

PROCESS, POLITICS AND THE POLITICS OF PROCESS: THE *TRANS-PACIFIC PARTNERSHIP* IN NEW ZEALAND

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This article discusses the domestic processes adopted by New Zealand in the negotiation and conclusion of the Trans-Pacific Partnership ('TPP'), and how the inadequacies in these processes have contributed to the development of party-specific political positions on free trade agreements ('FTAs') and sub-optimal substantive outcomes for New Zealand under the final TPP text. The increasing politicisation of FTAs may be damaging to New Zealand's long-term interests if New Zealand's treaty-making programme becomes less stable. The opposition Labour Party objected to the limited scope of the reservation for New Zealand's foreign investment screening regime during the examination of the earlier FTA with Korea. Given that the parliamentary examination process took place after the Korea FTA was signed, it was too late for Labour's concerns to be addressed in that agreement. The concerns were not addressed in the TPP either, which led Labour to oppose the TPP. The Waitangi Tribunal found fault with the lack of consultation with Maori over the TPP, and with the text of the exception in the TPP relating to Maori interests. The lack of independent scrutiny of past FTAs contributed to the problems in the TPP text. This lack of scrutiny, together with other aspects of the processes for negotiating and concluding FTAs in New Zealand, needs to change.

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I INTRODUCTION

The *Trans-Pacific Partnership* ('TPP') was the eleventh free trade agreement ('FTA') signed by New Zealand,¹ and also the most controversial. Criticism of the TPP has not been limited to the substantive content of

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¹ See *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ('TPP').

the agreement.² In addition to concerns over substantive matters, the process adopted by New Zealand for negotiating and then concluding the agreement has also been a beacon for controversy. This article discusses that process insofar as it concerns the consideration of the agreement by Parliament and engagement with the wider public. The article also considers the consequences of the process in terms of both the potential breakdown in the bipartisan political consensus that has characterised New Zealand's approach to trade agreements over several decades, and in terms of substantive outcomes. As to the latter, it focusses on two examples, and examines how New Zealand's foreign investment screening regime and its obligations under the *Treaty of Waitangi* are addressed under the agreement. It finds that the outcomes on these matters, both of which are of high regulatory importance to New Zealand, are sub-optimal. In turn, these outcomes have contributed to the growing political division on FTAs.

The article begins by discussing the expansion of New Zealand's FTA programme since the early 2000s, and how recent FTAs, the TPP especially, may prompt a break from political bipartisanship on FTAs towards the development of party-specific FTA policies (Part II). It then considers the examination of the TPP in two constitutional forums, Parliament (Part III), and the Waitangi Tribunal (Part IV). The parliamentary process for examining treaties in New Zealand is insufficiently robust. Parliament's examination of the TPP neither contributed much to executive accountability nor to better FTA policy-making. One of the issues identified during the earlier examination of New Zealand's FTA with Korea relates to the adequacy of New Zealand's standard treaty reservation for its foreign investment screening regime. Despite this earlier identification, the same reservation is used in the TPP. There was no independent scrutiny of the screening issue, and no in-depth reporting on it by the relevant select committee either. The inquiry by the Waitangi Tribunal into the TPP illustrates the lack of sufficient public consultation on New Zealand's FTA policies, in this case, with Maori. Proper consultation with Maori earlier on in the development of New Zealand's FTA programme may have resulted in a more effective exception for Maori interests in the TPP. Instead, the template provision, which has uncertain scope, was again deployed. The article concludes by offering reasons for the approach taken by New Zealand to the negotiation of the TPP and by drawing some comparisons with developments in Australia (Part V).

² For post-signature analysis of the TPP, see, for example, the series of research papers published online as part of a New Zealand Law Foundation-funded project: TPP Legal, *Expert Papers* <<https://tpplegal.wordpress.com>>. The TPP's investment chapter has attracted particular attention. For discussion, see, eg, Luke Nottage, 'The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification' (Sydney Law School Legal Studies Research Paper, April 2016); Public Citizen, 'Secret TPP Text Unveiled: It's Worse than We Thought' (6 January 2016) <<https://perma.cc/W6GV-KNZY>>; Penelope Ridings, 'Investment Negotiations: Walking the Tightrope Between Offensive and Defensive Interests' (2015) 21 *New Zealand Business Law Quarterly* 277; Caroline Henckels, 'Will Greater Precision in Investment Treaties Protect the Right to Regulate? An Assessment of the TPP's Investment Chapter' (2015) 21 *New Zealand Business Law Quarterly* 351; Luke Eric Peterson, 'A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US-Style Structure with a Few Novel Twists', *Investment Arbitration Reporter* (5 November 2015) <<https://perma.cc/XL65-EPCA>>.

II THE POLITICAL CONTEXT AND THE THREAT TO BIPARTISANSHIP

A *New Zealand's FTA Programme*

New Zealand has historically been economically dependent on exports, particularly of agricultural goods, and trade in both goods and services remains central to its economic wellbeing.³ At least since the mid-1980s (when its economy was significantly deregulated), it has enthusiastically promoted free trade in its economic relations with other countries.⁴ For example, it was active in the 'Cairns Group' of mainly developing-country agricultural exporters during the Uruguay Round of the *General Agreement on Tariffs and Trade* negotiations that led to the formation of the World Trade Organization, and remains a member of the Group today.⁵ New Zealand also concluded a bilateral FTA with Australia, its closest trading partner, in 1983.⁶ However, it still prefers trade liberalisation through multilateral initiatives (given their wider scope of application), and it was only when progress in the WTO showed signs of stalling in the early 2000s that New Zealand placed any significant attention on FTAs as a means of pursuing its trade interests. It signed an FTA with Singapore in 2001,⁷ which was then followed by a further nine FTAs including the TPP. Together with the FTA with Australia, the total number of its concluded agreements is currently 11.⁸

Initially, FTAs were regarded as primarily offering New Zealand better trading opportunities and they attracted strong bipartisan endorsement from both of New Zealand's two main political parties, the Labour Party and the National Party, for this reason.⁹ For example, the parliamentary debate in 2008 on the FTA between New Zealand and China (negotiated under the former Helen Clark Labour-led government) was reduced to the two major parties giving their different reasons for supporting it.¹⁰ Much of their attention was focussed on the potential trade gains, and also the fact that the FTA was an achievement for New Zealand in the sense that it was China's first with a developed country. Even though there was some opposition from minor parties relating to human rights,

³ See New Zealand Ministry of Foreign Affairs and Trade, *Trade Policy* <<https://perma.cc/Q6GH-FHMD>>.

⁴ David McCraw, 'New Zealand Foreign Policy under the Clark Government: High Tide of Liberal Internationalism' (2005) 78 *Pacific Affairs* 217, 230–4.

⁵ For background, see Cairns Group <<http://cairnsgroup.org/Pages/Default.aspx>>.

⁶ *Australia–New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983, [1983] ATS 2 (entered into force 1 January 1983).

⁷ *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, signed 14 November 2000, [2001] NZTS 1 (entered into force 1 January 2001).

⁸ The FTAs with Australia (1983) and Singapore (2001) were followed by agreements with Thailand (2005); Singapore, Brunei Darussalam and Chile via the *Trans-Pacific Strategic Economic Partnership* (2005) (the original basis for the TPP negotiations); China (2008); Australia and the ASEAN countries (2009); Malaysia (2010); Hong Kong (2011); Taiwan (2013); Korea (2015); and then the TPP.

⁹ The bipartisanship fits with the international relations theory that small states tend to exhibit a narrow range of concern in foreign policy activity with an economic focus. See Maurice A East, 'Size and Foreign Policy Behaviour: A Test of Two Models' (1973) 25 *World Politics* 556, 557, 560, 573–5; McCraw, above n 4, 222–3.

¹⁰ *Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China*, signed 7 April 2008, [2008] NZTS 19 (entered into force 1 October 2008) ('*New Zealand–China FTA*').

local manufacturing and other concerns, overall the tone was generally respectful.¹¹ Similarly, the bipartisanship was remarked upon in the debates on the FTA with Australia and ASEAN ('AANZFTA')¹² as bringing an 'outbreak of peace' to the debating chamber.¹³

New Zealand's treaty-making efforts have benefitted from the consistency in support for FTAs engendered by bipartisanship because officials have been able to work towards a long-term plan, without having to make significant contingencies in case a change in government might affect New Zealand's programme of current or proposed negotiations. Consequently, New Zealand has been able to represent its objectives consistently to negotiating partners, and pursue them without needing to reopen issues during a negotiation or stall ratification depending on the outcome at general elections. However, this bipartisanship may now be threatened. There has been a progressive evolution in New Zealand's FTA practice towards more comprehensive coverage, including in respect of matters that touch on sensitive regulatory issues such as investment and intellectual property. Recently, aspects of this evolution in practice have attracted controversy and placed the bipartisanship under pressure. The potential risks from this are considered below (Part II(C)).

