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CPTPP's Investment Chapter: Progressive or a mere reiteration?

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Abstract:

In March 2018, New Zealand signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This moment came after a series of significant events in New Zealand and international politics. The CPTPP rose from the collapse of the TPP and the similarity of the agreements mean the protests and arguments that encompassed TPP negotiations can be applied to the CPTPP. The investment chapter and Investor-State Dispute Settlement (ISDS) clauses were at the heart of the protests with arguments that the agreement would undermine the right of the sovereign to regulate in favour of foreign investors. Coupled with a new Government that had previously criticised the use of ISDS, it appeared New Zealand would shift away from the use of ISDS to ensure sufficient policy space. However, the agreement was signed without significant changes to the investment chapter, or the removal of ISDS. Members negotiated the investment chapter during the period of heightened public scrutiny and thus, the chapter contains provisions to respond to the criticisms. The agreement is not perfect, however, and New Zealand should not blindly follow the CPTPP's investment chapter when negotiating future treaties.

Keywords: Investment, ISDS, New Zealand, CPTPP

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I Introduction

The investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was purported to be a 21st Century trade agreement – the new gold standard. The investment chapter is just one chapter of a broad free trade agreement between 11 nations. The CPTPP origins lie with the Trans-Pacific Partnership (TPP), an agreement with the same 11 nations with the addition of the United States. The CPTPP is, unsurprisingly, similar to the TPP but includes some significant differences.

Negotiations of the TPP attracted significant political pressure and public outcry in New Zealand. A significant portion of those protests relate to the investment chapter, against the magnitude of investor protections and the inclusion of Investor-State Dispute Settlement (ISDS) provisions. Due to the similarity of the agreements it is worth outlining and assessing the opposition to the TPP's investment chapter. Safeguarding the Government's right to regulate was one of key objectives for New Zealand in negotiations.[1] On the other hand the investment chapter contains significant protections for investors. Therefore, the Government had to negotiate an agreement that struck a balance between investor protection and the right of the sovereign to regulate. This essay will assess whether the investment chapter of the CPTPP is the gold standard for New Zealand.

Part I will outline the various criticisms against the CPTPP or previously the Trans-Pacific Partnership (TPP). Part II will assess the provisions of the CPTPP against the backdrop of the criticism. It will illustrate whether these concerns will be alleviated by the CPTPP or even exacerbated. Part III will examine areas or changes that can be explored in future trade agreements to reach an agreement that is the gold standard for New Zealand. It will also highlight what the CPTPP could have done to become the gold standard with respect to investor-state dispute settlement.

[1] New Zealand Ministry of Foreign Affairs and Trade "CPTPP Overview" <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-overview/>

II Controversy Surrounding ISDS

A Opposition to ISDS and the TPP

ISDS is a method of resolving investment disputes between foreign investors and a host country. It provides a neutral and independent forum for the settlement of investment disputes.[2] ISDS is considered a crucial safeguard in allowing foreign investors to sanction illegitimate government conduct.[3] Historically, the clauses' primary purpose was as a mechanism to protect wealthy countries' investors. It prevented investors having to litigate their claims in a developing country which investors believed had corrupt or illegitimate domestic courts.[4] Providing an alternative and independent forum to settle disputes. In modern times the rationale for the inclusion of ISDS in investment agreements has shifted. The provisions seek to strike a balance between the protection of investors and the state's right to regulate.[5] Critics of ISDS see it as a threat to the sovereign's right to regulate.[6] This is because investors can sue in response to government legislation if it is in contravention of the investment agreement. The threat of an investor's claim can prevent the nation from regulating in their best interest resulting in the suggestion that the regulatory autonomy of the nation is diminished, creating a regulatory chill on host states. Therefore, ISDS places a restriction on the sovereignty of a state and critics believe the restriction is not worth the greater connectedness to the global economy.[7]

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[2] Stephan W. Schill *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/ at 2.

[3] At 2.

[4] JA Vanduzer "Investor-state Dispute Settlement in CETA: Is it the Gold Standard?" (2016) 459 CD Howe Institute, at 3.

[5] Rodrigo Polanco Lazo and Sebastian Gomez Fielder "Requiem for the Trans-Pacific Partnership: Something new, something old and something borrowed" (2017) 18(2) *MJIL* 298 at 306.

[6] José E Alvarez "Is the Trans-Pacific Partnership's Investment Chapter the new "Gold Standard"?" (2016) 47 VUWLR 503 at 512.

[7] Amokura Kawharu "The Admission of Foreign Investment under the TPP and RCEP: Regulatory Implications for New Zealand" (2015) 16(5-6) 1058.

