to provide a basis on which New Zealand can lawfully act other than in full compliance with its obligations under the TPPA, hence the references to discrimination against “persons of the other Parties”, and “more favourable treatment... in respect of matters covered by this Agreement”, in its text. The non-compliance is to the disadvantage of a TPPA State or person from that State, and it is that disadvantage that would give rise to a claim and the possible need for reliance on an exception.

63. In addition, if the purpose of the Treaty Exception was to cover all measures that provide Maori better treatment than Maori had received previously, then the way to achieve this would be to draft it to cover measures which are necessary to promote Maori interests.

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31 TPPA Drafters’ Note on Interpretation of “In Like Circumstances” Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment) (TPPA Drafters’ Note on Like Circumstances), Exhibit V to Ridings Affidavit, 19 January 2016.

32 Ridings Affidavit, 19 January 2016 at [24.2]-[24.3] and [35].
"favourable"

64. Much of the discussion in the cases dealing with non-discrimination obligations concerns the comparator (the meaning of “like” and similar terms, and whether policy distinctions can be taken into account). Relatively little has been said about what “favourable” means.

65. In one case, *Pope & Talbot Inc v Canada*, the tribunal considered the expressions “no less favourable” and “no less favourable than the most favourable treatment” in the national treatment obligation in art 1102 of the North American Free Trade Agreement (NAFTA). It concluded that there was no substantive difference between them, and that “no less favourable” referred to treatment that was “equivalent to, not better or worse than, the best treatment accorded to the comparator”.

66. The relevant terms and context of the national treatment obligation in the NAFTA differ from those of the Treaty Exception, including because the different expressions are used in the NAFTA clause to apply to different levels of government. That said, the tribunal’s approach was to apply the ordinary meaning of “no less favourable” to both.

67. The Oxford Dictionary defines “favourable” as “[a]dvantageous, convenient…; in favour of…”.

68. For treatment to be “more favourable” for the purpose of the Treaty Exception, it needs to be better than that accorded to the putative TPPA claimant, or be more advantageous to Maori than the claimant. Measures that would be more favourable, in the ordinary sense of the word “favourable”, would include dispensations and special benefits. Treatment that is only different, but does not confer any advantage, would not be more favourable. Measures that may reflect Maori interests but do not confer any better treatment on Maori would likewise not come within more favourable treatment.

69. Dr Ridings has observed that “[t]reatment that was different between Maori and others, but not more favourable to Maori, would not need to engage the exception”. Yet, such treatment could not engage the Treaty Exception. Whether an exception is needed to defend the treatment is an empirical question that has to be answered by considering first, what kinds of regulatory measures are required to protect Maori interests, and second, their potential inconsistency with the TPPA. This is discussed further in the analysis of the case studies.

70. Conversely, in a fact sheet concerning the legal and institutional aspects of the TPPA, MFAT explained, in relation to the Treaty Exception, that:

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33 *Pope & Talbot Inc v Government of Canada*, Award on the Merits of Phase 2, 10 April 2001 at [42]; attached as Exhibit DD to Ridings Affidavit, 19 January 2016.


35 Ridings Affidavit, 19 January 2016, [24.4].

Key features of these chapters include an exception that recognises the importance of the Treaty of Waitangi to New Zealand. *Nothing in TPP will prevent the Crown from meeting its obligations to Maori.* (emphasis added)

71. The statement is repeated elsewhere in the fact sheet,\(^{37}\) and in the National Interest Analysis prepared by MFAT in a section dealing with cultural effects.\(^{38}\)

72. The difficulty with these statements is that the Treaty Exception is limited to measures that the Government deems necessary to accord more favourable treatment to Maori. The statements are too broad, because they suggest that any measure adopted by the Government to give effect to its obligations to Maori would be covered by the exception — the exception does not allow for all such measures, only those that accord to Maori more favourable treatment. Either the statements reflect a misunderstanding of the scope of the Treaty Exception, or they reflect an understanding of the Treaty of Waitangi to the effect that the only measures which are required by the Treaty are those that accord Maori more favourable treatment. Again, I return to this issue in the analysis of the case studies.

"to Maori"

73. The ordinary meaning of "Maori" is that it encompasses the singular (individual person or group), plural, and Maori as a people. On this basis, a measure could be adopted to favour a particular hapu, for example, and still be a measure that accords more favourable treatment "to Maori". This is reinforced by the context of the Treaty Exception, through the specific reference to the Crown’s obligations under the Treaty of Waitangi. Those obligations exist at hapu, iwi, and national levels.

74. As a general matter, non-Maori may benefit from measures adopted to protect Maori interests, especially if the measures are adopted at the national level and are also in the general public interest. Whether a given measure falls within the Treaty Exception should depend on whether the Government has deemed it necessary to accord the more favourable treatment to Maori, as a specific group, either in fulfilment of its obligations under the Treaty of Waitangi or for some other *bona fide* reason. If the measure has many objectives, only one of which is to protect Maori interests, then the measure may not fall within the scope of the exception (because the Maori interest is subsumed into a general one), and may not satisfy the proviso or chapeau test.

75. It may be difficult to draw the line in relation to a measure that has other objectives, in addition to protecting Maori interests, and this difficulty is

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\(^{37}\) At page 2.

\(^{38}\) National Interest Analysis, copy distributed by the Crown by Memorandum dated 27 January 2016, at [7.3.1].
recognised by the parties’ experts.\textsuperscript{39} In principle though, it would not be workable for the exception to be read as applying to measures that give preferential treatment “to Maori” and no one else. This is because Maori are part of New Zealand society, many Maori interests are shared in common with those of non-Maori (so non-Maori policy objectives may also be in play), and in some cases, Maori interests may only practically be able to be pursued through the adoption of measures of general application. Interpreting an international treaty in a way that deprives it of meaning would be contrary to the principles of good faith and \textit{efjet utile} or effectiveness in treaty interpretation. Thus, the fact that a measure might also serve another purpose should not be determinative. It may give rise to suspicions about whether New Zealand is acting in good faith, and this could be examined by a tribunal as part of its review of the measure.

76. In Professor Kelsey’s opinion, every policy decision that New Zealand makes arguably includes some element of compliance with the Treaty of Waitangi (and it follows that the exception could not possibly cover all these decisions).\textsuperscript{40} I wonder whether this is accurate – certainly policy decisions should be consistent with the Treaty, but I doubt that all policies include compliance with the Crown’s Treaty obligations as an objective. The Treaty Exception is concerned with measures that are necessary to favour Maori, that is, measures that are required, or must be taken, to fulfil a legitimate policy purpose concerning Maori.

Measures “it [New Zealand] deems necessary”

77. Both experts for the parties agree that the Treaty Exception is partly self-judging (although there is some difference in opinion between them about the extent to which it is self-judging).\textsuperscript{41} I also agree that the exception is partly self-judging. This is because whether a measure is necessary to accord more favourable treatment to Maori is a matter determined by New Zealand. As a result, New Zealand is not subject to the often onerous “necessity test” that might otherwise be imposed through the use of the word “necessary” in the exception. In WTO and investment law, the necessity test involves an ends-means analysis that requires consideration of factors such as the trade or investment restrictiveness of the measure compared with the restrictiveness of reasonably available alternatives.\textsuperscript{42}

78. Different positions have been taken by states, adjudicators and commentators about the effect of self-judging exceptions. For example, some States take the view that the effect of making an exception self-judging is to insulate the exercise of the rights under the exception from review by dispute settlement.

\textsuperscript{39} See discussion in Seventh Kelsey Affidavit, 3 February 2016 at \[34\].
\textsuperscript{40} Seventh Kelsey Affidavit, 3 February 2016 at \[36\]-\[37\].
\textsuperscript{41} See Ridings Affidavit, 2 February 2016, \[11.1\].
\textsuperscript{42} See e.g. Appellate Body report, \textit{European Communities – Measures Prohibiting the Importation and Marketing of Seal Products} WT/DS400/AB/R (22 May 2014) (\textit{EU–Seal Products}) at \[5.169\] and the decisions cited therein. Exhibit P to Ridings Affidavit, 19 January 2016.
tribunals. The better view, shared by other States, as well as the few investment tribunals that have considered the question, is that the exercise of a self-judging exception remains subject to review at least with respect to whether the State has invoked it in good faith and in relation to a relevant subject matter.

79. A limited form of review for good faith under the Treaty Exception may see New Zealand having to provide reasons for a given measure adopted to accord more favourable treatment to Maori to demonstrate the link between the measure and the favourable treatment (but not the “necessity” of the measure for that purpose, as understood in international law), and possibly an absence of dishonesty or unfairness in its conduct. New Zealand would also need to demonstrate that the measure falls within the scope of the exception, i.e. that it accords more favourable treatment to Maori.

80. The principle of good faith is expressed in more concrete terms in the proviso at the beginning of the Treaty Exception, which is discussed next. Compliance with the proviso is not self-judging and is instead reviewable by a dispute settlement tribunal.

Proviso for “arbitrary or unjustified discrimination” or “disguised restriction”

General approach to interpretation of the proviso or “chapeau” text

81. Paragraph 1 of the Treaty Exception is subject to a proviso or chapeau. The proviso reads as follows:

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, ...

82. The general language of the proviso is similar to and was likely lifted from the introductory paragraph to the general exceptions provisions in art XX of the GATT and art XIV of the GATS. This supports my perception that the template for the Treaty Exception was drafted primarily with trade obligations in mind. In both the GATT and GATS, the introductory paragraph is commonly known as the chapeau (i.e. hat).


Relevant state practice is discussed in Stephan Schill and Robyn Briese “If the State Considers: Self-Judging Clauses in International Disputes Settlement” (2009) 13 Max Planck UNYB 61 (Schill / Briese “If the State Considers”) at 96-118. Attached as Exhibit #10.

For example, LG&E Energy Corp v Argentine Republic ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 at [207]-[214]; discussed in Schill / Briese “If the State Considers” at 110-113.
83. Given the similarities in language, function and structure, WTO jurisprudence on the chapeau provides helpful insights into the proper interpretation of the proviso in the Treaty Exception.

84. Dr Ridings has discussed interpretations of “arbitrary”, “arbitrary discrimination” and similar terms by the International Court of Justice and investment treaty tribunals.46 Professor Kelsey has discussed the interpretation of the key phrases as they have been used elsewhere in the WTO rules and investor-State arbitration.47 I agree with their summaries of those authorities. I have focussed on the WTO jurisprudence on the chapeau as I believe it is the most directly relevant to the interpretation of the Treaty Exception. I am not convinced however that interpretations of “arbitrary” made in the different context of substantive obligations would be applied to the proviso. Nor am I convinced that the proviso would be interpreted differently depending on the nature of the legal proceedings (investor-State or State-State).48

The WTO chapeau

85. The GATT art XX chapeau reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …

86. The chapeau is then followed by several sub-paragraphs listing various different policy grounds on which ostensible departures from GATT / GATS obligations may be justified. For example, the GATT exception covers measures that are “necessary to protect public morals” (sub-paragraph (a)) and measures “relating to the conservation of exhaustible natural resources” (sub-paragraph (g)).

87. The WTO Appellate Body has explained that, in relation to GATT art XX, the purpose of the chapeau is “to maintain a balance between a Member’s right to invoke the exceptions... of Article XX and the substantive rights of the other Members under the various other provisions of the GATT 1994”.49 It encourages States invoking exceptions to have due regard to the rights of others consistent with the international law principles regarding good faith and abuse

46 Ridings Affidavit, 19 January 2016 at [36].
47 Sixth Kelsey Affidavit, 19 January 2016 at [45]-[46]; Seventh Kelsey Affidavit, 3 February 2016 at [44]-[45], [47].
48 Contrast Seventh Kelsey Affidavit, 3 February 2016 at [42]. Compare Second Ridings Affidavit, 2 February 2016 at [22].
49 Appellate Body report, EU - Seal Products at [5.132].
of rights. The respondent State seeking to justify a measure has the burden to demonstrate that it satisfies the requirements of the chapeau.\textsuperscript{50}

\textit{Differences between the WTO chapeau and the Treaty Exception proviso}

88. There are some differences between the language used in the WTO chapeau and the proviso in the Treaty Exception.

89. The chapeau refers to measures not being “applied” as a means of discrimination. This is understood to require an assessment of the manner by which States implement their policies, including the process for developing policies, and the design and structure of regulatory measures and the process adopted to give effect to them.

90. In the Treaty Exception, measures must not be “used” as a “means” of discrimination. This could suggest the focus of the enquiry is more directly on whether the intent is to discriminate or restrict trade or investment. Analysis of intent would likely consider similar factors to those analysed under the WTO chapeau to assess the application of a measure, relating for example to its design, and whether due process was followed.

91. The WTO chapeau refers to measures that constitute “unjustifiable” discrimination, whereas the proviso to the Treaty Exception refers to “unjustified” discrimination. I do not perceive that there is a great deal in the difference;\textsuperscript{51} an unjustifiable measure cannot be justified, while an unjustified measure is one that has not been or is not justified. Dr Ridings has suggested that “unjustified” supports the self-judging aspect of the Treaty Exception.\textsuperscript{52} In my view it relates to whether New Zealand has given a reasoned justification for its adoption of a measure.