B *Signs of Trouble: The FTA with Korea*

All of New Zealand's FTAs since the 2008 agreement with China have been negotiated under the current National Government (in office since late 2008). The first real signs that its consensus with Labour on FTAs might be in trouble only emerged in 2015. This happened during the parliamentary examination of the FTA between New Zealand and Korea,¹⁴ when concerns about the regulation of foreign investment came to the fore. In broad terms, the FTA with Korea follows the pattern of Korea's earlier agreements with the United States, Canada and Australia. This helped to put New Zealand on a 'level playing field' with Korea's other FTA partners in terms of New Zealand's economic relationship with Korea,¹⁵ but it also represented an agreement to a US-style FTA with a comprehensive investment chapter based on the US Model Bilateral Investment Treaty ('BIT').¹⁶ At that point, New Zealand had already agreed to binding investor–state dispute settlement ('ISDS') provisions with China (2008),

¹¹ See, for example, the debates on the New Zealand–China Free Trade Agreement Bill (in committee): New Zealand, *Parliamentary Debates*, House of Representatives, 23 July 2008, vol 648, 17344.

¹² *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] NZTS 1 (entered into force 1 January 2010) ('AANZFTA').

¹³ New Zealand, *Parliamentary Debates*, House of Representatives, 28 April 2009, vol 653, 2637 (Pete Hodgson).

¹⁴ *Free Trade Agreement between New Zealand and the Republic of Korea*, signed 23 March 2015 (entered into force 20 December 2015) <<https://perma.cc/P5H4-ER7Z>> ('New Zealand–Korea FTA').

¹⁵ Foreign Affairs, Defence and Trade Committee, House of Representatives, New Zealand Parliament, *International Treaty Examination of the Free Trade Agreement between New Zealand and the Republic of Korea* (22 May 2015) 29 ('FADT Committee Report — Korea FTA').

¹⁶ See United States, State Department, '2012 US Model Bilateral Investment Treaty' <<https://perma.cc/XYR7-94PW>>. The current 2012 US Model BIT is substantially similar to the earlier 2004 version: see generally Mark Kantor, 'Little Has Changed in the New US Model Bilateral BIT' (2012) 27 *ICSID Review* 335.

Australia and the ASEAN countries (through *AANZFTA*, 2009), and Malaysia (2010),¹⁷ although in relation to the *AANZFTA*, New Zealand and Australia agreed via an exchange of side letters not to apply the investment chapter bilaterally between them.¹⁸ New Zealand had also signed two relatively limited BITs with China and Hong Kong, both with ISDS (in 1989 and 1995 respectively), and an investment protocol to the FTA with Australia, without ISDS (in 2011).¹⁹ The investment chapter in the FTA with China was an evolutionary step for New Zealand's FTA practice in terms of its acceptance of commitments on investment backed by binding ISDS. This notwithstanding, as noted the FTA with China was well received politically. Some submitters to the parliamentary select committee that examined the agreement, the Foreign Affairs, Defence and Trade ('FADT') Committee, raised concerns about the FTA's investment chapter, but these concerns were barely mentioned in the Committee's report.²⁰ The investment chapters in *AANZFTA* and the FTA with Malaysia are similar in scope, although they are more clearly influenced by the US Model BIT. That said, all three are more deferential to host government regulatory autonomy than the standard US template.²¹ For example, the provisions on performance requirements merely restate the parties' WTO obligations, and do not contain the more extensive prohibitions found in the US Model BIT.²² The FTA with Korea marked a further evolutionary step in New Zealand's investment treaty practice, because it conferred more extensive substantive commitments on investment compared to the then-existing

¹⁷ *New Zealand–Malaysia Free Trade Agreement*, signed 26 October 2009, 2724 UNTS 3 (entered into force 1 August 2010) ('*New Zealand–Malaysia FTA*').

¹⁸ See *Exchange of Letters between Australia and New Zealand concerning the Application of AANZFTA between Australia and New Zealand*, signed 27 February 2009 (entered into force 1 January 2010), available at <<http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/official-documents.aspx>>.

¹⁹ New Zealand signed investment treaties with China (in 1989), Hong Kong (1995), Argentina (1999) and Chile (also 1999). Only those with China and Hong Kong entered into force, and the one with China was terminated following the conclusion of the 2008 FTA. In 2011, New Zealand and Australia signed the investment protocol to the 1983 *Closer Economic Relations FTA with Australia: Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, signed 16 February 2011, [2013] ATS 10 (entered into force on 1 March 2013) ('*New Zealand–Australia Investment Protocol*'). For detailed discussion of New Zealand's investment treaty practice up to 2011, see David Williams and Amokura Kawharu, *Williams & Kawharu on Arbitration* (LexisNexis, 2011) ch 30.

²⁰ Foreign Affairs, Defence and Trade Committee, House of Representatives, New Zealand Parliament, *New Zealand–China Free Trade Agreement Bill (210–1) and the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China* (30 June 2008) 6–7.

²¹ For discussion of regional approaches to investment, see Dianne Desierto, 'Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties' (2015) 16 *Journal of World Investment and Trade* 1018, 1024–42 (remarking on the predominant preference of ASEAN members for preserving host state regulatory autonomy).

²² *New Zealand–China FTA* art 140; *AANZFTA* ch 11 art 5; *New Zealand–Malaysia FTA* art 10.6.

New Zealand agreements, in combination with binding ISDS.²³ For example, it includes the extensive US-style prohibitions on performance requirements.²⁴

At the time the Korea FTA was concluded, discussion within civil society and the media about the various pros and cons of the then-proposed TPP had promoted greater awareness of the potential regulatory issues raised by FTAs. Given the ever-increasing similarity in New Zealand's FTAs with the usual approach to investment taken by the US, the FTA with Korea was thus a kind of stalking horse for the TPP in that it provided an opportunity for political parties to test their positions on issues like ISDS. In contrast to the FADT Committee's report on the FTA with China, almost its entire report on the FTA with Korea addressed policy concerns relating to the FTA's investment chapter.

One of the key issues considered in the report concerned the constraints on amendments to New Zealand's regime for screening foreign investment. This issue subsequently became decisive to Labour's decision to vote against the implementing legislation for the TPP (see Part II(C)). New Zealand has screened investments in sensitive land since the 1960s for a combination of economic, cultural and conservation reasons.²⁵ (Foreign investments in significant business assets, as defined by a monetary threshold, are also screened). 'Sensitive land' as defined under current law means, in essence, farmland, reserves land, land adjacent to reserves land, and the foreshore.²⁶ It does not include urban land, unless covered by the provisions relating to reserves. Although both National and Labour maintain generally liberal outlooks towards inbound foreign investment, neither has ever been prepared to dismantle investment screening. In its analysis of the Korea FTA, the Ministry of Foreign Affairs and Trade ('MFAT') affirmed that the 'current operation' of the screening regime would not be affected.²⁷ This was on the basis of the regime's inclusion in New Zealand's annex of non-conforming measures. The annex further provides:

New Zealand reserves the right to adopt or maintain any measure that sets out the approval criteria to be applied to the categories of transactions that require approval under New Zealand's overseas investment regime.²⁸

Read alongside the rest of the entry on the screening regime, it is clear that the above reservation allows New Zealand to change the screening criteria within the existing categories of investments that are screened, and that the relevant categories are sensitive land and significant business assets. However, the reservation does not allow new categories of investments to be added to the screening regime. The ordinary meaning of the reservation in the context of

²³ The *New Zealand–Australia Investment Protocol* has expansive substantive obligations but no ISDS.

²⁴ *New Zealand–Korea FTA* art 10.11. For further discussion of the investment obligations in the FTA with Korea, see Amokura Kawharu, 'The Investment Chapter of the *New Zealand–Korea Free-Trade Agreement*: An Assessment of the Policy and Dispute Settlement Safeguards' [2016] *New Zealand Law Review* 291.

²⁵ See also Amokura Kawharu, 'The Values at Stake in the Screening of Foreign Investment in Land: A Legislative History in Three Acts' (2015) 21 *New Zealand Business Law Quarterly* 235.

²⁶ *Overseas Investment Act 2005* (NZ) s 12(a), pt 1 sch 1.

²⁷ New Zealand Ministry of Foreign Affairs and Trade, *Free Trade Agreement between New Zealand and the Republic of Korea — National Interest Analysis* (2015) 55.

²⁸ *New Zealand–Korea FTA* annex II (New Zealand) II-59.

the liberalising objectives of the FTA is that it does not allow the existing categories to become more restrictive either (for example, by adding in new types of sensitive land that have to be screened). Rather, it applies to ‘the’ categories of investment, as they currently stand. The limited scope of the reservation only became apparent to Labour from submissions to the FADT Committee. Labour became concerned about the issue in light of its policy proposal to introduce new restrictions on foreign ownership of residential housing (since almost all urban land would fall outside the category of sensitive land). It asked officials to clarify the exact scope of application of the reservation but was not assured by the responses it received (which were unhelpfully vague).²⁹ It added a ‘minority view’ to the Committee’s report recommending that steps be taken to clarify the situation. While remaining cautiously supportive of the FTA, Labour also signalled its future position on investment screening with respect to the TPP:

It is unlikely that future decisions to ban overseas land purchases would in practice give rise to ISDS claims (because of the cost involved, and the difficulty of proving loss) if a future government did clamp down on sales to overseas owners. Nevertheless, we believe that it is important that future governments be unambiguously left with the unrestricted sovereignty or power to do so.

The drafting of this clause in the agreement is ambiguous, and we recommend that the Government seek to clarify by side letter that the effect of it is to allow bans or stamp duties to be imposed [on sales of residential land] ...