ISDS in relation to the TPP and subsequently the CPTPP has been subject to extensive public debate in New Zealand. Prime Minister, Jacinda Ardern, has previously criticised ISDS calling the ISDS clauses within the TPP "a dog".[8] This was during her time in opposition as the TPP was negotiated under a different Government. The Labour Party opposed the TPP when there were in opposition.[9] Ardern believed that the ISDS provisions in the TPP were not in New Zealand's interests. The original clauses raised fears that it allowed corporations to sue the Government over policies that hurt their profits.[10] The Prime Minister's comments reflected the growing concern surrounding ISDS in New Zealand. Following the election and the withdrawal of the United States, the position changed. In government, the Labour Party oversaw the renegotiation of the TPP into the CPTPP and signed the agreement, despite the inclusion of ISDS. The new Government have announced a policy to steer away from ISDS provisions in future trade agreements[11]. This announcement responded to the increased public scrutiny ISDS has faced in recent times. The mentions of ISDS in New Zealand newspapers have grown significantly, peaking at the time of the 2017 election, exemplifying the importance of the debate.[12] The controversies of ISDS have been at the forefront of government policy and political debate in New Zealand.[13]

Bipartisan parliamentary support characterised previous trade agreements with investment chapters.[14] As an export-dependent economy, trade is central to New Zealand's economy. Therefore, both major parties agreed to support free trade initiatives. The Free Trade

[8] Vernon Small "Jacinda Ardern seeking TPP concessions at first appearance on international stage" Stuff (online ed), (6 November 2017) <https://www.stuff.co.nz/national/politics/98605976/jacinda-ardern-seeking-tpp-concessions-at-first-appearance-on-international-stage>.

[9] Andrew Little "Andrew Little on the TPPA" (29 January 2016) Labour <https://www.labour.org.nz/andrew_little_on_the_tppa>.

[10] Dan Satherley "TPP 'a damned sight better' now" *newshub.co.nz* (online), (12 November 2017) <https://www.newshub.co.nz/home/money/2017/11/tpp-a-damned-sight-better-now-ardern.html>

[11] Satherley, above n 10.

[12] Amokura Kawharu and Luke Nottage "Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà Vu (2018) 18/03 Sydney Law School Research Paper 1 at 4.

[13] Kawharu, above n 12 at 4.

[14] Amokura Kawharu "Process, Politics and the Politics of Process: The Trans Pacific-Partnership in New Zealand" (2016) 17 MJIL 286 at 288.

Agreement with Korea signalled a change.[15] The Labour Party were concerned with the constraints on New Zealand's regime for screening foreign investment. Furthermore, Labour raised questions over the lack of consultation with civil society.[16] These issues grew and further cracks in the bipartisan support appeared as the scale of the TPP became evident.[17]

B Events in Australia

The New Zealand political environment surrounding ISDS shares similarities with Australia under the Gillard Government. This is perhaps unsurprising due to the multiple interests and agreements shared between the two nations. The countries share similar legal and political systems. Furthermore, the open-trading economies of both nations are linked through hard and soft legal mechanisms.[18] Similarly, both share security and geopolitical interests. Australia's criticism of ISDS in recent times has come in two waves. In 2010 the Australian Productivity Commission conducted a report on FTAs and ISDS, at the request of the government.[19] The report was highly critical of ISDS.[20] The report suggested that ISDS is not valued by outbound investors.[21] Furthermore, the possibility of regulatory chill on host states is not outweighed by the value ISDS provides.[22] The majority of the report recommended against including ISDS in future agreements. Although the reasoning of majority's conclusion was critiqued, the report still had a significant effect on Australian policy towards ISDS.[23]

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[15] At 289.

[16] At 291.

[17] At 293.

[18] Kawharu and Nottage, above n 12, at 2.

[19] Productivity Commission, Commissioned Study *Bilateral and Regional Trade Agreements* <*https*://www.pc.gov.au/inquiries/completed/trade-agreements>.

[20] Productivity Commission, Research Report: *Bilateral and Regional Trade Agreements* (November 2010). 265 (Productivity Commission Report)

[21] At 270.

[22] At 274.

[23] Luke Nottage "Investment Treaty Arbitration in Australia, NZ and Korea" (2015) 25(3) *Journal of Arbitration Studies* 185 at 193.