92. Another difference between the WTO version of the chapeau and the proviso in the Treaty Exception in the TPPA is that the latter does not refer to “where the same conditions prevail”. Under the WTO rules, the existence of discrimination between countries where the same conditions prevail is strong evidence of “arbitrary or unjustifiable discrimination”.\textsuperscript{53} In the Treaty Exception, the reference is to discrimination “against persons of the other Parties”. The difference in language may reflect the special status Maori have; that is, similar conditions may not prevail, because Maori will not necessarily be subject to the same regulatory conditions as others in light of the Treaty of Waitangi. On the other hand, the WTO language confines the assessment of discrimination to limited circumstances, and a broader inquiry under the Treaty Exception is possible.

\textsuperscript{51}Contrast Seventh Kelsey Affidavit, 3 February 2016 at [48].
\textsuperscript{52}Second Ridings Affidavit, 2 February 2016 at [19].
\textsuperscript{53}Appellate Body report, \textit{US – Tuna} at [7:301].
93. I have some reservations about Dr Ridings' conclusion that a tribunal will likely take into account the treatment accorded to persons of other TPPA parties, as required by the proviso, as well as to Maori and non-Maori, to determine whether the discrimination is arbitrary.\footnote{Ridings Affidavit, 19 January 2016 at [39.4]-[39.5]. Also Seventh Kelsey Affidavit, 3 February 2016 at [49].} This makes sense when similar conditions prevail between all groups. It is more difficult though when non-Maori also receive favourable treatment under a measure that nonetheless has, as an objective, the fulfilment of the Crown’s obligations under the Treaty of Waitangi.

Existence of “arbitrary or unjustified discrimination” or a “disguised restriction”

94. The proviso requires that a given measure not be used as a means of arbitrary or unjustified discrimination or as a disguised restriction. In US – Tuna, the WTO Appellate Body summarised its approach to the meaning of arbitrary or unjustifiable discrimination. It held (following its earlier decisions) that:\footnote{Appellate Body report, \textit{US – Tuna} at [7.92]-[7.93] and [7.316].}

94.1 one of the most important factors is whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure at issue has been provisionally justified under one of the sub-paragraphs of GATT art XX; and

94.2. depending on the nature of the measure, and the circumstances of the case, other factors could also be relevant to the overall assessment.

95. Similar considerations are relevant to the interpretation of “disguised restriction” in the chapeau. The Appellate Body has confirmed that the phrase is not solely concerned with a lack of transparency, but with the illegitimate use of the exceptions.\footnote{Appellate Body report, \textit{US – Gasoline}, p 25.}

96. The Treaty Exception deals with measures that accord more favourable treatment to Maori compared to a TPPA claimant. That is, essentially a form of discriminatory treatment. For the exception to apply, it must be shown that the discrimination is not arbitrary or unjustified. One of the difficulties in applying the Appellate Body’s reasoning directly to the proviso in the Treaty Exception is that the exception does not reveal a true policy objective, in the sense that according more favourable treatment to Maori is not, in and of itself, a policy objective. Fulfilment of the Crown’s obligations under the Treaty of Waitangi is of course a legitimate policy objective covered by the exception, but as explained earlier, the exception potentially applies to any measure that accords more favourable treatment to Maori and not just those required by the Treaty.
97. Even so, there must be some legitimate policy rationale for a discriminatory measure, or it would be difficult - if not impossible - to argue that the discrimination is not arbitrary and unjustified or a disguised restriction.

98. In sum, the fundamental point of the proviso is to ensure that the measure at issue gives effect to a legitimate policy. It serves as a mechanism to ensure that an otherwise self-judging exception is not misused, contrary to the international law obligation against abuse of rights. While the New Zealand Government may determine that its policy requires more favourable treatment of Maori, an international tribunal constituted under the TPPA may consider a range of factors to assess whether a given measure is related to and justified by that policy. The burden is on the Government to show that the requirements of the proviso are met. If the policy objective is not to fulfil an obligation under the Treaty of Waitangi, the Government will also need to show it is nonetheless a proper one.

99. In my opinion the burden on New Zealand to meet the requirements of the proviso in relation to legitimate policies adopted in good faith would not be as onerous or difficult as suggested by Professor Kelsey. My reasons for this conclusion are:

99.1. although the concept of discrimination has been interpreted widely in WTO and investor-State cases to cover a wide range of State conduct, in the context of the proviso, it is more likely to be interpreted in a way that is similar to the way it has been interpreted under the WTO chapeau for the reasons given;

99.2. the chapeau meaning of arbitrary and unjustifiable discrimination is primarily concerned with ascertaining whether there is a rational relationship between a measure and the policy objective that is recognised by the exception - discrimination is not arbitrary and unjustified if there is a good reason for it;

99.3. the purpose of the Treaty Exception is to allow measures that accord Maori more favourable treatment, including in fulfilment of the Crown's Treaty of Waitangi obligations. In this way, it is inherently intended to allow discrimination to achieve a policy objective. Although many defences under the WTO exceptions have failed, including because they failed the chapeau test, this inherent acceptance of discriminatory measures distinguishes the Treaty Exception from the nature of the policy objectives listed in the WTO exceptions. To exclude measures from the cover of the Treaty Exception because they deliberately discriminate in favour of Maori would deprive the exception of its purpose and result in an ineffective interpretation of it;

99.4. different treatment of Maori across New Zealand that results in different effects on TPPA parties depending on where they are located should not

57 Seventh Kelsey Affidavit, 3 February 2016 at [48].
58 See Sixth Kelsey Affidavit, 19 January 2016 at [38] and Second Ridings Affidavit, 2 February 2016 at [41].
automatically lead to a finding of arbitrary discrimination, because the Treaty Exception does not require exactly the same treatment of all Maori;

99.5. some policy flexibility is intended. This is evident from the self-judging aspect of the exception and the open-ended nature of the objective to accord Maori more favourable treatment.

The agreement on the interpretation of the Treaty of Waitangi in paragraph 2

Paragraph 2 is ambiguous

100. Paragraph 2 of the Treaty Exception sets out the TPPA parties' agreement regarding the interpretation of the Treaty of Waitangi and the role of dispute settlement in relation to the exception. It provides:

The Parties agree that the interpretation of the Treaty of Waitangi... shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

101. The text of paragraph 2 suggests that the interpretation of the Treaty of Waitangi is not subject to dispute settlement proceedings under the TPPA, but its exact application is ambiguous. Dr Ridings has acknowledged that there is some ambiguity with the paragraph. 59

102. The following issues arise:

102.1. whether investor-State tribunals are bound by the first sentence;

102.2. whether the second and third sentences operate to preclude an investor-State tribunal from determining whether a measure referred to in paragraph 1 is inconsistent with an investor's rights under the TPPA.

Whether investor-State tribunals are bound by the first sentence

103. The apparent purpose of the first sentence is to confine the subject matter jurisdiction of dispute settlement tribunals. Their role with respect to the Treaty Exception is limited to determining that a measure falls within its scope of application, and that the measure has been adopted in good faith, in particular in accordance with the requirements of the proviso.

59 Ridings Affidavit, 19 January 2016 at [48].
104. I accept Dr Ridings’ explanation that, in the ordinary sense, the “dispute settlement provisions” of the TPPA include the investor-State dispute settlement provisions in Section B of Chapter 9.\(^{60}\) However, the ambiguity about the application of the first sentence to investor-State dispute settlement arises because “dispute settlement” is referred to generally in that sentence, but only State-State dispute settlement is referred to in the second and third sentences.

105. So what is clear is that, at least in relation to State-State dispute settlement, a panel would have no mandate to second guess (for example) whether the Crown’s assessment of its obligations to Maori in terms of the Treaty of Waitangi was legally correct.

106. If paragraph 2 is read disjunctively, so that the first sentence is disconnected from the rest of paragraph 2, the same limitation would apply to investor-State dispute settlement. The importance of the Crown’s responsibilities under the Treaty of Waitangi, which is reflected in the Treaty Exception, supports this meaning. Yet it remains an open question, because the word “otherwise” also suggests that the first and second sentences should be read together, and the latter only applies to State-State tribunals.

**Whether the second and third sentences have a preclusive effect**

107. It is possible to read paragraph 2 in a way that would preclude an investor-State tribunal from considering the application of the Treaty Exception. This is because the second and third sentences confirm that a State-State tribunal may do so (subject to the qualification in the first sentence), but they do not refer to investor-State tribunals.

108. I agree with Dr Ridings that a reasonable interpretation of paragraph 2 does not lead to this interpretation, given the reference to “investment” in paragraph 1.\(^{61}\) In addition, the third sentence confines the role of panels, through the word “only”. No limitation is expressly placed on investor-State tribunals. I note that the general practice of investor-State tribunals is that they do not read limitations into their jurisdiction lightly.

109. Dr Ridings has laid out a reasoned argument as to why an investor-State tribunal should be bound by paragraph 2.\(^{62}\) Such an exercise should not be necessary, because with careful drafting the ambiguity could easily have been avoided. The second and third sentences simply needed to refer to the equivalent investor-State dispute settlement provisions in Section B of Chapter 9. For example, in an annex (9-H) to the investment chapter, recourse to dispute settlement for claims relating to New Zealand’s foreign investment screening regime is precluded in the following terms:

4. A decision under New Zealand’s Overseas Investment Act 2005 to grant consent, or to decline to grant consent, to an

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\(^{60}\) Ridings Affidavit, 19 January 2016 at [46].

\(^{61}\) Ridings Affidavit, 19 January 2016 at [48].

\(^{62}\) Ridings Affidavit, 19 January 2016 at [46]-[49]; Second Ridings Affidavit, 2 February 2016 at [23].
overseas investment transaction that requires prior consent under that Act shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement). (emphasis added)

110. I agree with Professor Kelsey that the original use of the exception for Maori in the New Zealand-Singapore agreement may explain this anomaly.63 I recall that there is no binding investor-State dispute settlement under the agreement with Singapore. The same template has been used again despite the changing scope and nature of New Zealand's subsequent trade and investment agreements.

Preparatory work

111. Because aspects of the Treaty Exception are unclear or ambiguous, according to VCLT art 32, the preparatory work of the TPPA could be referred to in order to elucidate its ordinary meaning, or special meaning if one was intended, or to confirm an interpretation developed under art 31. “Preparatory work” means the travaux préparatoires, or the documentary records of the treaty negotiations (rather than internal working papers of government negotiators).

112. The travaux préparatoires for the TPPA are not publically available at present. There is some uncertainty about whether the terms of the confidentiality agreement between the TPPA parties would allow New Zealand to rely on the travaux if required for dispute settlement proceedings in the initial period of the TPPA entering into force. I do not have access to the agreement and cannot comment on that aspect of it.

113. In any case, given the confidential nature, manner and subject of the negotiations, it would be unusual for the travaux to be in a form, such as an explanatory report or record of proceedings, to be of much assistance.64 Because the Treaty Exception follows the same general template that New Zealand has used in its past agreements, it also seems unlikely that the text was negotiated, i.e., it is unlikely that different versions of a draft exception were circulated amongst the TPPA parties with explanations for variations (although the Crown could at least confirm this). By way of comparison, in the Pope & Talbot case, the tribunal explained that different drafts of the fair and equitable treatment provision may have influenced its interpretation of the final version in the NAFTA. The tribunal also criticised Canada for failing to provide them in a timely manner.65

114. The lack of access provided to the claimants to the working papers of the New Zealand Government appears to have been contentious between the parties. I

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63 Seventh Kelsey Affidavit, 3 February 2016, at [57].
64 As noted, in the context of bilateral investment treaty negotiations and the North American Free Trade Agreement (NAFTA), in McLachlan “Investment Treaties” at 372.
65 Pope & Talbot Inc v Government of Canada, Award in Respect of Damages, 31 May 2002 (Pope & Talbot v Canada (Damages)) at [39]. Attached as Exhibit #11.
have read the papers released to Professor Kelsey under the Official Information Act. I did not find them useful on the key issues relevant to the interpretation of the Treaty Exception. The full papers may or may not help to explain, for present purposes, why the exception was drafted the way it is, and what New Zealand hoped to achieve by it. However, I do not think they would be given much (if any) weight by an international tribunal.

DISPUTE SETTLEMENT PROCEDURES

115. The basic difference between investor-State and State-State dispute resolution is that in the former, the claimant is an investor relying on rights in Chapter 9 of the TPPA, whereas in State-State proceedings, the claimant is another TPPA State, and that State is not limited to claims based on Chapter 9. Apart from this, there are also some differences in the procedures for each type of claim.

116. The claimants’ concerns with the TPPA’s dispute settlement procedures are a particular expression of a more general concern about the validity of regulatory matters being determined by ad hoc international tribunals. In this section, I discuss specific issues that have been raised by the claimants relating to how the dispute settlement procedures could impact on the effectiveness of the Treaty Exception. Those issues include the extent to which Maori may participate or provide relevant expertise to ensure that a Maori perspective is before the tribunal, oversight of tribunals, and the possible impact of costs and remedies on the Crown’s willingness to regulate to uphold the Treaty of Waitangi.