Further, we recommend that such ambiguity be avoided in future agreements.³⁰

In addition to the screening issue, Labour raised concerns regarding the lack of consultation with civil society. Labour suggested that better communication about the progress of negotiations, and the high-level principles applied by New Zealand in those negotiations, might alleviate some of the growing disquiet about trade and investment agreements.³¹ Labour also doubted whether ISDS was of any benefit in FTAs between developed countries.³² Apart from Labour, the two minor parties represented on the Committee, the Green Party and New Zealand First, also provided minority views in the report. Both the Green Party and New Zealand First were highly critical of ISDS.³³ A few weeks after the report was issued, New Zealand First introduced an anti-ISDS private member’s Bill, the ‘Fighting Foreign Corporate Control Bill’, along similar lines to a Bill (since lapsed) introduced in the Australian Senate by the Australian Green Party in

²⁹ New Zealand Ministry of Foreign Affairs and Trade, ‘Supplementary Information on the Free Trade Agreement between New Zealand and the Republic of Korea’ (1 May 2015) 5–6.

³⁰ *FADT Committee Report — Korea FTA*, above n 15, 10–11.

³¹ *Ibid* 11. These concerns also became contentious on the conclusion of the TPP — for example, lack of engagement with the public over the TPP was given as a reason for street protests in Auckland at the time the TPP was being signed in that city: see Chris Bramwell, ‘TPP Protests Show Confusion over Deal’, *RNZ* (online), 5 February 2016 <<https://perma.cc/4ACS-ZNZ4>>.

³² *FADT Committee Report — Korea FTA*, above n 15, 11.

³³ *Ibid* 12–13.

2014.³⁴ In cl 5, the Bill simply provided that ‘New Zealand must not enter into an agreement with one or more foreign countries that includes provision for investor–state dispute settlement’.³⁵ It would have been difficult for Labour to vote in favour of the Bill since it had agreed to ISDS in the FTA with China. Nonetheless, Labour was at least prepared to support the Bill to the select committee stage so as to allow open debate. In the event, though, the Bill was defeated at the first reading.

C The TPP and Labour’s Five ‘Bottom Lines’

Initially, the general view taken about the TPP as shared by both National and Labour was that it represented an opportunity to address New Zealand’s limited participation in FTAs, and at the same time, achieve one of New Zealand’s major long-standing trade policy goals of an FTA with the United States. As the scale of the TPP became more evident and more widely known, opposition to the agreement and the potential risks it posed to New Zealand’s regulatory autonomy in respect of sensitive issues also grew. The National Government remained strongly supportive of the TPP negotiations and emphasised the potential trade gains that would flow from it.³⁶ For its part, and against the background of its concerns with the Korea FTA, Labour sought to represent the more sceptical public attitudes that were developing in relation to the agreement. This included growing opposition to the TPP amongst Maori in light of the potential constraints on the government’s ability to meet its obligations to Maori under the *Treaty of Waitangi* (see Part IV). Labour announced in July 2015 that its support for the TPP was contingent on five ‘non-negotiable bottom lines’. These were:

1. Drug buying agency Pharmac must be protected.
2. Corporations cannot successfully sue the Government [through the ISDS mechanism] for regulating in the public interest.
3. New Zealand maintains the right to restrict sales of farm land and housing to non-resident foreigner buyers.
4. The *Treaty of Waitangi* must be upheld.
5. Meaningful gains ... for farmers in tariff reductions and market access.³⁷

The first bottom line was an easy one, as the government had already promised not to undermine the fundamentals of Pharmac (the government-run pharmaceutical price control and purchasing scheme).³⁸ The second would

³⁴ Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Cth). For discussion, see Luke Nottage ‘The “Anti-ISDS Bill” before the Senate: What Future for Investor–State Arbitration in Australia?’ (2015) 18 *International Trade and Business Law Review* 245.

³⁵ Fighting Foreign Corporate Control Bill 2015 (14-1) (NZ) cl 5 (defeated 22 July 2015).

³⁶ Tim Groser, ‘The Future of Global Trade: US and NZ as Partners in the Asia Pacific — Completing the TPP Negotiation’ (New Zealand Government, Press Release, 30 June 2015).

³⁷ Vernon Small, ‘Labour Sets “Non-Negotiable” Stance on TPP Free Trade’, *stuff.co.nz* (online), 23 July 2015 <<https://perma.cc/ZN6N-JSLL>>.

³⁸ See Danya Levy, ‘No Pharmac in Trans-Pacific Partnership’, *stuff.co.nz* (online), 16 November 2011 <<https://perma.cc/KU3Q-WA88>>. While New Zealand refused to dismantle the Pharmac scheme, it did agree to improve its approval processes. For a summary of the relevant provisions and their estimated administrative costs, see New Zealand Ministry of Foreign Affairs and Trade, ‘Cost to Pharmac of Implementing the Transparency Annex of the TPP’ <<https://perma.cc/BF3U-4SCG>>.

depend on Labour's assessment of the policy safeguards in the investment and exceptions chapters of the TPP, while the third would depend on the scope of the reservation in the TPP for the foreign investment screening regime. As discussed below, the fourth bottom line regarding the *Treaty of Waitangi* had recently become the subject of claims before the Waitangi Tribunal, and would be answered by the Tribunal's decision in respect of those claims. As with the second, whether the fifth and final bottom line was met would depend on Labour's own assessment. On this basis, the third and fourth were the highest risk to Labour, as they could not be assured, nor self-assessed. They were risky too in light of the then-advanced stage of the TPP negotiations, because by then the government would probably have found it difficult to seek agreement on new issues from other TPP countries. The fact the third and fourth bottom lines were announced at this point also reveals a deeper problem in New Zealand's FTA policy-making, in that these issues should already have been fully examined as part of the earlier development of New Zealand's FTA programme (and not left until the FTA with Korea or the TPP), and an informed consensus could then have been built up around them. This issue is returned to in Parts III and IV.

In the event, Labour determined that the fourth bottom line was met, following the Waitangi Tribunal's overall conclusion that there had been no breach of the *Treaty of Waitangi* by the government's agreement to the TPP, but perhaps overlooking some of the nuance in the Tribunal's decision (see Part IV). Labour did not make clear its position on its second bottom line, relating to ISDS. It did make clear its view that, because the TPP did not allow future governments to amend the foreign investment screening regime to control property speculation, its third bottom line had not been met.³⁹ Labour was also doubtful about the fifth, and queried the accuracy of the economic modelling used to demonstrate the trade gains from the TPP.⁴⁰ Given its position on the screening regime, Labour had put itself in the position of having to oppose the TPP while at the same time try not to alienate its support base by appearing to be anti-free trade.

Against the backdrop of the longstanding bipartisanship on FTAs, two noteworthy things happened when the Trans-Pacific Partnership Agreement Amendment Bill was introduced into the New Zealand House of Representatives and read for the first time on 12 May 2016. (The Bill proposed the amendments needed to implement the TPP under New Zealand law). First, the Labour Party's spokesman on trade Dr David Clark declared that '[t]his National Government has destroyed a bipartisan approach to trade that has existed for decades'.⁴¹ Secondly, senior Labour politician the Hon Phil Goff, who helped to initiate the negotiations for the TPP in his capacity as trade minister under the previous Labour-led government, crossed the House to vote in favour of the Bill.

Although parliamentary debates are often characterised by rhetoric and political grandstanding, this has not generally been the case in New Zealand over

³⁹ Foreign Affairs, Defence and Trade Committee, House of Representatives, New Zealand Parliament, *International Treaty Examination of the Trans-Pacific Partnership Agreement* (4 May 2016) 11–12 ('*FADT Committee Report — TPP*').

⁴⁰ *Ibid* 12–13.

⁴¹ New Zealand, *Parliamentary Debates*, House of Representatives, 12 May 2016, vol 713, 11061.

matters concerning trade agreements. Instead, as explained earlier, for years there has been strong bipartisan support between National and Labour for promoting New Zealand's economic interests through FTAs. The political exchanges on the TPP are probably not sufficient to prove the collapse of bipartisanship, but they do show that a different approach was taken to that agreement, and that bipartisanship can no longer be taken for granted. The apparent threat to bipartisanship could be problematic if indeed it develops into a reality, in light of the importance of New Zealand's FTA programme to its economic development. In that case, the programme would become less stable, and New Zealand may be perceived as a more difficult country to negotiate with. New Zealand's small size and geographic isolation already put it in the vulnerable position of not being particularly attractive compared to other potential FTA opportunities, and uncertainty around its negotiating objectives could make this worse. It is also possible that politicisation of certain issues domestically could result in the adoption of rigid policy positions by individual governments that are not sustainable in New Zealand's FTA practice. In Australia, progress on building the Australian network of FTAs effectively stalled with the adoption of the Gillard Government Trade Policy Statement in 2011.⁴² The Statement broadly accepted the 2010 recommendations of the Australian Productivity Commission that favoured unilateral reform and multilateral initiatives over FTAs.⁴³ The Statement also accepted the Productivity Commission's recommendation that Australia should seek to avoid including ISDS provisions in FTAs. The only FTA concluded under the Gillard government was with Malaysia in 2012 (without ISDS).⁴⁴ According to media reports, Korea insisted on including ISDS in the FTA with New Zealand.⁴⁵ Thus, any blanket opposition to ISDS by New Zealand would probably have scuttled the agreement.

III PARLIAMENT'S EXAMINATION OF THE TPP

A Overview of the Treaty Examination Process

One of the questions raised by the evolution in FTA practice described in Part II is whether the parliamentary processes for scrutinising and reporting on FTAs is sufficiently robust, especially in light of their expanding coverage over matters that impact on domestic law making. The notion that international treaty-making is the domain of the executive is both a very old one,⁴⁶ and well-established in

⁴² Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011) <<https://perma.cc/H4KY-P4Q3>>. For discussion see, eg, Jürgen Kurtz, 'Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication' (2012) 27 *ICSID Review* 65.