Australia experienced a second wave of criticism after Philip Morris Asia brought a claim against the government's plain packaging legislation. It was the first ISDS claim Australia had received. The government removed colourful advertising from cigarette packets, with the hope of reducing smoking rates. Philip Morris Asia alleged it was a breach of the Australia – Hong Kong BIT. They were eventually unsuccessful in their claim, losing on jurisdictional grounds.[24] The outcome was unsatisfactory, failing to clarify the interaction between tobacco control and investment treaties. Tobacco companies can continue to threaten arbitration in response to tobacco control measures.[25] It continued to have political effects. Public opinion was concerned with the power of ISDS. The public did not want nations prevented from regulating in the public's interest. The outcome of the case did not matter, the mere fact that a claim could be brought against the government for the plain packaging legislation was enough for concerns to be raised. Subsequently, the centre-left coalition at the time announced a policy that they would not agree to ISDS provisions in future investment treaties.[26] It was a stance like the announcement made by Jacinda Ardern's Government. It is worth noting that these policies do not prevent the government from being sued entirely. If there were no ISDS provisions the governments would be sued in their respective national courts.

Australia's experience has sent political shockwaves across the Tasman. New Zealand's interests are similar to those of Australia meaning the same criticisms and concerns were relevant. In 2012, the New Zealand Government agreed in principle to introduce similar plain packaging regulations, pending the results of the Australian case.[27] The plain packaging regulations came into force six years later in March 2018, an example of

[24] *Phillip Morris Asia Limited v The Commonwealth of Australia (Jurisdiction and Admissibility)* PCA 2012 12, 17 December 2015.

[25] Sergio Puig, and Gregory Shaffer. "A Breakthrough with the TPP: The Tobacco Carveout." (2016) 16 Yale Journal of Health Policy, Law, and Ethics 327 at 332.

[26] Archived at <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>

[27] Tariana Turia *Government Moves Forward with Plain Packaging of Tobacco Products* (20 February 2013) <https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>.

regulatory chill.[28] As a result, the public were concerned that the investment chapter and ISDS as an enforcement mechanism would threaten New Zealand's right to regulate in this manner. Protestors believed that this threat was not worth the potential gains to New Zealand investors.

C ISDS Procedure

The criticisms of ISDS are not limited to the constraints on the regulatory autonomy of the sovereign. There are also significant concerns surrounding the judicial process. ISDS is criticised for its lack of procedural safeguards, diminishing the legitimacy of the system.[29] Arbitrators are appointed and tribunals created on an ad hoc basis. This means the tribunals often produce inconsistent and occasionally ill-reasoned results.[30] The proceedings themselves lack transparency.[31] In common law countries, transparency and the open court principle fosters legitimacy in the dispute settlement process.[32] Thus, transparency is a necessity for the legitimacy of ISDS.[33] The lack of transparency means awards are relatively free from scrutiny.[34] Without transparency and public scrutiny, it is unlikely that the public will ever believe that ISDS is predictable and consistent.[35] As a result, critics argue that ISDS violates the rule of law.[36] They question why domestic courts may be bypassed for the decision of an inconsistent and arbitrary tribunal.

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[28] Ministry of Health *Tobacco Standardised Packaging* (2018) <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/tobacco-standardised-packaging>

[29] Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall "Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel" (October 2010) Annual Forum for Developing Country Investment Negotiators at 1.

[30] Alvarez, above n 6, at 514.

[31] Vanduzer, above n 4, at 8.

[32] Colin Trehearne "Transparency, Legitimacy, and Investor-State Dispute Settlement: What can we Learn from the Streaming of Hearings" (9 June 2018) Wolters Kluwer <http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings/>

[33] Michael Douglas "The Importance of Transparency for Legitimising Investor-State Dispute Settlement: An Australian Perspective" (2015) XIX Hors Series 111 at 112.

[34] Schill, above n 2, at 2.

[35] Douglas, above n 33, at 115.

[36] At 115.

The role of the arbitrators also attracts significant criticism with concerns over perceived conflicts of interests. The ad hoc nature of ISDS means that an arbitrator in one case can serve as counsel in another – the 'two-hats' argument. This conflict of interest challenges the independence of decision-makers.[37] Their decisions as arbitrators can affect their professional activities. [38] As a result, whether consciously or sub-consciously, critics argue that arbitrators tend to favour the interests of investors.[39] Parties appoint the arbitrators, leading to a further conflict of interest. Therefore, there will be questions as to whether the arbitrator will favour those that appointed him or her.

Proponents of ISDS argue its significant assistance and value in investment agreements with developing countries.[40] Providing an alternative forum for dispute settlement outside of domestic courts. Domestic courts were not considered sufficiently independent of the state by investors.[41] Investors believed it was unlikely that those avenues would grant them effective and timely relief.[42] However, arguably this does not justify the inclusion of ISDS in the TPP where it is predominantly developed countries with mature legal systems.[43] The TPP does include less-developed countries, such as Vietnam. New Zealand companies would be less willing to invest in those countries if ISDS was removed. ISDS provides a level of certainty for investors that their investment will not be undermined by government action without recourse. Therefore, New Zealand investors in foreign countries benefit from the inclusion of ISDS. These benefits must be considered in assessing the value of ISDS to New Zealand.