117. The investor-State and State-State procedures under the TPPA are described in detail throughout the parties’ expert evidence. It does not appear that the content of the law in this area is a matter of significant disagreement between the parties, as opposed to its value. The purpose of this section is to fill in gaps or elaborate on the relevant laws relating to the claimants’ concerns, and state my opinion on them.

Overview

Investor-State dispute settlement

118. The TPPA provides for the resolution of claims by TPPA investors whose investments are protected by the provisions of Chapter 9. This includes rights to sue for breaches of certain investment agreements and authorisations.

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66 See Ridings Affidavit, 19 January 2016, Exhibit J.
67 In Pope & Talbot v Canada (Damages) the tribunal did not find helpful submissions and other documents of the state parties to the NAFTA that were not proper travaux préparatoires: paras [26]-[36].
side letter, the investor-State dispute settlement provisions do not apply as between New Zealand and Australia.\textsuperscript{69}

119. If a claim cannot be resolved by consultation and negotiation, then it may be referred to binding arbitration (Section B of Chapter 9). The arbitration may be conducted, at the investor's election, under one of the following rules:\textsuperscript{70}

119.1. the arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID) and the 1965 ICSID Convention. Two TPPA States, Mexico and Viet Nam, are not contracting parties to the ICSID Convention so this option is not available to their investors;

119.2. the ICSID Additional Facility, if either the respondent State or the State of the investor (but not both) is a party to the ICSID Convention;

119.3. the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or

119.4. any other arbitration rules if the parties agree.

120. Arbitration under the ICSID Convention and rules is governed solely by those instruments. Arbitration under the other methods is governed by the chosen rules as well as the national law of the seat (or legal place) of the proceedings. This difference impacts on what kind of review of the tribunal’s award is available once the proceedings have come to an end. The TPPA also sets out various supplementary rules for the proceedings, for example, relating to transparency.

121. ICSID arbitrations are usually conducted in Washington DC, which is where the ICSID is based. In other arbitrations, unless the parties agree on a place themselves, the tribunal decides the matter.

\textit{State-State dispute settlement}

122. The TPPA has its own self-contained rules for State-State dispute settlement in Chapter 28. Consequently, the procedural provisions within the TPPA are more detailed than those for investor-State proceedings. The State-State provisions are modelled on those for State-State disputes in the WTO dispute settlement system. As in the WTO system, the TPPA provisions for the resolution of State-State disputes have a very strong emphasis on settlement through consultations, where the aim is to reach a “mutually satisfactory resolution of the matter”.\textsuperscript{71} It is relatively rare for States to pursue claims over investment (as opposed to trade) related matters.

\textsuperscript{69} Exhibit JJ to Ridings Affidavit, 19 January 2016.
\textsuperscript{70} TPPA art 9.19.4.
\textsuperscript{71} TPPA, art 28.5.6.
Maori participation in proceedings through written submissions

Investor-State

123. Professor Kelsey has stated in her evidence that Maori would have no right to participate in investor-State proceedings brought against New Zealand. This is undoubtedly correct. The claim would be defended by the Government representing New Zealand. The TPPA follows the standard model for investment treaties which is to confer rights of standing on investors who are the immediate beneficiaries of their terms but not other non-state actors.

124. Both parties’ experts have explained that Maori could apply to the tribunal for permission to make submissions explaining a Maori perspective on the issues in dispute. If permission is granted, the Maori participants would have status as amicus curiae. I note that this is a limited status which allows the amicus curiae to make written submissions; it does not provide access to the written file (such access would be limited to what is already available publically), and it does not confer the right to speak at the oral hearing.

125. While the admission of amicus is at the discretion of tribunals, in practice, tribunals do grant permission to applicants who may have something relevant to offer and the threshold is not difficult to meet. Where several applicants share similar interests in a given case, the tribunal may ask them to consolidate their efforts and file a single submission to reduce the burden on it and the parties.

126. The issue with amicus curiae participation is not really about the right (or lack of) to participate, but the effectiveness of participation. The lack of access to the file can make it difficult for submitters to fully prepare their submissions, and the inability to appear at the oral hearing means their ideas are not able to be fully tested or discussed before the tribunal.

127. In some cases, it appears that tribunals have found factual information provided by amicus curiae useful. For example, the NAFTA tribunal’s award in Glamis Gold v United States includes references to information provided by the Quechan Nation regarding the sacred sites that were protected by the environmental measure at issue in the dispute (although it is not clear from the award if that information was provided directly via the amicus submissions or by the parties in their submissions). The Quechan Nation is a Native American tribe with ancestral lands around California and Arizona.

128. There is little evidence that amici curiae have had any influence on the legal reasoning of tribunals to date. In the Glamis Gold proceedings, the Quechan submission argued that art 31(3) VCLT mandated international law norms on the protection of indigenous rights to be taken into account in the interpretation of the relevant NAFTA provisions. The submission noted that the claimant investor had not addressed this issue in its written pleadings, and that the United States had only done so inadequately in its response. The Quechan argument

72 Sixth Kelsey Affidavit, 19 January 2016 at [19].
73 TPPA, art 9.22.3.
was not addressed in the award (which dismissed the claim). The tribunal remarked:75

... inasmuch as the State Parties to the NAFTA have agreed to allow amicus filings in certain circumstances, it is the Tribunal's view that it should address those filings explicitly in its Award to the degree that they bear on decisions that must be taken. In this case, the Tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties who, in all circumstances, acted with the utmost respect for the proceedings and Parties. Given the Tribunal's holdings, however, the Tribunal does not reach the particular issues addressed by these submissions.

129. In some disputes, it is possible that State respondents may have been reluctant to embrace arguments presented in amicus submissions so as not to appear 'anti-investor'. In a case where New Zealand has invoked the Treaty Exception, its arguments would probably align closely with any submissions Maori make in the proceedings. For this reason, Maori submissions could be more influential than is the norm for amicus participants, but this is speculation given the absence of influence to date.

130. Non-ICSID awards can be judicially reviewed in accordance with the law of the seat and place of enforcement. If judicial proceedings were held in New Zealand under the Arbitration Act 1996 (see below), interested Maori could apply to the court to participate as an intervener in those proceedings.76

State-State

131. There is similar provision for non-party participation in State-State disputes. Although not formally termed "amicus curiae", the rules of procedure will (when written) authorise panels to receive written submissions from non-governmental entities.77

Maori participation in proceedings as experts or witnesses; tribunal expertise

Investor-State

132. It would be more constructive for Maori to participate as part of the defence. As the respondent, New Zealand would be entitled to call its own witnesses and experts in its defence of any claim. In any case where the Treaty Exception is

75 Glamis Gold Ltd v United States of America, Award, 8 June 2009 (Glamis Gold v US) at [8]. Attached as Exhibit #13.
76 For example, the Arbitrators' and Mediators' Institute of New Zealand participated as a third party intervener in Carr v Cook Gallaway Allan [2014] 1 NZLR 792. Attached as Exhibit #14.
77 TPPA, art 28.13(e).
invoked, it would be in New Zealand’s best interests to call Maori witnesses and experts who could support its defence. There would always be a risk that a tribunal comprising a majority (at least) of non-New Zealanders would have difficulty understanding the local context; appointing witnesses and experts would help to address that risk.

133. In UNCITRAL proceedings, tribunals are conferred express authority to appoint their own experts. Some ICSID tribunals have interpreted their procedural discretion broadly and also appointed experts. This is another potential route by which expertise could be provided to a tribunal. The TPPA itself only authorises the tribunal to appoint experts in relation to scientific matters.

134. New Zealand would be entitled to appoint one of the three tribunal members, and could seek to appoint a person with appropriate expertise and sensitivity to cultural matters.

State-State

135. Likewise, in State-State proceedings, New Zealand would be entitled to call its own witnesses and experts. It would be prudent for New Zealand to call Maori witnesses and experts in support of its defence in any case where the Treaty Exception is invoked. The panel could also appoint its own expert, provided the disputing parties agree.

136. New Zealand would be entitled to appoint one of three panellists. The rules require disputing parties to endeavour to select panellists with expertise or experience relevant to the subject matter of the dispute.

Appeals and review of awards

Investor-State

137. There is presently a lack of robust oversight of the decisions of investor-State tribunals. The general concern with this is that errant decisions can go unchecked. The immediate issue in this inquiry is that an investor-State tribunal may not accept that the Treaty Exception is properly invoked, raising the question of what, if any, recourse New Zealand would have against the award whether in New Zealand courts or elsewhere.

138. The TPPA parties have agreed to consider incorporating an appeals facility for arbitral awards made under the agreement if one is created but have not taken any steps towards creating such a facility themselves.

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78 UNCITRAL Arbitration Rules, art 29.
79 TPPA, art 9.27.
80 TPPA, art 9.22.
81 TPPA, art 28.15.
82 TPPA, arts 28.9.2(a) and 28.9.4.
139. The parties’ experts have made various comments about the availability of review and the inability to appeal awards. A clear distinction needs to be drawn between ICSID and non-ICSID arbitrations. It also needs to be remembered that in any dispute, the method of dispute resolution (ICSID / non-ICSID) is chosen by the investor (as claimant). In effect the investor therefore determines the nature and scope of any possible review of the award.

140. The majority of cases so far have been conducted under the ICSID rules. As set out below, some form of review of a tribunal’s consideration of the Treaty Exception would be available in relation to both ICSID and non-ICSID awards, although this does not include appeals in the usual sense.

ICSID arbitrations

141. In ICSID arbitrations, awards are annulable on the limited grounds discussed in Dr Riding’s evidence. These grounds relate to serious natural justice breaches and excess of jurisdiction, but do not include errors of law. The ground of “manifest excess of power” includes failure to apply the law. In recent cases it has controversially been construed to include misapplication of the relevant law. It could include failure to apply the Treaty Exception if the exception was invoked by New Zealand. Broad constructions of manifest excess of power remain contentious amongst commentators and they (broad constructions) are not the norm.

Non-ICSID arbitrations

142. For non-ICSID arbitrations, the situation is more complex. An award would be reviewable to the extent permitted by the law of the seat and the place of enforcement (if different).

143. Thus, the availability of an appeal on a question of law depends on where the proceedings are held. In New Zealand, for international arbitrations, appeals on questions of law are technically available, but only if the parties agree. That is, if New Zealand wished to appeal an award, it would need to convince the investor to agree to this, and the investor would probably only agree if it wished to pursue its own appeal against parts of the award. The position varies in other jurisdictions. For instance, appeals in England are by leave.

144. Otherwise, recourse to the court is limited to applications to have the award set aside and / or for the refusal of its enforcement. In the case of arbitrations seated in New Zealand, this means that an award can be set aside on the grounds

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83 TPPA art 9.23.11.
84 Ridings Affidavit, 19 January 2016 at [114].
85 See Williams & Kawhara on Arbitration (LexisNexis, 2011), [29.7.19]. Attached as Exhibit #15.
86 Arbitration Act 1996, s6(2) and c15 of sch 2.
specified in the Arbitration Act 1996.87 The grounds relate to serious procedural defects, lack or excess of jurisdiction, and conflicts with public policy.

145. If the arbitration was held overseas, New Zealand could defend an application for enforcement of the award in New Zealand on the same grounds. An application would need to be made under the Arbitration Act 1996 to have enforcement refused.88

146. If New Zealand holds assets overseas, the investor could seek enforcement in another jurisdiction, to avoid the possibility of review proceedings in the host State. New Zealand could resist enforcement in those overseas jurisdictions on the grounds laid down in the 1958 New York Convention. (It is unlikely enforcement would be sought in a non-Convention jurisdiction.) These grounds mirror those under the Arbitration Act 1996 i.e., serious procedural defects, jurisdiction, and conflicts with public policy.

147. The concept of public policy has been defined narrowly by New Zealand courts,89 but a strong argument could be made that the Treaty of Waitangi reflects a public policy matter, and that an award that was inconsistent with the Treaty would be contrary to New Zealand public policy. The courts both here and internationally look for conflicts with a State’s fundamental public policy interests rather than the more transient day-to-day government policy.90 In my view, New Zealand courts would readily accept the Treaty of Waitangi as a matter of fundamental New Zealand public policy. That acceptance would open the door to consideration of whether an award was in conflict with public policy. Although there is no authority directly on point, I suggest that a court would balance policy interests regarding the Treaty of Waitangi with policy interests associated with the country’s economic integration in the Asia-Pacific.

148. Non-ICSID awards are challenged in setting aside and enforcement proceedings reasonably often. The Canadian examples referred to by Dr Ridings91 are relevant to New Zealand law, because the grounds for setting aside in Canada are the more or less the same as those in New Zealand – both our arbitration laws are based on the same template.