⁴³ Productivity Commission, Commonwealth of Australia, *Bilateral and Regional Trade Agreements Research Report* (November 2010) <<https://perma.cc/2C68-9745>> ('APC Report').

⁴⁴ *Malaysia-Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) ch 12. Malaysia and Australia had in any event already agreed to ISDS as between them under *AANZFTA*.

⁴⁵ Radio New Zealand, 'Questions Raised over Korea FTA', *Business News*, 27 March 2015 <<https://perma.cc/8NPH-Q663>>.

⁴⁶ See Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 153.

New Zealand. However, the role of Parliament in examining treaties has also been increasingly recognised. This reflects the growing influence of international treaties on domestic law,⁴⁷ and the need for mechanisms to provide for public scrutiny and hold the executive to account in relation to their treaty-making activities.⁴⁸ In addition to these concerns, the natural place for bipartisanship on FTA policies to develop is Parliament, and its examination of treaties is important for this reason too.

The process for examining treaties was reformed in 1997 to give Parliament a greater role in that process. The power to take treaty action remains with the executive, but it is now also subject to some oversight by the House of Representatives. Signing a treaty requires Cabinet's approval.⁴⁹ Standing Orders then require that certain types of treaty (essentially multilateral treaties and significant bilateral treaties) be presented to the House for examination, along with a national interest analysis ('NIA') addressing the reasons for the treaty, its implications for New Zealand, what consultation has taken place, and the means of implementing the treaty domestically.⁵⁰ Once the treaty has been presented to the House, it is automatically referred to the FADT Committee for examination.⁵¹ The government must allow the Committee at least 15 sitting days in which to examine the treaty, invite any public submissions, and report to the House on any matter that ought be drawn to the attention of the House.⁵² Legislation to implement the treaty can only be introduced once the Committee has reported, or the 15-sitting-day period has expired, whichever is sooner.⁵³ The exact amount of time available to the FADT Committee for a given treaty varies, as it depends on how often the House is scheduled to sit after a treaty has been referred. It can be as short as six calendar weeks.

Campbell McLachlan considers that referral of treaties to the FADT Committee may have improved the quality and transparency of treaty ratification, but that so far it has not actually led to Parliament asserting any real power over the process.⁵⁴ Treasa Dunworth has questioned whether the current approach is adequate for upholding democratic principles, and has also suggested that in some instances it is no more than a 'rubber-stamping exercise'.⁵⁵ The problem of the absence of meaningful checks and balances is especially acute in New Zealand given the unicameral structure of its Parliament. To date,

⁴⁷ New Zealand Law Commission, *The Treaty Making Process: Reform and the Role of Parliament*, Report No 45 (1997) 1–3, chs 4, 5.

⁴⁸ The reasons for (and against) parliamentary oversight are considered in depth in McLachlan, above n 46, 153–61.

⁴⁹ Cabinet Office, Department of the Prime Minister and Cabinet, New Zealand, *Cabinet Manual* (April 2008) [7.112].

⁵⁰ New Zealand House of Representatives, *Standing Orders of the House of Representatives* (2014) OO 397–8 ('NZHR *Standings Orders*').

⁵¹ *Ibid* O 399. The FADT Committee may refer the treaty to another select committee if its subject is within the other committee's terms of reference.

⁵² *Cabinet Manual*, above n 49, [7.119]–[7.120]; *NZHR Standing Orders* O 400(2).

⁵³ *Cabinet Manual*, above n 49, [7.122].

⁵⁴ McLachlan, above n 46, 180.

⁵⁵ Treasa Dunworth, 'International Law' [2015] *New Zealand Law Review* 285, 302. See also Treasa Dunworth, 'Public International Law' [2000] *New Zealand Law Review* 217, 217–21; Treasa Dunworth, 'Public International Law' [2002] *New Zealand Law Review* 255, 255–61; Treasa Dunworth, 'Public International Law' [2004] *New Zealand Law Review* 411, 411–15.

attempts to introduce a requirement for parliamentary approval of treaties or for pre-signature review have failed. Both Labour and National have preferred to retain the executive power, and have been satisfied with the overall structure of the current review process.⁵⁶ Even so, there remain systemic deficiencies within that process. They are illustrated by the examination of the TPP, including (in particular) in relation to the reservation for New Zealand's foreign investment screening regime.

B *Overview of the Examination of the TPP*

In line with the standard procedure, the TPP and MFAT's NIA were presented to the House and then referred to the FADT Committee on 9 February 2016. The Committee called for submissions and extended the usual submissions period by about two weeks, with a closing date of 11 March 2016. Some submitters were also granted individual extensions on request. The Committee received over 6000 submissions (about half were form submissions), and heard from 255 oral submitters.⁵⁷ The government initially indicated that the deadline for the Committee to report back to the House was 31 May 2016. It then shortened the timeframe by three weeks in order to allow the implementing legislation to be passed before the end of the year. As a result, the Committee had just five days after the end of the hearing of oral submissions to complete its report. The report was produced on 4 May 2016 and the Trans-Pacific Partnership Agreement Amendment Bill was introduced the following week.

C *Reporting on the TPP and the Foreign Investment Screening Issue*

As indicated by the truncating of the reporting period, one of the issues with the parliamentary process for examining treaties in New Zealand is the absence of any set period of time following the close of the FADT Committee's hearings for deliberations and report writing. Ostensibly, the submissions period was extended because of the complexity of the TPP and the need to give the public a reasonable opportunity to voice concerns and be heard on the agreement. This did not, however, lead to an extension of the reporting period, which remained subject to the same overall timeframe of 15 sitting days.

Cutting back on the originally specified timeframe for reporting limited the scope for considered deliberations and likely indicated to some submitters that the report was already written, or at least that the outcomes on the various issues were predetermined. The chair of the Committee appeared to confirm this when he was asked whether, in light of the new timeline, the select committee process could realistically assuage public concerns about the TPP: 'it doesn't matter what

⁵⁶ For example, see Foreign Affairs, Defence and Trade Committee, House of Representatives, New Zealand Parliament, *Report on the International Treaties Bill* (25 November 2002) ('*FADT Committee Report — International Treaties Bill*'). Similar proposals for greater parliamentary oversight have also arisen in Australia, although the federal make-up of that country and its bicameral Parliament implicate different constitutional considerations. For the view of the Joint Standing Committee on Treaties ('JSCOT'), see JSCOT, House of Representatives, Parliament of Australia, *Report 128 — Inquiry into the Treaties Ratification Bill 2012* (15 August 2012) ('*JSCOT Report 128*').

⁵⁷ *FADT Committee Report — TPP*, above n 39, 21. In comparison, the FADT Committee received 3582 submissions on the FTA with Korea and only heard from 27 submitters: *FADT Committee Report — Korea FTA*, above n 15, 14.

evidence *we* provide or how *we* try to balance the information to allay those fears. *They* are already set in their minds'.⁵⁸ No reason was given for the government's desire to pass the Bill by the end of 2016.⁵⁹ Labour, the Green Party and New Zealand First labelled the change to the timeframe undemocratic,⁶⁰ although under the 15-sitting-day rule the government was entitled to introduce the Bill much earlier, in March.

The actual report suggests a lack of effort, which itself points to a lack of any incentive to make an effort. Excluding the appended NIA, it was brief, comprising just over nine pages (for the government majority), plus a further 10 setting out the minority views of Labour, the Green Party and New Zealand First. It generally provided a weak or incomplete analysis of the submissions. For example, some submitters expressed concerns about the cost of extending the terms for copyright, in response to which the report merely refers to the view on the issue as provided by MFAT. There is no assessment of MFAT's view. The report described the concerns of some submitters about the possible increased prices and corresponding negative health effects resulting from the TPP's increased protections for biologic medicines, but gave no response to those concerns at all.⁶¹ The majority report contained factual errors, such as the statements that all known investment treaties include ISDS provisions (many do not), and that the TPP negotiations began in 1998 (rather than a decade later).⁶² Incredulously, the majority concluded that the provisions in the TPP's investment chapter would not in any event affect New Zealand inbound or outbound investment:

Some submitters consider that the [national interest analysis] does not quantify the national benefits of providing protection for investors. We note that the provisions in Chapter 9 will enhance and not affect investment into or from New Zealand.⁶³

The majority report was also silent on Labour's third bottom line concerning the scope of the reservation for the foreign investment screening regime. Instead, it stated that apart from the raising of screening thresholds, the TPP would have 'no further implications' for investments that the regime presently covers.⁶⁴ As to controls on residential housing, the report noted that the power of future governments to impose discriminatory taxes on property would not be affected. In other words, the report skirted around the limitations in the reservation by pointing to measures other than screening that might be adopted to further Labour's housing policy objectives.

Equally, the NIA did not confront the issue of the scope of the reservation and the question whether existing screening categories can be changed. It only

⁵⁸ Radio New Zealand, 'New TPP Timeframe an "Attack on Democracy"', *Morning Report*, 8 April 2016 (Mark Mitchell) <<https://perma.cc/XWC4-XHD7>> (emphasis added).

⁵⁹ The TPP provides a two year window for ratification, after which the agreement may enter into force with ratification by countries representing 85 per cent of the group's GDP: TPP art 30.5.

⁶⁰ Radio New Zealand, 'New TPP Timeframe an "Attack on Democracy"', above n 58.

⁶¹ *FADT Committee Report — TPP*, above n 39, 5 (on copyright), 10–11 (on biologic medicines).

⁶² *Ibid* 2, 8.

⁶³ *Ibid* 6.

⁶⁴ *Ibid* 7.

affirmed that the TPP will not require changes to the way investment in sensitive land is currently screened, that it does not allow governments to ban TPP nationals from buying property, and that discriminatory taxes may continue to be imposed.⁶⁵ The NIA was written by MFAT, which is the agency that was also responsible for leading the TPP negotiations for New Zealand. Given this lack of independence, it is perhaps unsurprising that the analysis emphasised positive rather than contentious outcomes, and that the government's majority on the FADT Committee agreed with it. Both the Committee's report and the NIA leave the impression that the screening issue was avoided because the natural interpretation of the reservation — that changes to screening categories are not allowed — is politically inconvenient. Labour inevitably sounded its protest in its minority view that its third bottom line had not been met, and complained that the failure to preserve the right to screen non-resident purchases was contrary to the previously established bipartisan approach to trade agreements.⁶⁶

Better reporting on the screening issue would have provided greater transparency on the effects of the TPP, but it would not have influenced its text (since the treaty had already been signed). Likewise, Labour was alerted to the issue with the drafting of the reservation for investment screening through submissions to the FADT Committee on the FTA with Korea, but by then it was too late to deal with it other than by a side agreement or amendment to the FTA, neither of which has eventuated. The Committee's reports could potentially be useful for future agreements, although it is not known whether the government attempted to change the reservation for investment screening after the report on the Korea FTA and before the conclusion of the TPP. That said, problems with the screening regime had started to emerge from around 2008,⁶⁷ and the need for reform flexibility had been a live issue since at least then. In this light, the broad policy implications of the reservation should have been explained more fully in the national interest analyses for those earlier FTAs before the reservation became New Zealand's established position on the matter. Instead, successive NIAs over the past decade have repeated the same conclusion that the reservation preserves the current operation of the screening regime, without taking into account the frequent reviews of the regime during that period and the ongoing calls for its further and more comprehensive reform — for example, to address foreign investment in strategic assets.⁶⁸

⁶⁵ New Zealand Ministry of Foreign Affairs and Trade, *Trans-Pacific Partnership: National Interest Analysis* (25 January 2016) 57.

⁶⁶ *FADT Committee Report — TPP*, above n 39, 12.

⁶⁷ In 2008, a Canadian pension fund applied for consent to acquire up to 40 per cent of the company that owns the Auckland airport. This prompted the then Labour Government to amend the screening regulations, by adding a new factor to be taken into account by the responsible Ministers when applying the 'benefit to New Zealand' test for screening sensitive land applications under the *Overseas Investment Act 2005* (NZ). The application was then rejected on the ground that it did not meet the test. Nonetheless, the application also revealed a shortcoming in the Act. The concern about the proposed investment was that the airport is a strategic asset. The Act does not screen investments in strategic assets, and the airport bid was only caught because the airport itself is on sensitive land.

⁶⁸ For recent examples, see, eg, Bill Rosenberg, 'Can We Ensure Foreign Investment Benefits New Zealand?' (2015) 21 *New Zealand Business Law Quarterly* 221; Nick Wells and Greer Fredricson, 'Overseas Investment in New Zealand: A Regulatory Regime Ripe for Reform' (2015) 21 *New Zealand Business Law Quarterly* 230. In this respect, even Labour's position with its focus on residential housing is short-sighted.

D *Debate on the TPP*

There is no requirement for any general debate on treaties in the House, whether before or after a treaty is signed. The Cabinet Manual notes that a general debate may be called, but this is at the discretion of the government (which has a majority on the Business Committee of the House).⁶⁹ The standard government line against such debates taking place before signature of an FTA — as repeated in the FADT Committee's report on the TPP — is that negotiating FTAs involves sensitive matters and releasing negotiating texts for general discussion could jeopardise New Zealand's ability to achieve a quality outcome.⁷⁰ A proposal in Australia to require pre-signature assessment of FTAs likewise attracted criticism on the grounds that it could create tensions with the other country involved and undermine confidence in Australia's negotiating credibility.⁷¹ Any pre-signature review and debate in New Zealand may well be unlikely for the time being, given the resistance to the idea of the major parties as noted earlier (Part III(A)). All the same, many countries have published their model texts and positions on FTA matters. General debates on *these* documents could promote some accountability and transparency, and also be used as an opportunity to seek some common ground on major FTA issues that can then inform the specific negotiating mandates. Alternatively, draft mandates could be tabled for discussion, along with proposals for further consultation.⁷² These efforts could pre-empt opposition parties from having to resort to announcing non-negotiable bottom lines, or filter the issues that form the basis for those party-specific positions.

While debate during the negotiation of an FTA may be problematic, the same justifications against such debates cannot be deployed in relation to the period after a treaty has been signed. Yet even in this period there is no requirement for a debate on treaties and the policies that underlie them, and such debates are seldom called.⁷³ Instead, the normal process is only to debate the implementing legislation that is required to give effect to a treaty under domestic law. In the case of the TPP, the debate on the first reading of the Trans-Pacific Partnership Agreement Amendment Bill was wide-ranging. It extended to consideration of the broad economic and strategic reasons for New Zealand to ratify the agreement, the foreign investment screening issue, as well as the examination of the TPP by the FADT Committee. Nonetheless, it would be more principled for these matters to be focused on as part of a debate called for that purpose, rather than in a debate on the drafting of the implementing Bill. Greater focus on the

⁶⁹ *Cabinet Manual*, above n 49, [7.120].

⁷⁰ *FADT Committee Report — TPP*, above n 39, 4.

⁷¹ *APC Report*, above n 43, 309. See also *JSCOT Report 128*, above n 56, 12–15. In Australia, a treaty may be referred to the JSCOT before the conclusion of negotiations, but in practice this happens rarely: see McLachlan, above n 46, 164.

⁷² JSCOT has made a similar recommendation: see *JSCOT Report 128*, above n 56, 12–15 (repeating an earlier recommendation that negotiating priorities and objectives should be tabled).

⁷³ The debate on the FTA with Singapore is a rare exception: see New Zealand, *Parliamentary Debates*, House of Representatives, 12 September 2000, vol 587, 5421. The exception relating to the *Treaty of Waitangi* was central in that debate, as National (in opposition) opposed its inclusion.

examination of treaties could also give the FADT Committee an incentive to improve the quality of its reporting.

IV THE WAITANGI TRIBUNAL INQUIRY

A Lodging of the Wai 2522 Claim

In parallel to the late stages of the negotiations and then conclusion of the TPP, the Waitangi Tribunal conducted an inquiry into the impact of the agreement on Maori interests.⁷⁴ As with the parliamentary examination of the TPP, the Tribunal's inquiry was negatively affected by a series of official decisions to limit open discussion on the merits of the agreement. The claim itself also highlights another shortcoming of the NIA required for that examination (in addition to the lack of independence, as discussed above). The Standing Orders require that each NIA address the cultural effects of a given treaty coming into force for New Zealand,⁷⁵ but they do not require an assessment of a proposed treaty's compatibility with the Crown's legal obligations under the *Treaty of Waitangi*.⁷⁶ (In dealings with Maori under the Treaty, the government is still referred to as the 'Crown').⁷⁷ In-depth analysis of the impact of FTAs on those obligations in prior NIAs may have prompted reflection by the government on the adequacy of its approach to *Treaty of Waitangi* matters in its FTA programme, and pre-empted the need to test the adequacy of that approach in relation to the TPP.

The first claims were lodged by Maori individuals and representatives of Maori groups in June 2015. Eventually, a total of nine claims were filed on behalf of several prominent Maori individuals, as well as a number of tribes and organisations from across New Zealand. The New Zealand Maori Council, the statutory body created to give a voice to Maori in national policy-making,⁷⁸ was among the claimants. Thirty-two interested parties participated in the proceedings in support of them. In essence, the claims reflected a concern that New Zealand's obligations under the TPP would constrain the Crown's ability, and potentially its willingness, to fulfil its obligations to Maori under the *Treaty*

⁷⁴ The Waitangi Tribunal is a standing commission of inquiry that was established under the *Treaty of Waitangi Act 1975* (NZ) to make recommendations on claims made by New Zealand's indigenous Maori people relating to the practical application of the principles of the *Treaty of Waitangi*, and to determine whether Government actions or omissions are consistent with those principles. The *Treaty of Waitangi* was signed in 1840 by Maori chiefs and representatives of the British Crown, and is generally regarded as a founding document of New Zealand's (unwritten) constitution. The principles of the Treaty include the duties to consult with Maori, and to actively protect Maori interests.

⁷⁵ *NZHR Standing Orders* O 395(1)(d).

⁷⁶ Several calls have been made for the *Treaty of Waitangi* to be included in the list of matters that NIAs must address: see, eg, Māori Party, 'Māori and the Trans-Pacific Partnership Agreement', Submission to the FADT Committee, 11 March 2016, 8 <<https://perma.cc/BP2M-DYAU>>; *FADT Committee Report — International Treaties Bill*, above n 56, 5 (referring to the Green Party proposal to that effect); Waitangi Tribunal, 'Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity' (Wai 262, 3 July 2011) vol 2, 688 ('*Wai 262 Report*') (referring also to the New Zealand Law Commission's support for the idea).