149. In the Metalclad v Mexico case, the Canadian court set aside parts of an award for excess of jurisdiction, including because the NAFTA tribunal applied principles that it held were not part of the NAFTA fair and equitable treatment standard.92 In another Canadian case, Cargill v Mexico, Mexico argued that the NAFTA tribunal exceeded its jurisdiction by awarding damages for loss incurred by the claimant in its capacity as an exporter to, rather than investor in, Mexico. The court disagreed the damages were awarded on that basis and

87 Arbitration Act 1996, art 34(2) of sch 1.
89 Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] 2 NZLR 614 (CA) (Amaltal v Maruha) at [47]. Attached as Exhibit #16.
91 Ridings Affidavit, 19 January 2019 at [115].
92 The United Mexican States v Metalclad Corp [2001] BCSC 664 at [70]. Attached as Exhibit #17.
upheld the award. As Dr Ridings has noted, Canada’s setting aside application in the *Bilcon v Canada* dispute is pending. Canada’s application is based on jurisdiction and public policy grounds.

In sum, while these cases are not appeals, they show that the grounds for review can involve substantive matters. If an award is annulled, the dispute may be re-arbitrated.

**Interpretations by the TPPA Commission**

The TPPA Commission may issue interpretations of the agreement, and any interpretation it gives will bind investor-State tribunals. Given the number of TPPA State parties and the difficulties in getting all of them to agree on an interpretation, as a practical matter I have doubts about the usefulness of this mechanism for safeguarding against interpretations that do not reflect the State parties’ intentions. With one notable exception under the NAFTA, it has not had an impact under other free trade agreements. It is perhaps too soon to tell whether it will be effective at promoting predictability and maintaining quality in decision making under the TPPA’s dispute settlement procedures.

**Costs and remedies**

**Investor-State**

As I understand it the argument in relation to the financial implications of investor-State dispute settlement is that the threat of an award of compensation and the cost of defending claims may impact on the willingness of the Crown to carry out its regulatory responsibilities under the Treaty of Waitangi. The regulatory chilling effect of international disputes settlement can be difficult to measure. I comment below on the nature of the remedies that may contribute to such an effect.

The TPPA limits the remedies in investor-State disputes to monetary compensation and restitution of property (although the respondent State can choose to compensate in lieu of restitution). TPPA tribunals may also award costs. Practice regarding the awarding of costs varies considerably in investor-State arbitration.

In relation to compensation, the tribunal has to determine both the standard of compensation and a formula for calculating it. The TPPA provides that the standard of compensation for lawful expropriation is the amount “equivalent to the fair market value of the expropriated investment immediately before the expropriation took place”.

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93 *The United Mexican States v Cargill Inc* [2011] ONCA 622 at [84]. Attached as Exhibit #18.
94 Sixth Kealey Affidavit, 19 January 2016 at [65]-[66].
95 TPPA, arts 9.29.1 and 9.29.3.
96 TPPA, art 9.8.2(b).
does not specify what standard should apply for unlawful expropriation and breaches of other investor protections. In these cases tribunals tend to apply the standard developed under customary international law for unlawful acts, which is to compensate (technically, award reparations) for the overall economic losses suffered by the investor.\textsuperscript{97}

155. In practice tribunals have relied on various methods for calculating compensation for loss of an investment, including liquidation, replacement or book value, and discounted cash flow (DCF). DCF is the most widely used formula in current practice, but it also remains controversial as it includes predicted loss of future profits and often leads to large sums being claimed.\textsuperscript{98}

State-State

156. The approach to remedies in State-State dispute settlement is quite different, in that the preferred outcome is not payment of compensation but rather the withdrawal or amendment of the measure at issue so as to remove the inconsistency with the TPPA.\textsuperscript{99} In other words, New Zealand would be expected to reform its laws in a way that would not be expected by an award in investor-State arbitration. This type of remedy may not deter regulation being adopted in the first place, but it may also see the regulation being changed.

157. If reform is not possible, then the disputing States may agree on monetary compensation. As a last resort, the complaining State may suspend obligations it owes to New Zealand, of equivalent value to the loss caused by the offending measure.\textsuperscript{100}

OBLIGATIONS UNDER THE INVESTMENT CHAPTER OF THE TPPA

158. The parties' experts have described the various obligations imposed on New Zealand under Chapter 9 of the TPPA regarding investment.\textsuperscript{101} They discuss the nature of the obligations and their possible impact on New Zealand's regulatory autonomy. They disagree over the likely interpretation of the obligations. The purpose of this section is to provide my assessment of the key relevant protections. It serves as background to my analysis of the case studies that follows.

159. In addition to the obligations in the investment chapter, the parties' experts have drawn attention to the possible application of obligations in Chapter 10 dealing

\textsuperscript{97} SD Myers, Inc v Canada, Second Partial Award, 21 October 2002 at [122]. Attached as Exhibit #19.
\textsuperscript{98} Campbell McLachlan and others International Investment Arbitration (OUP, 2007) at [9.27].
\textsuperscript{99} TPPA, art 28.19.2.
\textsuperscript{100} TPPA, art 28.20.
\textsuperscript{101} In particular, Ridings Affidavit, 19 January at [58]-[96]; Sixth Kelsey Affidavit, 19 January at [112]-[130]; Second Ridings Affidavit, 2 February 2016 at [51]-[57].
with services and Chapter 11 on financial services. The most likely bases for a claim are those in the investment chapter (and investors would be the most likely claimants) and the parties' experts appear to have the same view.

Overview

160. The dual objectives of the investment chapter are to promote cross border investment between the TPPA countries and to protect TPPA investors both in relation to the process of investing (the "pre-establishment" phase) and their actual investments once made. These objectives are achieved by imposing obligations on the TPPA parties to allow access to their markets, and to protect TPPA investors and their investments. The obligations are set out in Section A of Chapter 9. They are directly enforceable by investors against the host governments of their investments through the investor-State dispute settlement provisions in Section B the chapter.

161. The investor protections include the non-discrimination rules of national treatment and MFN, the entitlement to a minimum standard of treatment, and protections in relation to expropriations by the host government. The TPPA protections have in-built policy safeguards, some of which are novel, aimed at clarifying the purpose of the protections and preserving policy space.

162. The chapter also applies limits on policy making in specific areas such as investment screening under the Overseas Investment Act 2005 (OIA), fiscal policy, and economic development (the latter through prohibitions on certain so-called "performance requirements").

163. There are various exceptions to these obligations. Some exceptions apply generally to all obligations (such as the exception for security measures in TPPA art 29.2). Other exceptions apply to some obligations only (such as the exception for fiscal measures related to safeguarding the balance of payments in TPPA art 29.3). Apart from the Treaty Exception, there are also reservations specific to New Zealand set out in New Zealand’s annexes of "non-conforming measures". The effect of these annexes is to exempt compliance by New Zealand from specified obligations, in relation to the policy areas stated in the annexes. The obligations affected by the exemptions in the annexes are those relating to non-discrimination, personnel and performance requirements.

164. In addition to claims based on alleged breaches of the substantive protections in Section A of Chapter 9, investors can also take claims to investor-State arbitration on the basis of alleged breaches of certain types of government contracts and investment authorisations. There is a carve-out for disputes relating to consent decisions under the OIA. For other disputes, investors can initiate a claim before an investor-State arbitration tribunal following the six

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102 Ridings Affidavit, 19 January at [97]; Sixth Kelsey Affidavit, 19 January at [112] and [115]; Eighth Kelsey Affidavit, 11 February 2016 (various places).
103 TPPA annex 9-H.
month period for consultations. There is no requirement on investors to seek remedies in New Zealand courts first.

165. Dr Ridings has explained that the prohibitions on performance requirements are amongst the types of substantive obligations that are not the focus of most investment disputes.\footnote{Ridings Affidavit, 19 January at [59].} Perhaps it is worth noting that these prohibitions could be problematic in the present context, if it were not for the inclusion of the Treaty Exception. This is because the prohibitions preclude the adoption, for example, of requirements to buy locally produced goods and services, and the adoption of advantages such as subsidies and tax incentives that are conditioned on such requirements being met.\footnote{TPPA, art 9.9.} In recent years performance requirements have been used, for example, to promote the development of the film industry (there is a specific exception for the film industry in New Zealand’s sector-specific annex of non-conforming measures).\footnote{TPPA, New Zealand annex II of non-conforming measures at 19.} These types of measures could also be used to promote the development of the Maori economy.

166. In the remainder of this section, I discuss:

166.1. the obligation of national treatment;

166.2. the minimum standard of treatment; and

166.3. the protections relating to expropriation.

**National treatment: art 9.4**

167. The national treatment obligation obliges New Zealand to accord treatment to TPPA investors and their investments that is no less favourable than the treatment it accords to domestic investors and investments in like circumstances.

168. Thus, any measure adopted by New Zealand to protect Maori interests could potentially be inconsistent with the national treatment obligation if it results in a TPPA investor receiving less favourable treatment than that accorded to Maori. The TPPA investor would need to be in “like circumstances” to those Maori benefitting from the measure for the inconsistency to arise.

169. Although superficially a straightforward concept, the obligation of national treatment has been difficult to apply in practice. In particular, the decided cases differ over the extent to which a measure adopted to pursue legitimate policies can be upheld in circumstances where it imposes a disproportionate burden on a foreign investor. However, in the TPPA, the parties have introduced novel language which helps to clarify their intentions regarding how measures with legitimate policy objectives should be assessed:
169.1. A footnote explains that, in assessing "like circumstances", it is relevant to consider whether the treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives;

169.2. An interpretive Drafters' Note has been issued by the parties to explain their shared intentions further, with references to cases decided under the NAFTA. As the Note explains, these cases emphasize the point that different treatment (as between foreign and domestic investors) may be justified by legitimate policy goals;

169.3. The Note also makes clear that the claimant investor must be in a competitive relationship with the domestic investor or investors for the purpose of the comparison in treatment; and

169.4. Finally, the Note indicates that the purpose of the national treatment obligation is to prevent deliberate protectionist discrimination based on nationality.

170. Professor Kelsey is sceptical about the value of the footnote and Drafters' Note but in my view they go a long way towards ensuring that policy objectives would be a central factor in the assessment of "like circumstances".

171. The Drafters' Note cites from the 2011 NAFTA award in Grand River Enterprises Six Nations Ltd., et al. v. United States of America. In Grand River, the tribunal held:

NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in 'like circumstances'... The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like...

172. On this reasoning, the legal status of Maori in New Zealand under the Treaty of Waitangi (the entitlement to the rights preserved by the Treaty of Waitangi) suggests that Maori would not always be in like circumstances to TPPA investors. That is, in view of these clarifications, a measure adopted to protect legitimate Maori interests under the Treaty of Waitangi may not be inconsistent with the national treatment obligation, even if it results in relatively less favourable treatment of a TPPA investor when compared to a Maori investor.

173. Another NAFTA case cited in the Note is the 2004 award in GAMI Investments Inc v Mexico. In this case, Mexico determined that certain sugar mills operating in effective insolvency should be nationalized in the public interest.

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107 Eighth Kelsey Affidavit, 11 February 2016 at [26]-[27].
108 TPPA Drafters' Note on Like Circumstances, 1-2.
109 TPPA Drafters' Note on Like Circumstances, 2.
The investor's national treatment claim failed as its mill was nationalized not because of the foreign ownership, but in the interests of the Mexican economy in the broad sense. Adopting similar thinking, it could be argued that public investment in an asset that is Maori owned is not favourable treatment of a domestic investor, if the purpose of the investment is to ensure its ongoing operation in the public interest.

174. In addition, New Zealand has included exemptions from the national treatment obligation in its annexes of non-conforming measures in various policy areas. These include certain government services, privatisation, some resource and heritage management matters including in relation to water and fisheries, research and development, and some agriculture matters.110 Thus, less favourable treatment of a TPPA investor could also be permissible through the savings effect of these exemptions.

175. As an aside, I suggest that New Zealand's annexes of non-conforming measures could have included existing measures specifically relating to Maori, to avoid doubt and any need to rely on the Treaty Exception. For example, grants to Maori businesses provided by Te Puni Kokiri. That would leave the Treaty Exception to deal with new measures as they are adopted.

**Minimum standard of treatment: art 9.6**

176. The TPPA includes two core investor protections that find their origins in customary international law, the so-called "minimum standard of treatment" (art 9.6), and rules regarding the expropriation of covered investments (including the obligation to compensate, art 9.7). In recent years these protections have raised concerns amongst States and commentators about the undermining of regulatory autonomy. They therefore warrant close scrutiny to assess their potential to limit the ability of the Crown to ensure the protection of Maori interests.

177. In relation to the minimum standard of treatment, the TPPA obliges each state party to accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security (that is, the minimum standard of treatment). Fair and equitable treatment is described as including the obligation "not to deny justice in [legal proceedings] in accordance with the principle of due process" (art 9.6.2(a)).

178. What is required by customary international law is then detailed in an interpretive annex (annex 9-A). In that annex, the standard of treatment is stated to refer to all customary international law principles that protect foreign-owned investments. Linking the standard to customary international law is intended to remove the risk of a free-standing treaty-based fair and equitable treatment obligation, and confine the scope of protection in a way that is more deferential.

110 TPPA, New Zealand annexes I and II of non-conforming measures.
to the regulatory interests of States. It follows NAFTA State practice and has become common practice in recent treaties.