⁷⁷ See, eg, Janet McLean, 'Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand' [2015] *New Zealand Law Review* 187.

⁷⁸ *Maori Community Development Act 1962* (NZ) s 18.

of *Waitangi*. Maori mistrust was heightened by the Crown's refusal to confirm whether the TPP would ultimately include the standard 'Treaty of *Waitangi* exception' that New Zealand has included in all of its FTAs since the 2001 FTA with Singapore. While the Crown did confirm that it had tabled an exception on similar terms,⁷⁹ without the text, its effectiveness could not be assessed. In addition to this general concern, the claimants also raised a more specific issue relating to the 1991 *International Convention for the Protection of New Varieties of Plants* ('*UPOV 91*').⁸⁰ Their argument was that if the TPP required the parties to accede to *UPOV 91* (which they correctly predicted), the standard *Treaty* exception would not allow New Zealand to adequately protect Maori intellectual property rights. The claimants sought an urgent hearing on these matters and a recommendation that the Crown cease its participation in the TPP negotiations until their concerns had been addressed.

In response, the Waitangi Tribunal declined the applications for urgent hearing on the ground that there was no real prospect it could conduct an inquiry before the probable conclusion of the negotiations, and in view of the late filing of the claims (just months before conclusion of the TPP negotiations in October 2015). Its decision was pragmatic, and probably necessary to preserve its credibility, given the unlikelihood that the government would have taken any recommendation to halt progress towards concluding the TPP seriously. At the same time, the Tribunal's ability to make a fully informed decision on potential prejudice to Maori, and the need for urgency, was compromised by the secrecy of the TPP negotiations and the government's refusal to share the draft texts with any of the claimants as part of a domestic consultation process. The Crown acknowledged that the terms of the agreement on confidentiality reached between the TPP countries allowed the disclosure, in confidence, of negotiating texts and materials to parties outside of government who are participants in a domestic consultation process. It based its refusal to disclose to Maori on New Zealand's negotiating practice not to disclose FTA texts, rather than the TPP confidentiality agreement.⁸¹ The Tribunal observed that the Crown's consultation up until that point appeared to have been selective and limited, reflecting that the Crown saw Maori as no more than potential economic stakeholders in the TPP rather than as Treaty partners in a constitutional relationship with the Crown that gave rise to a legitimate interest in the Crown's regulatory capacities.⁸² The Tribunal also agreed to conduct an urgent hearing once the final text of the TPP was available.⁸³ In addition, the Tribunal supported a proposal for a barrister to review the proposed exception to enable him or her to provide an independent opinion on its effectiveness for protecting Maori interests, and potentially reassure the claimants. The Crown rejected the proposal, reasoning that by the time the claims were lodged it was too late to

⁷⁹ Crown, 'Written Submissions of the Crown for Judicial Conference on Urgency', Submission in Wai 2522, 24 July 2015.

⁸⁰ *International Convention for the Protection of New Varieties of Plants*, opened for signature 2 December 1961 (as revised 19 March 1991) <<https://perma.cc/6WC7-SFGU>> ('*UPOV 91*').

⁸¹ Waitangi Tribunal, *Decision on Applications for Urgent Hearings concerning the Trans-Pacific Partnership Agreement* (Wai 2522, 31 July 2015) 12–13.

⁸² *Ibid* 17–18.

⁸³ *Ibid*.

make any changes to what had already been put before the other TPP counterparties, so any review would have had no purpose.⁸⁴

B *The Treaty of Waitangi Exception in TPP art 29.6*

The final text of the TPP was made available on 5 November 2015. It revealed the inclusion of a *Treaty of Waitangi* exception in the general exceptions chapter of the TPP. It is modelled on the standard template, and reads as follows:

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.

The exception raises complex interpretative issues, some of which could have been avoided by clearer drafting. These issues include whether the interpretation of the proviso ('provided that such measures') should be guided by WTO jurisprudence,⁸⁵ the extent to which the exception is self-judging and the effect of the self-judging element on the role of dispute tribunals,⁸⁶ the meaning of 'more favourable treatment to Maori', and whether the second paragraph applies to ISDS. Some of these uncertainties arise from the use of a template text that has not been reviewed or updated to account for New Zealand's expanding

⁸⁴ Crown, 'Memorandum of Counsel for the Crown Providing Update on Independent Counsel Proposal', Submission in Wai 2522, 28 July 2015.

⁸⁵ The general exceptions provision in art XX of the WTO's *General Agreement on Tariffs and Trade* ('GATT') has a similar proviso or 'chapeau'. There are however differences in language between the two exceptions. In addition, GATT art XX lists various policy issues that attract the application of the exception, such as public health. One of the difficulties in applying the WTO jurisprudence directly to the proviso in TPP art 29.6 is that the *Treaty* 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.

⁸⁶ There is a question as to whether the self-judging element ('it deems') applies to the necessity of a measure to achieve an objective, or to the necessity to accord more favourable treatment. The Crown argued during the hearing that it would be the latter, which provides New Zealand with more scope to determine what amounts to more favourable treatment. The better and purposive interpretation is that the exception is self-judging in relation to New Zealand's need to fulfil its obligations to Maori, rather than its need to discriminate, and that more favourable treatment would be objectively assessed.

international treaty commitments.⁸⁷ A major issue with the exception is that the meaning of ‘more favourable treatment to Maori’ is uncertain. The scope of application of the exception to measures adopted by the Crown to promote Maori interests is also therefore uncertain. In particular, it is unclear what the relevant comparator should be, whether measures adopted to protect Maori interests necessarily accord more ‘favourable’ treatment to Maori, and whether non-Maori may also benefit from a measure (and if so, to what extent).⁸⁸

The comparator issue arises because the term ‘more favourable’ is a comparative expression, and 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. Essentially, there is a question whether the phrase means more favourable treatment of Maori as compared to a putative TPP claimant where both are in like circumstances, or more favourable treatment of Maori in a more general sense.

As noted, New Zealand included an exception allowing more favourable treatment of Maori in the 2001 New Zealand–Singapore FTA,⁸⁹ and the exception in that agreement provided the template for all later FTAs. The commitments regarding investment in the Singapore agreement are modest. They include the obligation of national treatment,⁹⁰ but there are no clauses (for example) on performance requirements, expropriation or the minimum standard of treatment. Given the style of the language and the origins of the exception, it could be argued that the exception is a response to the non-discrimination obligation of national treatment, and that it deals with discrimination between Maori and TPP claimants who are in like circumstances, that is, 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. One of the difficulties with this approach is that there is no uniform meaning of ‘like circumstances’. Likeness for the purpose of non-discrimination obligations may be interpreted differently, depending on whether the discrimination arises in a trade or investment context, and on the particular wording used. This difference is illustrated by the TPP itself, where the parties have agreed to a specific interpretive approach to the phrase ‘in like circumstances’ to embed public policy considerations into the assessment of the

⁸⁷ For example, s 2 of the *Treaty of Waitangi Act 1975* (NZ) on the interpretation of the *Treaty of Waitangi* is ambiguous as to whether it covers dispute settlement under the investment chapter. The original use of the *Treaty* exception in the 2001 FTA with Singapore probably explains the anomaly, because the Singapore agreement does not include binding consent to ISDS.

⁸⁸ The author was commissioned by the Waitangi Tribunal to provide an independent opinion on the effectiveness of the exception to protect Maori interests. The opinion discusses these issues in greater detail: Amokura Kawharu, ‘Brief of Evidence of Amokura Kawharu’, Submission in Wai 2522, 24 February 2016.

⁸⁹ *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, signed 14 November 2000, [2011] NZTS 1 (entered into force 1 January 2001) art 74 (‘*NZ–Singapore CEP*’). A more limited subject-specific exception was included in New Zealand’s schedule to the 1994 *General Agreement on Trade in Services* of the WTO.

⁹⁰ *NZ–Singapore CEP* art 29.

national treatment and most-favoured nation obligations in the investment chapter.⁹¹

The alternative view is that there is no express limitation to Maori and TPP claimants who are in like circumstances in the text of the exception, and the context of the exception within the TPP 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 or obligations, 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. On the other hand, the lack of a direct comparator for assessing preferential treatment may prove challenging, because comparing like with unlike to determine whether a measure accords more favourable treatment may be difficult. 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.

For treatment to be ‘more favourable’ for the purpose of the *Treaty* exception, it needs to be better than that accorded to the putative TPP claimant, or be more advantageous to Maori than the claimant.⁹² 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 may likewise not come within more favourable treatment. Even taking a broad approach to what constitutes more favourable treatment, it strains language to suggest that all measures for protecting Maori interests also accord preferential treatment. It is conceivable that the application of some such measures could nevertheless be inconsistent with an obligation in the TPP, and not fall within any other exception. Problems for New Zealand could arise where, for example, Maori interests are taken into account in a statutory decision-making process and a decision is challenged as being contrary to an investor’s TPP rights.⁹³

⁹¹ TPP arts 9.4, 9.5 n 14; *Drafters’ Note on Interpretation of ‘In Like Circumstances’ under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)* <<https://perma.cc/7ZNG-EMME>>.

⁹² In *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*. 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’: *Pope & Talbot Inc v Canada (Award on the Merits of Phase 2)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 10 April 2001) [42].