179. The NAFTA provision on fair and equitable treatment has now been the subject of detailed analysis and interpretation in several cases. The statement of the tribunal in Waste Management v Mexico about the kind of conduct that infringes the minimum standard of treatment of fair and equitable treatment has been influential in recent cases and is illustrative of the approach now generally taken by NAFTA and other tribunals. In Waste Management, the tribunal rationalised the then existing cases as suggesting that:

...the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

180. Thus, the minimum standard of treatment is not just concerned with laws but also how they are implemented. While at the level of principle the Waste Management approach sets a high threshold for breach, the application of the minimum standard continues to produce controversial outcomes in individual cases.

181. The Bilcon v Canada case, which is discussed by both parties’ experts, is an example of a controversial outcome where the Waste Management approach was applied. The Waste Management tribunal itself recognised that “[e]vidently the standard is to some extent a flexible one which must be adapted to the circumstances of the case”.

182. In addition, the Waste Management tribunal’s reasoning has its own difficulties. The tribunal based its analysis on previous NAFTA decisions. States and commentators continue to be critical of tribunals adopting a common law / precedent approach to the minimum standard of treatment, because the source of the standard is customary international law (comprising State practice and opinio juris), not the decisions of past tribunals.

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112 Waste Management Inc v United Mexican States ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 (Waste Management v Mexico) at [98], Exhibit AA to Ridings Affidavit, 19 January 2016.
113 Waste Management v Mexico at [99].
183. In terms of the application of the standard under the TPPA, I note:

183.1. the TPPA provision on the minimum standard of treatment follows the usual practice of conferring tribunals a wide discretion to evaluate whether certain conduct meets the threshold for liability. The recently negotiated agreement between Canada and the European Union (CETA) takes a different approach, and specifies a list of proscribed behaviours based on the principles commonly associated with the minimum standard of treatment;

183.2. the initial focus of fair and equitable treatment was on due process in judicial and administrative proceedings. It now encompasses a wider range of regulatory behaviour, but there remains some uncertainty about what standard States must meet in the regulatory context;

183.3. tribunals have often assessed regulatory behaviour in terms of legitimate expectations. The concept of legitimate expectations refers to the expectations of the claimant investor. It has generally evolved in the decided cases from an overly expansive requirement on States to maintain a stable and predictable regulatory environment, to one where the investor's expectations must be reasonable and investment-backed, i.e., grounded in representations made to the investor, or in a legal right of the investor to certain treatment;

183.4. in the TPPA, a novel provision (art 9.6.4) states that “the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment”. It has been suggested that this provision is aimed at foreclosing claims based on an investor's subjective expectations, rather than its legitimate (objectively reasonable and investment-backed) expectations. Another possibility is that a State can frustrate an investor's expectations but only by conduct that is otherwise not in breach of the minimum standard. In either case, an expectations claim is still possible, where a state arbitrarily departs from an investor's reasonable expectations. There is no clarification in the TPPA about what is and is not relevant in constituting an investor's expectations. For example, unlike CETA, the TPPA text does not require expectations to be based on specific representations;

183.5. the position of some States (including TPPA parties) is that there is no place for legitimate expectations at all in the minimum standard of treatment but this is not reflected in the TPPA;

115 Técnicas Medioambientales Teomed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (Teomed v Mexico) at [154]. Attached as Exhibit #21.
116 Waste Management v Mexico at [98].
118 Contrast Second Ridings Affidavit, 2 February 2016, [53.3].
119 See references cited in Second Ridings Affidavit, 2 February 2016, [53.3].
183.6. In several cases tribunals have stressed that in framing their expectations, investors need to inform themselves of the host State’s laws and policies. At the same time, this is usually balanced against the expectation on host States to act and deal with investors coherently;120 and

183.7. The TPPA does not clarify the State parties’ position on whether the standard of protection exists “within the confines of reasonableness”, as asserted by the NAFTA tribunal in its 2010 decision in Merrill & Ring Forestry v Canada.121 In Merrill & Ring, the tribunal added “unreasonable” conduct to “unfair and inequitable” conduct as a type of State conduct that could breach the fair and equitable treatment standard.122 It is unclear to what extent the notion of reasonableness is separate from an investor’s objective expectations, or indeed from the meaning of what is “fair”. If a TPPA tribunal considered that the unreasonableness of a State’s conduct was a ground for complaint, this would lower the threshold for breach.

184. For the above reasons, the minimum standard of treatment remains problematic, despite the efforts of the TPPA drafters to safeguard regulatory autonomy.

185. The claimants’ case studies contemplate possible changes to the regulatory environment so as to give effect to or protect Maori interests. It has been accepted in the cases that changes to the regulatory environment can frustrate an investor’s legitimate expectations for the purpose of a claim for breach of the minimum standard. As indicated, in some earlier cases, tribunals took an expansive approach and held that investors could expect a high degree of regulatory stability. There has since been a retreat from this approach, although the exact contours of what investors can legitimately expect remains unsettled.

186. In Bilcon v Canada, the investor, Bilcon, was denied a permit to construct and operate a quarry and marine terminal at Whites Point in Nova Scotia. One of its complaints was that the review panel established to assess its proposal in effect (and improperly) re-zoned Whites Point. No formal re-zoning had taken place, but the tribunal briefly considered how it might have approached the claim if such a change was promulgated. The following passage is cited from the majority award. In my view it is consistent with the main principles associated with fair and equitable treatment:123

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120 See e.g. MTD v Chile at [165], cited in Second Ridings Affidavit, 2 February 2016 at note 52 attached as Exhibit CC to Ridings Affidavit, 19 January 2016 at pp70-71. Also discussed in Eighth Kelsoy Affidavit, 11 February 2016 at [96].
121 Merrill & Ring Forestry Inc v Canada, Award, 31 March 2010 at [213] (Merrill & Ring v Canada).
122 Merrill & Ring Forestry v Canada at [210].
123 Clayton / Bilcon of Delaware, Inc v Government of Canada, PCA Case No 2009-04, Award on Jurisdiction and Liability, 17 March 2015 at [572]; attached as Exhibit G to Sixth Kelsey Affidavit, 19 January 2016. Also, Merrill & Ring Forestry v Canada, Award, 31 March 2010 at [232].
This case would be more difficult if the issue were a duly enacted change by authorized law-making authorities to the zoning status of the Whites Point area while the Bilcon environmental assessment was already in progress, and substantial expenditures had taken place. NAFTA cases, such as Mobil and Waste Management, express a cautious approach about using investor expectations to stifle legislative or policy changes by state entities that have the authority to revise the law or policy. As lessons of experience are learned, as new policy ideas are advanced, as governments change in response to democratic choice, state authorities with the power to change law or policy must have reasonable freedom to proceed without being tasked with having breached the minimum standard under international law. That freedom is not absolute; breaches of the international minimum standard might arise in some special circumstances—such as changes in a legal or policy framework that have retroactive effect, are not proceeded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.

187. The tribunal in Merrill & Ring was more liberal. It stated: 124

...any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives.

188. The Merrill & Ring tribunal also appeared to accept that the stability of the legal environment was a requirement of fair and equitable treatment that existed independently of investor expectations. 125 It indicated that new regulatory measures creating benefits for local industries to the detriment of a foreign investor might be contrary to the investor’s reasonable expectations.

189. I accept Dr Ridings’ point that the minimum standard of treatment, as part of customary international law, is part of the common law of New Zealand. 126 At the same time, certain Maori customary rights are also protected by New Zealand common law. It has not been judicially established whether, in the event of conflict, the rights of investors could or should prevail under common law over the customary rights of Maori. In Paki v Attorney General (No 2), the Supreme Court indicated that Maori customary rights may have some priority over other common law principles. 127 The way I see it is that international responsibility lies with New Zealand to provide the minimum standard of treatment under customary international law, regardless of both common law

124 Merrill & Ring Forestry v Canada at [233].
125 Merrill & Ring Forestry v Canada at [232].
126 Ridings Affidavit, 19 January 2016 at [78].
and the TPPA, but customary international law does not require that the minimum standard be assessed or enforced through investor-State arbitration.

Expropriation: art 9.8

190. A TPPA investor is entitled to be paid compensation for any expropriation of their investment by a host State. An expropriation is a governmental interference with a tangible or intangible property right or interest in an investment. Article 9.8 specifies that the level of compensation for a lawful expropriation (that is, a taking for a public purpose and in accordance with due process) is fair market value. The amount of compensation for an unlawful taking is not specified, but as explained earlier, may include loss of future profitability.

191. As with the minimum standard of treatment, the expropriation claim has its foundations in customary international law. Article 9.8 encompasses indirect and therefore regulatory expropriation. Concerns over broad interpretations of what constitutes an indirect expropriation have prompted states to be much more directive about how the claim is expressed in their treaties, to protect regulatory space. Thus, in the TPPA, the parties have included an interpretive annex (annex 9-B) to confirm their shared understanding of what constitutes an expropriation, including regulatory expropriation.

192. The annex states that in any case, the tribunal has to conduct a fact specific inquiry to determine whether a measure amounts to indirect expropriation. The annex lists three non-exhaustive factors that a tribunal would need to consider – these are the economic impact of the challenged measure, the extent to which it interfered with the investor's reasonable expectations, and the character of the government action. A footnote provides that whether expectations are reasonable depends on factors such as whether they are backed by binding and written assurances by the host State, and the nature and extent of regulation or potential for regulation in the relevant sector.

193. The annex concludes by accepting that regulation in the public interest may, in "rare circumstances", constitute an indirect expropriation. Public health, safety and the environment are listed as legitimate public welfare objectives.

194. The annex does not explain when rare circumstances might arise. Read against the other parts of the annex, rare circumstances would likely be construed narrowly. Possibilities include measures that discriminate, breach prior commitments to investors, or impose unreasonable and excessive burdens on investors to bear the cost of the public interest. To date, there has been no case discussing the meaning of "rare circumstances" under other treaties that also use the term. I note that most of New Zealand's past treaties do not allow expropriation claims resulting from public welfare regulation, even in rare circumstances.

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128 TPPA, Chapter 9, annex 9-B.
195. As a result of the refinements to the expropriation claim, its substantive content has moved closer to the minimum standard of treatment, although with any indirect expropriation claim the investor must prove that the contested measure has an economic effect equivalent to a direct expropriation, and the meaning of what constitutes investor expectations is clearer. If an investor is successful in establishing a breach of either obligation, then New Zealand could seek to defend the claim under the Treaty Exception. New Zealand's need and ability to rely on the exception is considered in the next section dealing with case studies.

THE APPLICATION OF THE TREATY EXCEPTION: CASE STUDIES

Overview

196. There is an assumption implicit in the Crown's position that, in order to protect Maori interests, it would adopt measures that accord Maori more favourable treatment. Therefore, according to the Crown, the Treaty Exception is adequate to protect those interests because it allows more favourable treatment. The assumption should be questioned because the Treaty Exception only allows measures that accord Maori more favourable treatment. To give effect to its obligations to Maori, it could be necessary for the Crown to adopt special measures for Maori that are not inherently discriminatory, and/or measures of general application that are intended to promote Maori interests but again, are not inherently discriminatory.

197. The purposes of this section are to consider what kinds of measures are already in place or may be needed to protect Maori interests, whether those measures accord more favourable treatment to Maori, whether they may be inconsistent with New Zealand's primary obligations under the TPPA, and the extent to which an exception (including the Treaty Exception) may be available to defend the inconsistency. To illustrate, I begin by briefly considering some of the existing measures already in place to protect Maori interests. This is not an area of my expertise, but I have some experience as a trustee of Maori land trusts and I have come across these particular measures in my capacity as trustee. I then deal with the case studies proposed by the claimants.

Existing measures

Measures that accord more favourable treatment to Maori

198. The business development grants provided through Te Puni Kokiri to Maori organisations and the special taxation regime for Maori Authorities are good examples of measures that could be inconsistent with the national treatment obligation. The lower taxation rate on income of Maori Authorities and other

129 See Te Puni Kokiri policy document (which has been provided as a guide for funding) and Inland Revenue guide to the Maori Authority tax rules. Attached as Exhibit #25.
related measures under the current taxation regime would be covered by the taxation exception in TPPA art 29.4.6, but the exception limits what amendments can be made in the future. These measures are also good examples of measures that accord Maori more favourable treatment within the scope of the Treaty Exception, under either of the alternative interpretations of more favourable treatment discussed earlier.

199. A less obvious example of more favourable treatment, which has not yet been enacted, is the proposal in the Land Transfer Bill to authorise a court to reverse indefeasibility of title if the estate or interest is in Maori freehold land and was registered without complying with Te Ture Whenua Maori Act 1993 (the TTWMA). If a court granted relief on an application of the former Maori land owner, that person would receive preferential treatment over the registered proprietor.

Special treatment of Maori

200. The TTWMA is an example of special legislation to protect Maori interests, in this case, interests in land as a taonga tuku iho. The Act sets up a system of administration of Maori land but is not designed to give Maori land owners more favourable treatment in relation to anyone else. For the most part, others are simply not involved.

201. However, in some instances, third parties do acquire interests in Maori land and may require the confirmation of the Maori Land Court (MLC) to the transfer of legal title. To give an example, in Matauri Bay Properties Ltd (in liq) v Proprietors of Matauri X Incorporation, the MLC granted an application to confirm an alienation of Maori freehold land to settle debts (capped at $15 million if the transfer went ahead). The debts arose originally from a failed investment by the Maori land owners. With the development of the Maori economy, relationships between Maori land owners and non-Maori partners may become more common.

202. In a hypothetical case with similar facts to the Matauri X case, if the MLC refused confirmation because it was not satisfied the statutory criteria had been met, then the MLC’s decision could be challenged. The applicants could appeal to the Maori Appellate Court. Alternatively, if the third party is an investor under the TPPA and suffers loss from the MLC’s decision, it could take proceedings through investor-State arbitration claiming damages for breach of the minimum standard of treatment. An investor would normally be expected to exhaust domestic remedies if judicial acts are the basis of a claim of denial of justice in breach of the minimum standard of treatment. For this reason, the investor may first need to exhaust domestic avenues of appeal. The normal principle was not applied to the decision of an administrative body in Bilcon v

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130 Land Transfer Bill, cl 57(4)(c). Attached as Exhibit #26.
132 Louwen Group Inc v United States of America ICSID Case No ARB(AF)/98/3, Award, 26 June 2003 at [164].
Canada. In that case, Bilcon advanced its claim against Canada without having the decision of the environmental review panel considered in a judicial review process, an issue raised without success by Canada in its defence against Bilcon's claim.

203. The investor could argue, along the lines of the claimant in Bilcon v Canada, that in refusing to confirm the transfer the MLC took into account an irrelevant consideration of which it had no notice. It could seek damages on the international plane for breach of the minimum standard of treatment. In my opinion, such an argument is legally flawed, but nonetheless it was accepted by the majority in the Bilcon case. Alternatively, the investor could argue that the outcome was arbitrary, unfair and inconsistent with reasonable expectations, because there were no or insufficient reasons to depart from precedent such as the case involving Matauri X.

204. The immediate Maori interests may not be adversely affected by the investor-State proceedings (they applied to the MLC to allow the transfer in the first place), but the proceedings could affect the normal operation of the TTWMA system in a manner that is unhelpful to wider Maori interests. This could be the case if, for example, the proceedings impact on how the MLC treats applications involving foreign investors, or on the ability to develop precedent through the normal appeals process.

205. It would be difficult to argue that these circumstances fall within the Treaty Exception:

205.1. first, the Treaty Exception applies to "measures" adopted by New Zealand. If the complaint is that the MLC applied an irrelevant consideration, then the TTWMA is not itself at issue, but rather its application to particular facts through the MLC. The MLC's decision gives rise to the breach. Similarly, in Bilcon, the environmental laws were not at issue, but rather the conduct of the environmental review panel. Once again, I wonder if the reference to "measure" in the Treaty Exception reflects the origins of the exception in New Zealand's early trade agreements. This is because breaches of the non-discrimination rules in trade agreements are normally brought about through the adoption of measures, whereas investment obligations (especially the minimum standard of treatment) can be breached by a wider range of host State conduct. I refer to the dissent in Bilcon where this distinction is made clear: "the case of course does not challenge Canada's laws; rather, it challenges the way they have been implemented".133

205.2. even assuming the adoption of the wider interpretation of "more favourable treatment", the specific outcome does not accord Maori such treatment, as the Maori land owners sought confirmation of the proposed transfer of land and were refused. Indeed, in a case like Matauri X, the Maori landowners could be in a worse position from the refusal;

133 Dissenting Opinion of Professor Donald McRae, Bilcon v Canada, at [44]; attached as Exhibit AB to Sixth Kelsey Affidavit, 19 January 2016.
205.3. the TTWMA protects the special interests of Maori in retaining land, but does not accord Maori preferential treatment even in a broad sense.

206. My brief is to consider the effectiveness of the Treaty Exception to protect Maori interests rather than whether New Zealand should be immune from all claims that implicate those interests. I have already acknowledged the argument that New Zealand has international responsibility for breaches of customary international law (although the minimum standard of treatment is problematic for the reasons given earlier). There may also be an argument that a claim like the hypothetical described here is unlikely.134 It is at least conceivable that such a claim could be made, and in my view it is unlikely that the Treaty Exception would be available to defend it. The hypothetical is really intended to demonstrate the potential inadequacy of the exception to the extent that Maori interests may be protected through facially non-discriminatory measures.

Claimants’ case studies: fracking

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

207. This scenario proposes changes to New Zealand’s foreign investment laws. I have assumed the proposed changes would be given effect by amendments to the OIA. The amendments would be consistent with New Zealand’s obligations under the TPPA.

208. The principal form of regulation of foreign investment into New Zealand is screening. Since the 1960s New Zealand has subjected certain foreign investment to a screening process to ensure that significant investments in New Zealand are in the national interest. Currently, screening takes place under the OIA and associated regulations. The OIA screens investment proposals that fall within the Act’s definitions of “significant business assets” and “sensitive land”. (Fishing quota is also regulated but not discussed further.) Applications for consent are made to the Overseas Investment Office and are screened against a range of economic and non-economic criteria. The criteria are mandatory; if they are met, consent must be granted; if the criteria are not met, consent must be declined (OIA s 14(1)).

209. The OIA will need to be amended to give effect to New Zealand’s commitment under the TPPA to increase the monetary threshold for investment in significant business assets by non-government investors from $100m to $200m. Once the

134 See Second Ridings Affidavit, 2 February 2016 at [27] and [45] (in relation to the risk of investor claims generally).
TPPA has entered into force, the following investments by TPPA investors will be subjected to screening:135

209.1. acquisition or control by non-government sources of 25 per cent or more of a New Zealand entity where either the consideration for the transfer or the value of the assets exceeds NZ$200 million;

209.2. commencement of business operations or acquisition of an existing business by non-government sources, where the total expenditures to be incurred in setting up or acquiring that business or those assets exceed NZ$200 million;

209.3. acquisition or control by government sources of 25 per cent or more of a New Zealand entity where either the consideration for the transfer or the value of the assets exceeds NZ$100 million;

209.4. commencement of business operations or acquisition of an existing business by government sources, where the total expenditures to be incurred in setting up or acquiring that business or those assets exceed NZ$100 million; and

209.5. acquisition or control, regardless of dollar value, of certain categories of land that are regarded as sensitive or require specific approval.

Change to the screening criteria; special conditions for fracking

210. New Zealand’s consistent treaty practice has been to exempt the OIA from its national treatment obligations, and to reserve to itself the flexibility to amend the criteria for screening in the existing categories of screened investments. The TPPA follows the usual practice of including the exemption and the reservation in annexes of non-conforming measures.136 The result is that the current operation of the Act can continue, and the screening criteria for the existing categories can be changed. In terms of the fracking case study, the proposed measures could be adopted under the Act as additional criteria in ss16 and 18 for screening in the above-listed categories.

211. According to Professor Kelsey, it is unclear whether the proposed type of measures would constitute screening criteria for the purpose of the reservation, and she has suggested that they would instead be conditions on operations which are not covered by the reservation.137 I have reached a different conclusion. If New Zealand wished to impose the measures as criteria, then it could do so. There is no limit on the types of criteria that may be imposed. The reservation is set out in annex II of New Zealand’s non-conforming measures. It provides:

135 TPPA, New Zealand annex I of non-conforming measures, 12-13 and annex II 7-8.
136 TPPA, New Zealand annex I of non-conforming measures, 12-13 and annex II 7-8.
137 Eighth Kelsey Affidavit, 11 February 2016, [117]-[118].
New Zealand reserves the right to adopt or maintain any measure that sets out the approval criteria to be applied to the categories of overseas investment that require approval under New Zealand’s overseas investment regime.

212. The OIA exemption is included in both of New Zealand’s annexes of non-conforming measures so that the OIA is treated as both a generic (annex I) and sector specific (annex II) measure. The entry dealing with the OIA in annex I of New Zealand’s non-conforming measures should, according to its own terms, be read in conjunction with annex II. Therefore, changes to screening criteria made in accordance with the reservation in annex II apply to the exemptions for the OIA in both annexes.

213. The existing criteria in the OIA include a specific criterion applicable only to investments in farmland. The criterion is that the land must first be offered for sale on the open market in accordance with a procedure specified in regulations (OIA s 16(1)(f)). In a similar vein, new specific criteria with the reporting and consent requirements could be imposed to deal with investment in fracking operations.

214. In any event, New Zealand could also extract the proposed measures from investors as conditions of consent. In exercising their powers, the responsible Ministers are conferred a very wide authority in s25(c) OIA to grant consent subject to conditions that the Ministers think appropriate. The statement in New Zealand’s annex I of non-conforming measures that “investors must comply with the criteria set out in the overseas investment regime and any conditions specified by the regulator and the relevant Minister or Ministers” (emphasis added) supports this power.

215. It would be appropriate for the Ministers to impose conditions along the lines of the proposed measures, given the existing terms of the OIA. One of the criteria for sensitive land investments is that the investment will benefit New Zealand, and if the land is non-urban land greater than five hectares, the benefit must be substantial and identifiable (s16(1)(e)). The factors for assessing whether an investment meets this criterion include factors relating to the environment and cultural heritage. Conditions that relate to the environment and cultural heritage would support the implementation of the existing screening criteria.

Application of the OIA to proposed fracking operations

216. There is no detailed investment proposal as part of the case study. I nonetheless note that the definition of “sensitive land” in Schedule 1 to the OIA is extremely broad. It includes the seabed, non-urban land that is greater than five hectares, and much smaller areas of land which are adjacent to specified types of land (for example, 0.4 hectares if the land adjoins a reserve).
217. I venture to suggest that most commercial mining operations in New Zealand would be carried out on land within the definition of sensitive land under the OIA. From my review of the materials provided to the Tribunal regarding fracking, it would appear that fracking operations in particular would be carried out on sensitive land (although I have no expertise on this matter). To the extent that any TPPA-foreign investment in fracking operations involves sensitive land, it would be screened, and could be screened according to the proposed new criteria of cost benefit analysis and Maori consent.

218. The terms of existing consents may be varied by the responsible Ministers with the agreement of the investor (s27 OIA). Therefore, under current law, an already consented investor could not be subjected to additional OIA requirements to carry out a cost benefit analysis and obtain Maori consent without the agreement of the investor. It seems unlikely that the proposed measures would be imposed on existing consent holders, as this would not be an effective way to manage the problems arising from fracking. Because such amendments are not expressly contemplated by this scenario, I do not discuss them further. The potential TPPA issues arising from changes in the general law applicable to fracking operations are considered under the second and third scenarios.

Other regulation for fracking investments not screened under the OIA

219. For completeness, the remainder of my discussion of this scenario concerns the regulation of foreign investment in fracking operations which falls outside the OIA screening categories.

220. If New Zealand adopted measures to require cost benefit analysis and Maori consent for foreign investment in such operations, then the measures would likely be inconsistent with the national treatment obligation in TPPA art 9.4. I agree with Dr Ridings’ observation that it would be hard to justify (with or without the TPPA) targeting foreign investment while not applying the same measures to New Zealand operations that cause the same harmful environmental and cultural effects. The OIA requirements do not need to be justified. Instead, significant investments within the ambit of the OIA can be screened as an express exemption from national treatment, reflecting long-standing New Zealand policy.

221. If there is no legitimate policy reason for applying the measures to foreign investors only, then it is doubtful the measures would meet the requirements of the proviso to the Treaty Exception. If there is a legitimate policy reason for the discrimination (because, for argument’s sake, Maori require foreign operators to be treated differently), then there would be the further difficulty of having to convince a tribunal to adopt the wider meaning of “more favourable treatment”. To fall within the scope of the exception, New Zealand would need to establish that the measures accord Maori more favourable treatment in the regulation of

138 Third Ridings Affidavit, 9 February 2016, [12].
the mining industry as compared to foreign investors. It is not an easy comparison to make.

222. Dr Ridings doubts that rational foreign investors would channel capital into setting up a business without first having obtained requisite approvals, such that the likelihood of claims is marginal.\textsuperscript{139} I generally agree with that assessment, except that the process of obtaining approval can itself be a costly exercise. This might be the case if, for example, the prospective investor must consult with a range of affected or interested parties, and if detailed plans need to form the basis of those consultations.

223. Furthermore, although it is uncommon for States to take proceedings on investment matters, a TPPA State party may be interested in bringing proceedings against a discriminatory measure that is applied beyond the limits of the exemptions for the OIA. States may be motivated to act for systemic reasons in relation to discriminatory measures that act as barriers to entry into a market. If New Zealand's measures are found to be inconsistent with the national treatment obligation and are not justified by the Treaty Exception, the result of State-State dispute settlement may be a recommendation on New Zealand (in effect) to withdraw the measures.

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

224. A key question in this scenario is whether the moratorium or ban (hereafter “ban”) on fracking is intended to apply to all mining operations including those that have existing mining licenses and consents to frack, or to proposed operations only. I assume it is intended to apply to both existing and proposed operations.