⁹³ For discussion of case studies, see Kawharu, ‘Brief of Evidence’, above n 88. Issues may arise if, for example, new governance regimes are adopted in respect of natural resources that give Maori a greater say in their management. This could lead to perceptions of bias, unexpected complexity in regulation and difficulties for foreign entities to participate effectively without access to relevant cultural expertise. However, it is inherently difficult to predict in advance what measures may be adopted in future years and how TPP parties or their investors may respond to them.

Apart from these difficulties, conceptually an exception that is worded to allow for ‘more favourable treatment’ of Maori does not reflect the constitutional status of Maori as a political community requiring distinct rather than favourable treatment. Instead, it suggests that the exception is aimed at positive discrimination, and has a temporary and remedial function only. The Crown accepted that the phrase ‘more favourable treatment’ ‘kind of jars’,⁹⁴ but it also argued that because the phrase is the converse of the usual national treatment obligation to provide investors with ‘no less favourable treatment’ than local investors, it would be well understood by New Zealand’s FTA partners.⁹⁵ Even so, under this explanation the point of the exception is to address a prohibition on discrimination, by using the opposite language of the prohibition in the exception. Since the real and wider purpose (as accepted by both the Crown and claimants) is to preserve the regulatory space the Crown needs under the *Treaty of Waitangi*, as a matter of language, the exception could easily have provided for this, and avoided the need for a comparative analysis: for example, ‘nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to fulfil its obligations to Maori, including under the *Treaty of Waitangi*’.

C *The Exception for UPOV 91 in TPP annex 18-A*

The release of the final TPP text in November 2015 revealed the inclusion of a further and more specific exception relating to the *Treaty of Waitangi* in an annex to the intellectual property chapter, annex 18-A. This additional exception is intended to address New Zealand’s obligations with respect to *UPOV 91*. According to para 1, New Zealand is obliged to either: (a) accede to *UPOV 91*, or (b) adopt a sui generis plant variety rights system that gives effect to *UPOV 91*, in either case within three years of the TPP’s entry into force for New Zealand. Paragraph 2 states that nothing in para 1 precludes ‘the adoption by New Zealand of measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the *Treaty of Waitangi*’.

Accession to *UPOV 91* is problematic for New Zealand in light of the limitations that it would impose on the Crown’s ability to meet its obligations to protect Maori cultural property interests in plant variety rights.⁹⁶ The general *Treaty* exception in TPP art 29.6 would not allow New Zealand to protect those Maori interests, because non-accession to *UPOV 91* would not involve the ‘adoption’ of a discriminatory ‘measure’ in favour of Maori within the terms of

⁹⁴ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Wai 2522, 5 May 2016) [5.1.2] (*Wai 2522 Report*) (quoting from the Crown’s expert witness).

⁹⁵ *Ibid.*

⁹⁶ *UPOV 91* allows plant rights holders to exclude others from producing the relevant plant (with limited exceptions). The potential for inconsistency between commercial and indigenous interests in plant-related intellectual property has been recognised: see, eg, Office of the United Nations High Commissioner for Human Rights, ‘The Right to Adequate Food’ (Fact Sheet No 34, 2010) 13 (describing the development of international intellectual property regimes as a potential threat to indigenous interests in plant genetic resources). The Crown has acknowledged that the obligations under *UPOV 91* have the potential to directly and significantly affect Maori interests: see Crown, ‘Crown Memorandum’, Submission in Wai 2522, 8 April 2016.

the exception. Therefore, a specific exception was needed. The Waitangi Tribunal had identified deficiencies in the Crown's processes for engagement with Maori over international treaties in an earlier, whole-of-government report, in which it considered how the Crown–Maori relationship might work outside of the settlement of historical grievances (the *Wai 262 Report*).⁹⁷ In particular, it gave detailed recommendations about the steps the Crown should take to engage with Maori before agreeing to new intellectual property regimes under international instruments. This is to ensure, to the extent reasonable in the circumstances, that Maori interests are not adversely affected.⁹⁸ That engagement was lacking over *UPOV 91* during the negotiation of the TPP, and the exception in annex 18-A regarding *UPOV 91* was not developed in consultation with Maori.⁹⁹ Nonetheless, para 1 gives New Zealand the option to either accede to *UPOV 91* or adopt a domestic equivalent, and in designing the latter, New Zealand can include measures to protect Maori interests in indigenous plant species. This regulatory flexibility is a positive outcome for Maori. The remaining two paragraphs (3 and 4) seek to support that flexibility by limiting the application of the dispute settlement provisions of the TPP. These paragraphs are worded poorly, however, which perhaps suggests some haste in their drafting, and may also limit their effectiveness. It is unclear whether the fourth paragraph, which precludes dispute settlement regarding the interpretation of the *Treaty of Waitangi*, adds anything to para 3, which precludes dispute settlement in respect of disputes concerning the application of para 2. Furthermore, para 3 precludes dispute settlement regarding the consistency of measures adopted in reliance on para 2 with New Zealand's obligations under para 1. This does not make sense as para 2 is intended to operate as an exception to para 1, and para 3 needed only to have dealt with the application of para 2. Both the claimants and the Crown appointed legal experts to provide evidence on the interpretation of the Treaty clause. The Tribunal also appointed its own legal expert to provide an independent opinion. All three experts agreed that

there is a risk of a state-to-state dispute from the implementation of Paragraph 1(b) of Annex 18-A. We are of different views as to whether there is no or a limited risk of investor state dispute settlement. This is a complex and difficult area that will require extensive consultation in determining an outcome consistent with the Annex. We agreed that paragraph 4 was not necessary.¹⁰⁰

⁹⁷ *Wai 262 Report*, above n 76.

⁹⁸ *Ibid* 685–6.

⁹⁹ The claimants argued that annex 18-A was prompted by their claim, but also acknowledged that they could only infer what the Crown had done during the TPP negotiations (or not done) to protect Maori intellectual property rights given the absence of engagement with Maori: see Claimant, 'Closing Submissions', Submission in Wai 2522, 30 March 2016, [8], [176].

¹⁰⁰ Penelope Ridings, Jane Kelsey and Amokura Kawharu, 'Joint Response to Question 2 on *UPOV 1991*', Submission in Wai 2522, 18 March 2016 (copy on file with author).

D *The Waitangi Tribunal Report*

The Tribunal granted urgency to the hearing of the claims on release of the final TPP text, and specified two issues to form the focus of its inquiry. These were:

- (a) whether or not the *Treaty of Waitangi* exception clause is indeed the effective protection of Māori interests it is said to be; and
- (b) what Māori engagement and input is now required over steps needed to ratify the TPPA (including by way of legislation and/or changes to Government policies that may affect Māori).¹⁰¹

The final TPP text was released in November 2015, and preparations for the hearing began shortly afterwards. The hearing was held over five days from 14 to 18 March 2016, and the Tribunal issued its report on 5 May 2016. The report is measured both in terms of the Tribunal's overall assessment of the Crown's conduct and its suggestions for better engagement with Maori over future FTAs. The Tribunal found that there had been no breach of the principles of the *Treaty of Waitangi* on the basis that TPP art 29.6, in combination with other policy safeguards in the agreement, provide the required standard of 'reasonable' protection of Maori interests.¹⁰² At the same time, the Tribunal accepted that there are flaws in the drafting of the clause, and it also criticised the Crown's process of engagement with Maori.¹⁰³ In terms of substance, the Tribunal was particularly concerned that the 'more favourable treatment' phrase did not fully reflect the Treaty relationship (because not all measures needed to protect Maori interests consist of measures that accord Maori more favourable treatment), and gave rise to uncertainties over matters such as the relevant comparator.¹⁰⁴ On the other hand, the Tribunal noted favourably that the exception was at least partly self-judging, and that other aspects of the TPP (such as the ability of states to deny claims in respect of tobacco control measures) mitigated the regulatory risks to New Zealand.¹⁰⁵

The *UPOV 91* aspect of the inquiry was adjourned for later consideration, if required. This was on the basis that the Crown still had some policy flexibility available to it to determine how it will give effect to its TPP obligations with respect to plant varieties under annex 18-A.¹⁰⁶ In consequence, the claimants

¹⁰¹ Waitangi Tribunal, *Decision on Applications for Urgent Hearings concerning the Trans-Pacific Partnership Agreement* (Wai 2522, 31 July 2015) 17.

¹⁰² The Tribunal explained that the applicable standard is of a 'reasonable degree of protection, not perfection': *Wai 2522 Report*, above n 94, [5.1.6]. It relied on its earlier jurisprudence, in particular, as set out in its Wai 262 report. In that report, the Tribunal stated: 'Maori are the Crown's Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances. The test of reasonableness is particularly important in the international arena, where New Zealand has to act, as we were told, with 'likeminded' states and tailor its goals to what can realistically be achieved': *Wai 262 Report*, above n 76, 682–3.

¹⁰³ *Wai 2522 Report*, above n 94, [4.4.5], [5.1.4]–[5.1.6].

¹⁰⁴ *Ibid* [5.1.6]. The claimants argued that the interpretive uncertainties associated with the exception would have a chilling effect on future governments. The Tribunal accepted that regulatory chilling is an issue, but noted also that its existence would be hard to assess: at [5.1], [5.1.6].

¹⁰⁵ *Ibid* [5.1.6].

¹⁰⁶ *Ibid* [5.2.3].

may resurrect the proceedings with respect to what steps may be needed to protect Maori interests under annex 18-A.