225. I see no difficulty in terms of the TPPA for the ban to apply prospectively. This includes applying the ban to operators who presently intend to apply for a consent, although there is an issue regarding the non-renewal of consents that I discuss further below. There is a clear possibility that New Zealand might follow other jurisdictions and adopt a ban on fracking given the sensitivity of and ongoing research into the effects of the process as elaborated in the materials provided to the Tribunal. The possibility of reform would inform the putative TPPA investor's expectations about the regulatory environment in New Zealand and diminish the prospects of a successful claim for wasted expenses.

226. If the ban is to apply to existing operations, it would effectively revoke existing licenses and consents and the economic impact would be far greater. If the severity of the impact is equivalent to a direct expropriation, a TPPA investor may claim that its investment has been indirectly expropriated by the ban. I would not regard a ban as a form of direct expropriation as that term is normally

\textsuperscript{139} Third Ridings Affidavit, 9 February 2016 at [13.4]-[13.5].
understood (that is, transfer of title or outright seizure of property in favour of the government or third party). The ban could also give rise to a claim for breach of the minimum standard of treatment.

**Expropriation**

227. Dr Ridings has explained that fracking permits are normally of short duration, and that the ban could take effect on expiry of each existing consent. There is a question whether an investor would nonetheless argue that its investment has been indirectly expropriated if its consent is not renewed after expiry.

228. In *Tecmed v Mexico*, the investor initiated proceedings against Mexico under the investment treaty between Spain and Mexico for indirect expropriation of its investment, amongst other claims. Tecmed argued that the non-renewal of its permit to operate a landfill was motivated by political reasons and denied it the economic use of its investment. In response, Mexico said that the non-renewal decision was made in a highly regulated and extremely sensitive framework of environmental protection and public health, and was a legitimate action that did not amount to an expropriation. The tribunal upheld Tecmed’s expropriation claim. It determined that the effect of the decision was to deprive the investor of all its economic interest in the landfill, and that the decision was not proportionate to legitimate policy goals or evidence of harm but was driven by community pressure. On this basis, the investor’s claim may have been rejected if the non-renewal of the permit was based on a convincing scientific analysis, but it is evident from the award that the tribunal was reluctant to allow public opinion to inform policy.

229. The NAFTA case *Methanex v United States* involved a ban similar to the measure proposed for this scenario. California introduced a ban on the sale and use of a gasoline additive, methanol, on environmental grounds. Methanex was a producer of methanol and claimed that its investment had been expropriated by the ban, and specifically that the ban caused the loss of its returns on its investment and the idling of its plant in the United States. The tribunal explained that such regulation would not normally found a claim for indirect expropriation:

... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to

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140 See TPPA, annex 9-B. Resource consents are not property under New Zealand law (RMA s122) so would not be capable of direct expropriation under the TPPA. Contrast Eighth Kelsey Affidavit, 11 February at [129].
141 Third Ridings Affidavit, 9 February 2016, [30].
142 *Tecmed v Mexico* at [151].
143 *Methanex Corporation v United States*, Final Award, 3 August 2005 part IV Chapter D at 4. Attached as Exhibit #28.
the then putative foreign investor contemplating investment that the
government would refrain from such regulation.

230. The Tribunal rejected Methanex’s expropriation claim on the basis that the
California ban was made for a public purpose, was non-discriminatory and was
adopted following due process. It was relevant that Methanex was well aware of
the process of environmental regulation in the United States including the
involvement of the wider public and the prospect of reform to better protect the
environment.

231. Under the TPPA, the specific requirements of the annex on expropriation apply
(annex 9-B). These requirements are very similar to, but not as strict as, the
requirements indicated by the tribunal in Methanex. According to the annex, a
TPPA tribunal would need to consider, in its fact specific inquiry in a given
case:

231.1. *economic impact:* as the proposed measure is to take the form of a ban,
the economic impact would probably be severe (or at least it would be
if the investor has no alternative but to cease operations). This would
favour the investor’s claim;

231.2. *the investor's reasonable, investment-backed expectations:* the investor
would have a reasonable expectation that the term of its lawfully
obtained consent would be allowed to run to its expiry, at least if it is
complied with. It is an “investment-backed” expectation. This would
be especially the case if the consents are for short duration. The
reasonable expectation would be that the consents are of short duration
precisely because of the need to continually monitor the regulatory
position and to allow changes to be introduced within relatively short
timeframes, but only after the expiry of existing consents;

231.3. in my view, the general possibility of regulation in the mining /
fracking sector would not by itself be sufficient to displace this
expectation.\(^{144}\) However, if during the term of the consent, there was a
material change in circumstances, such as new evidence of
environmental harm from fracking, then it could be reasonable to
expect the New Zealand Government to respond. It is not clear though
what level of harm would be required. For present purposes I have not
considered whether the relevant consent would be conditional on
monitoring and the absence of defined harmful effects, although I
assume it probably would be;

231.4. *character of the government action:* the ban is to be given effect by
legislation, or (presumably) by a local authority exercising a power
under legislation. It would therefore be lawful in terms of New Zealand
domestic law. If the ban is adopted following a proper regulatory

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\(^{144}\) Contrast Third Ridings Affidavit, 9 February 2016 at [31.4]-[32].
process, this would favour the defence. It would further favour the defence if the ban is a logical consequence of the regulatory process, in the sense that potential harm from fracking is reasonably established during that process. It is unclear whether public opposition to fracking would be helpful in establishing the rationale for a policy change. The approach of tribunals to this issue is not consistent, as demonstrated by the awards in  

231.5. *non-discrimination:* it would favour the defence if the ban is designed and applied on a non-discriminatory basis and for a public purpose. An investor may argue that a ban applied at a regional level only, in response to local concerns and conditions, is discriminatory as compared to the treatment of investors in other areas. The Resource Management Act 1991 (RMA) contemplates regional variations in the regulation of the environment through regional and district plans. In effect, the investor’s argument would be that the TPPA does not permit this kind of regulation. The response to such an argument would be that, as in cases like *Methanex* and *Bilcon*, what is important is whether regulation is applied on a non-discriminatory basis to those who are subject to it – in *Methanex*, the issue was whether California’s measure was discriminatory against foreign suppliers operating within California. In contrast, in *Bilcon*, the measure at issue was federal regulation that had been applied inconsistently to different investors across Canada. In *Merrill & Ring*, the tribunal appeared to accept that regional variations could be justified by local conditions;

231.6. *public purpose:* the purposes of the measure are to protect the environment and to uphold Maori values in the protection of the environment. The annex recognises that the environment is a legitimate subject of public interest regulation, which would favour the defence of the measure. Given the Preamble, legitimate public purposes would also likely be construed to include the protection of cultural values;

231.7. *whether “rare circumstances” exist:* as explained earlier, the annex provides that non-discriminatory regulatory actions for a public purpose are not expropriatory except in rare circumstances. It may be relevant to consider whether the investor has lost its investment in response to uncertain or minimal environmental harms, or the extent to which the public interest is served by the ban.

232. A ban on fracking could result in a finding that an investment has been indirectly expropriated, if the economic impact on the investor is severe and disproportionate to the public interest. In terms of the renewal of consents, if fracking consents are granted for short two – three year periods, then this indicates that investors holding them could not reasonably expect their renewal.

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145 I agree with Dr Ridings’ description of proper process in her Third Affidavit, 9 February 2016 at [24].
146 *Merrill & Ring v Canada* at [225].
on an ongoing and long-term basis. If the ban is adopted following due process where potential harm from fracking is reasonably established, there would be grounds for defending an expropriation claim at least in relation to the non-renewal of a consent. In other words, a claim is possible, as is a good defence, but without specific facts it is difficult to be more conclusive.

Minimum standard of treatment

233. Some of the conclusions reached in relation to the potential expropriation claim are also applicable to the claim for breach of the minimum standard of treatment. A TPPA tribunal would likely assess the following factors:

233.1. *the investor's expectations*: as discussed in relation to expropriation, an investor would have reasonable expectations about the ongoing validity of its lawfully obtained consent. The lack of specificity on what constitutes investor expectations in the minimum standard of treatment clause would give a tribunal a discretion to weigh arguments about what can reasonably be expected. However, frustration of the investor's expectations by itself would be insufficient to establish a breach of the minimum standard of treatment under the TPPA;

233.2. *whether the ban is arbitrary*: the application of the ban to existing consents would be inconsistent with the rule of law principle against retrospective application of new laws. This would support an investor's claim that the ban is applied in an arbitrary way. It would also point to New Zealand acting unreasonably, if the tribunal included reasonableness in its assessment;

233.3. *natural justice and due process*: as with expropriation, if the ban is adopted following a proper regulatory process, this would favour New Zealand's ability to defend a claim for breach of the minimum standard of treatment;

233.4. *discrimination*: as with expropriation, if the ban is applied on a non-discriminatory basis, this would favour the defence of the measure.

234. I tend to agree with Professor Kelsey (although perhaps with less force) that a ban on fracking applied to existing consents could be accepted by a tribunal as breaching the minimum standard of treatment under the TPPA on the basis it is arbitrary. An investor's reasonable expectation about the ongoing validity of its lawfully obtained consent, although insufficient by itself, would support an overall finding of breach. New Zealand might well argue that it followed formal due process in adopting the ban, but that process could be seen as resulting in

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the arbitrary treatment of an investor. In other words, the consequences of due process would not be ignored.

Treaty exception

235. If an investor succeeds in establishing that an expropriation has taken place, or that there has been a breach of the minimum standard, New Zealand may look to the Treaty Exception to defend the ban:

235.1. *proviso:* assuming the ban is applied to all fracking operations in New Zealand, there would be no discrimination and no disguised protectionism against foreign investment in the affected sector. This would strongly favour New Zealand being able to meet the requirements of the proviso. If the ban is applied regionally, an investor may argue that the measure is arbitrarily discriminatory. The better view is that the measure would be non-discriminatory if applied on a non-discriminatory basis to all investors within the relevant region to give protect Maori interests in that region;

235.2. *more favourable treatment:* New Zealand would need to demonstrate that the measure is necessary to accord more favourable treatment to Maori. The more favourable treatment would be in the preferences given to Maori interests over those of others in the regulation of the mining industry. Whether a TPPA tribunal would accept this as adequate for the purpose of the exception would depend on its acceptance of the broad view of more favourable treatment.

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

236. The TPPA analysis of the proposed measure in scenario three is similar to that discussed for scenario two. That is, scenario three also raises the possibility of an indirect expropriation claim and a claim for breach of the minimum standard of treatment, and the same factors would be considered in the assessment of each claim and the defence to the claims under the Treaty Exception. I briefly consider those factors, to the extent that they differ in their application to this scenario.

Expropriation

237. Regarding the prospects of an expropriation claim, much would depend on the terms of the licenses and consents (and whether they permit changes to be made to them) and the cost implications of the new measures.
238. In *Glamis Gold v United States* for example, the investor claimed compensation for regulatory expropriation on the basis that onerous new regulations applicable to its mining operations would cause it to suffer significant financial loss. In particular, the regulations imposed a back-filling requirement on its open-pit mines, in order to better respect the values and traditions of the local Quechan Nation regarding their sacred lands. The tribunal rejected the expropriation claim because the investor still retained a viable investment, despite the new regulations.\(^{148}\)

239. If the proposed measures do have an effect equivalent to an expropriation, then the factors discussed above for scenario two would form the basis of the tribunal’s analysis of the investor’s claim.

240. In terms of the investor’s expectations, the investor would likely argue that it reasonably expected the conditions of its consent to frack not to change during its term. However, while it may be reasonable for an investor to expect that its lawfully vested right to operate an investment not be revoked (scenario two, above), it would not be reasonable to also expect that regulation of the investment remain frozen for its duration, unless the investor was given specific assurances by the government or regulatory authorities that the regulatory settings would remain stable.

241. There is a clear potential for changes in the regulation of fracking, and current law permits changes to the terms of consent conditions in certain circumstances. Therefore, changes to the regulation of fracking would be reasonably expected.\(^{149}\) According to the *Bilcon* majority, the possibility of a new government taking a fresh look at the issue would also inform what an investor could reasonably expect.\(^{150}\) For these reasons the investor’s reasonable investment-backed expectations would not be as strong in this scenario as they would likely be under scenario two.

**Minimum standard of treatment**

242. Changes in regulation may give rise to a breach of the minimum standard of treatment, in limited circumstances. As above, a tribunal would likely consider the investor’s reasonable expectations, whether the proposed measures are arbitrary or discriminatory, and whether due process is followed in the design and application of the measures.

243. I refer to my discussion of investor expectations in relation to the potential expropriation claim. In my view, it would be reasonable to expect ongoing changes in the regulation of the mining industry’s fracking sector given the controversial nature of the fracking process.

\(^{148}\) *Glamis Gold v US* at [366].

\(^{149}\) Contrast Eighth Kelsey Affidavit, 11 February 2016 at [39].