The Tribunal properly acknowledged that maintaining the *Treaty* exception in all of New Zealand's FTAs since the one with Singapore was to the credit of successive New Zealand governments.¹⁰⁷ This is particularly so in the context of the TPP, given the number of parties involved, and the fact that the *Treaty* exception is the only country-specific exception of general application in the agreement.¹⁰⁸ Nonetheless, in terms of process, the Tribunal found fault with the Crown's strategy for consulting with Maori in order to ascertain the nature of any specific Maori concerns in light of the reach of the TPP, and the Crown's failure to carefully review the usual template to ensure that it would operate as intended within the TPP. The Tribunal further noted that issues it identified in the *Wai 262 Report* had still not been addressed. It said:

It seems to us that, contrary to the findings of the Wai 262 Tribunal, the Crown did not seek to provide a realistic opportunity for Maori to identify their interests in the TPPA as a Treaty partner. The secrecy or confidentiality of the development of Crown policy in relation to the TPPA and its negotiating positions compounded this difficulty, and is likely to have been a factor in low levels of engagement between the Crown and Maori (whether initiated by either party) prior to the lodging of these claims.¹⁰⁹

Looking to the future, the Tribunal suggested that the Crown engage in a constructive dialogue with Maori regarding the template *Treaty* exception for future FTAs, particularly given the possibility that modified European Union-style approaches to dispute settlement may emerge and require adjustment to that template. The Tribunal also suggested that the Crown adopt a protocol setting out how it would involve Maori in the event that New Zealand becomes party to any ISDS claim in which the *Treaty* exception is invoked.¹¹⁰

As noted above (Part III(B)), the government truncated the timeframe for the introduction of the TPP implementing legislation into Parliament. This compromised the Tribunal's ability to report fully on the issues raised during the hearing because, as a matter of comity, it loses jurisdiction to hear claims relating to issues that are submitted for consideration by the House of Representatives. Initially, the Crown advised the Tribunal that the TPP-implementing legislation would not be introduced before early June 2016. Subsequently, on 8 April 2016, the Crown advised the Tribunal that the TPP timeframes had been shortened, that the FADT Select Committee's report on the TPP would be tabled in the House in the first week of May, and that the TPP Bill

¹⁰⁷ *Ibid* x.

¹⁰⁸ By way of comparison, Canada has used a more limited form of reservation in its investment treaties against its obligations relating to national treatment, most-favoured nation, senior management and performance requirements, to preserve its ability to adopt measures that accord rights or preferences to its indigenous peoples. The same reservation is included in Canada's schedule of non-conforming measures in the TPP, but unlike New Zealand's *Treaty of Waitangi* exception, the Canadian reservation is not an exception of general application across the whole TPP and nor is it partly self-judging: see TPP annex II (Schedule of Canada) 2 (Investment and Cross-Border Trade in Services).

¹⁰⁹ *Wai 2522 Report*, above n 94, [5.2.2].

¹¹⁰ *Ibid* [5.2.3].

may be introduced at any time from 9 May onwards.¹¹¹ Because the Tribunal had to expedite its writing, it was unable to consider in depth all the matters raised during the proceedings in its report.¹¹²

The response of the claimants to the Tribunal's findings was mixed. For the New Zealand Maori Council, it was resigned acceptance. Its chairman, Sir Edward Durie, reflected on how the Tribunal found fault with the Crown's approach, yet did not declare a breach of the principles of the *Treaty of Waitangi*:

The Council considers that Māori were entitled to a positive finding that a clause which purports to protect Māori interests does not in fact provide such protection, and the report is disappointing in that respect. In particular the clause provides for affirmative policies to bring Māori achievement into line with national standards but it fails to protect Māori property interests. It will be disappointing in that respect for those iwi with significant water and geothermal interests ...

However, given that the TPP proposal has passed beyond the negotiation stage, the Tribunal has helpfully proposed that Māori and the Crown should now engage in perfecting the clause for the future, and in developing the New Zealand approach to the application of the clause in the event of a dispute where the clause may be invoked.¹¹³

V CONCLUSIONS

For so long as FTAs seemed to be all about trade concessions, the gains to New Zealand were straightforward and the risks seemed minimal. The nature of New Zealand's trade commitments encouraged bipartisanship. As it became clearer that FTAs were expanding in scope and gave rise to regulatory risks on sensitive issues, and even potential litigation risks through the ISDS mechanism, National, Labour and the minor parties began to stake out their own positions on those risks. The first signs of this emerged during the parliamentary examination of the FTA between New Zealand and Korea. The threat to bipartisanship was even more evident again with respect to the TPP. This is problematic because it would be in New Zealand's interests for political parties to work towards finding common ground on major FTA issues and develop model provisions, rather than their own party-specific policies.

The developments in New Zealand find some parallels with the evolution in foreign investment regulation and FTA policy in Australia. Luke Nottage has observed that Australian politics was for a long time ambivalent about foreign investment until a series of turning points involving, inter alia, major foreign investment proposals, changes in demographics of foreign investors (the rise of Chinese investment), the negotiation of FTAs containing investment chapters especially with the United States (the bilateral FTA signed in 2004, but particularly the TPP), the 2010 report by the Australian Productivity Commission (generally critical of ISDS), and the first ISDS claim against Australia by Philip Morris Asia formally filed in early 2012.¹¹⁴ Unlike Australia,

¹¹¹ Crown, 'Crown Memorandum', Submission in Wai 2522, 8 April 2016.

¹¹² *Wai 2522 Report*, above n 94, [1.4].

¹¹³ Sir Edward Durie, quoted in New Zealand Māori Council, 'Māori Council Response to the Waitangi Tribunal Trans-Pacific Partnership Report' (Press Release, 6 May 2016).

¹¹⁴ Luke Nottage 'The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia' (2015) 21 *New Zealand Business Law Quarterly* 266.

New Zealand has not faced a treaty-based ISDS claim. The New Zealand Productivity Commission has also not investigated the merits or otherwise of FTAs or ISDS. Even so, as in Australia, individual investment proposals have prompted reforms to the foreign investment screening regime in New Zealand as well as discussion on the potential pitfalls of foreign investment, while the negotiation of the FTA with Korea and then the TPP have together been a turning point for New Zealand's political attitudes to the regulation of investment under FTAs.

A further possible explanation for the increasing politicisation of FTAs may relate to the make-up of the National-led government during the latter stages of the TPP negotiations. Since the introduction of the mixed-member proportional representation voting system in 1996, New Zealand has become used to coalition governments. Following the 2011 election, and then again in 2014, National almost had a clear majority and enjoyed a relatively large presence in Parliament as compared to Labour.¹¹⁵ After the 2014 election, the Prime Minister John Key began his third term in office by warning his ministers and the National members of parliament not to be arrogant,¹¹⁶ but at times it seemed that National wanted to present the TPP as its own achievement, and — particularly in relation to the examination of the TPP by the FADT Committee — was not terribly interested in hearing contrary views. Adding to the complexity, the claim before the Waitangi Tribunal shows that Maori appreciate how FTAs now reach behind the borders and raise important questions about the regulatory capacities of the Crown to meet its obligations under the *Treaty of Waitangi*. Through the Tribunal's process, Maori claimed an interest in the negotiation and conclusion of such agreements to the extent that Waitangi exceptions should be included, and that interest too has featured in the political discourse (notably as one of Labour's bottom lines).

At any rate, the weakened bipartisanship and the expansion of New Zealand's FTA commitments suggest that the process for concluding international treaties needs to change. The rubber-stamping of New Zealand's most important FTA to date, the TPP, also adds weight to the calls for a further review of New Zealand's constitutional arrangements for examining and adopting international agreements.¹¹⁷ The two key substantive issues discussed in this paper concern the scope of New Zealand's standard reservation for foreign investment screening, and the standard *Treaty of Waitangi* exception. Both these issues are of long-standing and high regulatory importance to New Zealand. The lack of independent scrutiny and meaningful debate under the existing process has contributed to sub-optimal outcomes for New Zealand on both these issues in the existing agreements. Their repetition in the current suite of FTAs may make it

¹¹⁵ National won 60 seats (one short of a majority); Labour won 32 seats; the Green Party won 14 seats; and New Zealand First won 11, while three other minor parties won 4 seats between them.

¹¹⁶ Audrey Young, 'Election 2014: Triumphant PM's Strict Line with MPs: Don't Get Arrogant', *New Zealand Herald* (online), 22 September 2014 <<https://perma.cc/9CRP-YRWR>>.

¹¹⁷ See Dunworth, 'International Law' [2015], above n 55, 307–9. In its minority view in the FADT Committee's report on the TPP, the Green Party also followed up on its earlier calls for a greater parliamentary role in the treaty examination process: *FADT Committee Report — TPP*, above n 39, 17.

harder for New Zealand to adopt better drafted provisions in future FTAs. Even within the current overall framework of post-signature review, to minimise the risk of similar issues occurring in the future, at the least, there should be provision for general debate in the House on treaties themselves (and not just implementing legislation), for independent analysis of treaties (including of the implications for the government's obligations under the *Treaty of Waitangi*), and for a reasonable period of time for the FADT Committee to hear submissions and write its reports. The strategy for engaging with Maori also needs to change, taking into account the Waitangi Tribunal's *Wai 262 Report* and the concerns and recommendations by the Tribunal during its inquiry into the TPP.