\(^{150}\) *Clayton / Bilcon of Delaware, Inc v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability, 17 March 2015 at [572]; attached as Exhibit N to Sixth Kelsey Affidavit, 19 January 2016. Discussed by the majority in the context of a fair and equitable treatment claim.
244. If the proposed measures are warranted by a genuine and rational policy, it is unlikely they would be deemed evidence of arbitrary conduct by New Zealand. In terms of due process, if the proposed measures are implemented through a lawful process such as the one in the RMA for reviewing resource consents, this also favours the defence to the claim.

245. A breach of the minimum standard of treatment would be possible under this scenario, but it would not be a strong claim unless the process adopted to implement the measures or their implementation was arbitrary, grossly unfair or unjust, discriminatory or completely lacking in transparency. Even on the lower and more dubious standard of unreasonableness, a claim would still be difficult. If the claim is established on any of these grounds, then it is unlikely that New Zealand would be able to satisfy the good faith requirements of the Treaty Exception.

Claimants' case studies: freshwater

Scenario one: amendment to the Resource Management Act to provide a sustainable framework for the management of fresh water within every catchment, covering all aspects of freshwater governance, values, limits, decision-making, and allocation and that recognises the mana of iwi and hapu and provides for iwi rights, including proprietary rights, and for relationships and responsibilities as kaitiaki in respect of water.

246. This scenario deals with the allocation and management of rights in freshwater resources. I am unsure how the proposed changes would affect specific investors, and unsure what proprietary rights are involved. I have endeavoured to flesh it out for the purpose of analysis.

247. The proposed governance regime appears to contemplate a new approach to decision-making that recognises Maori values, specifically, kaitiakitanga. Reflecting kaitiakitanga, it may be necessary to impose a higher standard of environmental protection than is provided for under the current framework for managing freshwater resources. The description of the possible measures for this scenario refers to “limits” which may include limits on the use of water and limits on discharges into water. The new decision-making processes would presumably have Maori involvement.

248. I have assumed that the new governance regime is applied to holders of existing water use permits. I have also assumed however that the grant of proprietary rights to Maori does not entitle Maori to extract benefits from the holders of water use permits in addition to what the permits currently provide, and that the permits remain valid. That is, I have assumed that the proprietary rights of Maori to water are not exclusive, but are managed as part of the new governance regime alongside the rights of others. New permits may be issued on different terms, consistent with the objectives of the new regime. Finally, I

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151 RMA 1991, s128-130.
have assumed that the putative TPPA investor holds a permit to use water and now finds itself subject to the new governance measures.

249. On the basis of these assumptions, a possible complaint of an investor may be that, as a result of the new measures, it is now burdened with additional compliance costs, and is also now faced with a new, complex and less certain approach to the management of its user interest in water. It does not appear from the described measures that the costs would be prohibitive. If this is correct, then the investor would have no claim to compensation for any indirect expropriation of its investment.

250. I note that Dr Ridings has focussed on a possible expropriation claim in her analysis of this scenario, but her approach hinges on different assumptions. In particular, that the granting of proprietary rights to Maori or new limits on the use of water would deprive the investor of its user rights under an existing permit, which in turn would deprive the investor of the value of its investment. If the measures neutralise the economic value of an investment, then I agree that an indirect expropriation claim would be possible in relation to the investment (rather than the permit specifically, which is potentially not an investment, as explained by Dr Ridings). I have not assessed this possibility because the assumptions seem unrealistic.

251. The cost implications and issues regarding the new decision-making aspects of the proposed measures could give rise to potential claims for breach of national treatment and the minimum standard of treatment.

National treatment

252. The national treatment claim would focus on the preferential distribution of water rights to Maori:

252.1. less favourable treatment: if Maori are allocated greater water rights through the new governance regime than the investor, then the investor has been treated less favourably. Likewise, if the proprietary rights granted to Maori include user rights that are not available to the investor, this would also result in less favourable treatment of the investor;

252.2. like circumstances: the assumed reasons for the new regime are to involve Maori in the governance of water, and to give substance to the customary interest Maori have in water. The reasons for the proposed measures strongly point to the absence of like circumstances between Maori and the investor.

253. If like circumstances do not exist, then adoption of the proposed measures would not be inconsistent with the national treatment obligation. There is also

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152 Third Ridings Affidavit, 9 February 2016, [48].
an exemption for the regulation of water in New Zealand's annexes of non-conforming measures. Depending on the final form of the measures, they may in any event be exempt from the national treatment obligation.153

Minimum standard of treatment

254. In terms of a minimum standard of treatment claim, a TPPA tribunal would likely assess the following factors:

254.1. the investor's expectations: government inaction to date on the matter of Maori interests in freshwater would not be sufficient to create a reasonable expectation of future inaction, particularly as freshwater management is still a live issue.154 General assurances about current policy do weigh in favour of creating an expectation about stability, but in the present context, expectations would need to also be viewed against the regulatory context. Reform to the framework of freshwater management is contemplated by current law. The RMA allows changes to consents and permits in certain circumstances, including through the adoption of a new national standard (s128(1)(ba)).155 The proposed governance regime could potentially be adopted under the RMA without the need for an amendment. In recent years reform has been taking place on an iterative basis. Unless an investor was assured there would be no further reform, or that future reforms would not apply to it, an objective assessment of the investor's expectations would allow for the possibility of further reform over the longer term, including to take into account Maori interests, notwithstanding current policy;

254.2. whether the measures result in arbitrary treatment: in my view the question whether the measures result in arbitrary treatment could be a central issue in any claim. The participation of Maori in the decision-making process established under the new regime may give rise to a perception that decisions on the allocation of water rights are tainted by bias. In the Merrill & Ring case for example, the tribunal expressed serious concerns about the representation of local industry on a regulatory body.156 For the present scenario, it would depend on the nature of Maori participation and the finer details of the decision making process. This is not to suggest that such a process is wrong, but that the minimum standard of treatment under customary international law has not (yet) developed an appreciation of how indigenous governance or co-governance might work;

254.3. a related problem is that the investor may have little understanding of the Maori values underpinning the new regime. The consequence of this may be that the investor finds it difficult to participate effectively, at least to begin with. Addressing these difficulties could be expensive

153 TPPA, New Zealand annex II of non-conforming measures at 3.
154 Contrast Eighth Affidavit, 11 February 2016, [158].
155 Discussed in Ridings Third Affidavit, 9 February 2016 at [39].
156 Merrill & Ring at [227].
in time and resources. This problem could arise under the RMA as it is, and I briefly expand on it below;

254.4. natural justice and due process: adopting a proper legislative or other reform process for the adoption of the new governance regime favours the defence to the claim. However, the requirements of natural justice and due process also extend to the administration of the regime. As noted, the administration of the regime may not meet the requirements of natural justice as these requirements are understood in the customary international law sense;

254.5. discrimination: the issue of discrimination is related to the potential for arbitrary treatment. An investor could perceive that it is being discriminated against unfairly on the basis of its nationality and this risk is heightened because of the lack of due process. The investor could argue that the discrimination is further compounded by its inability to participate effectively in the decision-making process set up by the new governance regime.

255. The adoption of the proposed measures to better regulate freshwater management could give rise to a claim for breach of the minimum standard, but the claim would likely be based on how the new measures are implemented rather than on the change in regulation per se.

256. The RMA as it is currently written includes some recognition of Maori interests, and provides for their protection to some extent. I wish to briefly comment on potential TPPA issues arising in relation to the application of the relevant RMA provisions, beyond the measures proposed in this scenario.

257. In Part 2 of the Act, the relationship of Maori with ancestral lands and other taonga is listed as a matter of national importance (s6(e)). Kaitiakitanga is "another matter" that decision makers shall have particular regard to (s7(a)). The principles of the Treaty of Waitangi must also be taken into account (s8). I note that Dr Ridings has observed that in practice this means consultation.\footnote{Third Ridings Affidavit, 9 February 2016 at [33.3].}

258. From my recent experience as a participant in RMA processes, I suggest that the quality of consultation is important in order for both applicants and Maori to achieve satisfactory outcomes. Perhaps this is self-evident. However, from an investor’s perspective, particularly an investor without a long-standing involvement in New Zealand, a range of relevant issues may arise during a consultation and consenting process. These would include:

258.1. uncertainty about which groups to consult with, given that several groups may have kaitiaki roles within the same area and given that those roles can evolve. An investor may be surprised to learn that a hapu it was not aware of has objected to a consent application, despite its efforts to consult;
uncertainty about what form or level of consultation is required;

uncertainty about what is meant by kaitiakitanga given its exact meaning may differ between different kaitiaki;

uncertainty about what is required to mitigate harms to the cultural environment to the extent that the required mitigation does not involve scientific processes; and

difficulties in accessing cultural advice to foresee what may be required in an application and difficulties in accessing cultural evidence to rebut arguments.

In terms of the *Waste Management* description of fair and equitable treatment, it could be argued that from a customary international law perspective such treatment is “arbitrary” and / or “idiosyncratic”. It would not be sufficient for New Zealand to argue in response that the treatment is consistent with New Zealand law.

**Treaty Exception**

It is unlikely that the proposed measures would breach the national treatment obligation because Maori would not be in like circumstances to the investor. There would be no need to rely on the Treaty Exception.

As to whether a breach of the minimum standard of treatment would come within the exception:

*proviso*: although it would depend on the terms of the new regime, it appears that the proposed measures could involve arbitrary and discriminatory treatment. However, conclusions about such treatment for the purpose of the breach of the minimum standard obligation should not simply be transposed to the exception for the purpose of assessing whether the requirements of the proviso are met. Otherwise, New Zealand would not be able to rely on the exception for most breaches of the minimum standard of treatment, despite the exception’s stated coverage to the whole of the TPPA. New Zealand would have a reasonable argument that it meets the requirements of the proviso, if it can establish that the proposed measures have their basis in a legitimate policy and are adopted in good faith;

*more favourable treatment*: the preferential allocations of water rights to Maori would clearly amount to more favourable treatment;

the other proposed measures, such as the involvement of Maori in the governance of freshwater, could amount to more favourable treatment of Maori but this is less clear-cut. The more-favourable treatment would be in the status Maori hold in the regulation of freshwater, including the right to make decisions affecting others. Whether such a status would be accepted as more favourable treatment depends on
adoption of the broad interpretation of the phrase. An investor would likely argue that Maori do not receive more favourable treatment for the purpose of the exception, as Maori are not accorded any advantage or benefit. Rather Maori interests are taken into account in an administrative process. These considerations would equally apply to the current operation of the RMA.

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

262. As I understand it, the proposed measure in this scenario can be reduced to the non-renewal of a permit to use water following the expiry of the permit, and thereafter, the exclusive use of water by Maori. This scenario raises very similar issues to those already discussed and I address them only briefly.

263. The proposed measure could give rise to an expropriation claim and/or a claim for breach of the minimum standard of treatment, for substantially the same reasons, and with the same analysis, as applicable to the non-renewal of a consent to frack discussed in the first case study. Key issues in establishing a breach of either obligation would include whether the investor could substantiate a legitimate expectation to have its permit renewed, and whether a proper process was followed in the adoption and implementation of the measure.

264. The measure could also give rise to a national treatment issue, for substantially the same reasons, and with the same analysis, as applicable to the preferential allocation of water rights to Maori in the first scenario under this case study. The national treatment claim, if not already addressed by the exemptions in New Zealand's annexes of non-conforming measures, would likely fail, because Maori are not in like circumstances as other investors.

265. For the purpose of the proviso, New Zealand would need to establish a very clear rationale as to why water rights within a particular region have to be allocated only to Maori. On this front, the scenario proposes a prohibition on new rights to protect mauri, or the exclusive distribution of rights to Maori for customary and commercial use. These reasons are not compatible—it would be one or the other—and a precise rationale would need to be more fully developed.

CONCLUSION

266. I conclude by indicating where my opinion sits relative to the opinions of the parties' experts on the main issues, and by re-stating my overall opinion on the Treaty Exception as summarised at the outset in light of the matters examined in this brief.
267. As between the experts, I have less difficulty with the proviso or chapeau in the Treaty Exception compared to Professor Kelsey, but agree with both of the parties' experts that "more favourable treatment to Maori" is at least open to interpretation and that paragraph 2 is ambiguous. The policy safeguards in the substantive investor protections in Chapter 9 of the TPPA are positive innovations. I am less sceptical than Professor Kelsey, but also less optimistic than Dr Ridings, about their effectiveness.

268. Trade and investment treaties are long term agreements. The GATT for example has been in existence since 1947 (the original text was carried forward into the WTO framework with some modifications). When drafting exceptions to a given agreement, some foresight is needed about what may be needed both in the present and in the future. It needs to be said that the Treaty Exception is unique in trade agreements, and demonstrates leadership by New Zealand in recognising the interests of indigenous people. At the same time however, its adequacy is compromised because it does not fully reflect the comprehensive nature of the TPPA, it has not evolved in light of changing jurisprudence (unlike other policy safeguards), and finally, its scope does not account for the range of policy choices and administrative regimes that may be needed to protect Maori interests now and in the future.

SWORN

at Auckland on 24 February 2016

Before me:

\[\text{Signature}\]

A solicitor of the High Court of New Zealand

\[\text{Signature}\]

Briar Georgina Ensor
Solicitor
Auckland