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[37] Schill, above n 2, at 3.

[38] At 3.

[39] M. Sornarajah, Resistance and Change in the International Law on Foreign Investment. Cambridge: Cambridge University Press, 2015.

[40] Vanduzer, above n 4, at 3.

[41] At 3.

[42] At 3.

[43] James Roberts, Theodore Bromund and Riddhi Dasgupta "Straight Talk on the ISDS Provisions in the Trans-Pacific Partnership" (17 May 2016) The Heritage Foundation <https://www.heritage.org/international-economies/report/straight-talk-the-isds-provisions-the-trans-pacific-partnership>.

D Foreign Ownership of Land

As the TPP negotiations progressed, public concern became particularly obvious. Political and public support was divided over the agreement and more specifically, ISDS. Labour wanted to introduce the capacity for the New Zealand government to include additional regulation over foreign investment, particularly new screening categories for foreign investors.[44] In contrast to its open trading regime, New Zealand has a restrictive foreign investment regime. New Zealand is sixth from the bottom in the OECD's Foreign Direct Investment (FDI) Restrictiveness Index.[45] New Zealand has entered fewer Bilateral Investment Treaties (BIT) in contrast to its number of trade agreements.[46] New Zealand has only entered four BITs, only two of are in force.[47] Five of New Zealand's trade agreements contain an investment chapter.[48] Entering into a treaty such as the TPP with eleven nations with a liberal investment chapter is a new step for New Zealand and signified an opening of the foreign investment regime. This brought with it a stringent debate. The TPP had stronger commitments to admit foreign investment as compared to other agreements.[49] Thus, by encouraging further investment the risks of ISDS and regulatory chill are more prevalent. Worldwide, the increase in the number of ISDS claims has followed a similar trend to the increase in outward FDI stock.[50] Therefore, New Zealand increases the risk of an investor bringing a claim by encouraging further FDI.

New Zealand's special relationship with land and desire to protect it is reflected in its concern surrounding foreign investment and subsequently ISDS. Foreign ownership of land is a sensitive and significant issue within New Zealand. Land is culturally important.

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[44] Kawharu, above n 14, at 298.

[45] Organisation for Economic Development (OECD). FDI Regulatory Restrictiveness Index 2012. <www.oecd.org/investment/investmentpolicy/fdiregulatoryrestrictivenessindex.htm>.

[46] Nottage, above n 23, at 208.

[47] Investment Hub Policy <http://investmentpolicyhub.unctad.org/IIA/CountryBits/150#iiaInnerMenu>.

[48] New Zealand Ministry of Foreign Affairs and Trade "Free Trade Agreements in Force" <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/>.

[49] Kawharu, above n 14, at 291.

[50] Scott Miller and Gregory N. Hicks *Investor-State Dispute Settlement: A Reality Check* (Center for Strategic and International Studies, 2015) at 14.

For both Māori and Pākehā land ownership in New Zealand has strong historical and cultural associations.[51] To briefly explain, one of the reasons Pākehā settled in New Zealand was for the opportunity to own land to develop farms. For Māori, land has spiritual and symbolic elements – representing a source of identity and belonging.[52] These cultural issues make foreign land ownership a political stumbling block.[53]

The importance of land ownership explains New Zealand's comparatively restrictive foreign investment scheme. Foreign investment policy is designed to encourage quality investments but also to restrict those unwanted in sensitive sectors.[54] The Overseas Investment Act 2005 (OIA) contains the current screening regime. It represents a defensive focus on foreign investment within land-based assets.[55] In contrast, the CPTPP is designed to encourage the liberalisation of investment flows. However, New Zealand's treaty practice prior to this had been to "retain the ability to control the admission of foreign investment into the country".[56] Therefore, it appears these two goals conflict with each other. The concern is that if New Zealand is to take protective measures towards foreign investment, it risks investors bringing claims. These claims may be brought under ISDS or through domestic courts. It is the ISDS claims that are a sensitive issue within New Zealand and other nations.[57]

The TPP and other Free Trade Agreements (FTAs) contain exceptions for decisions made under the OIA. These decisions are not subject to ISDS claims.[58] New Zealand's current legislation and its ability to reject foreign investment is protected. However, in New Zealand it is questioned whether it is enough to protect the interests of the country. The

[51] Daniel Kalderimis "Chapter 3– Regulating Foreign Direct Investment in New Zealand – Further Analysis". <regulatorytoolkit.ac.nz>.
[52] Kalderimis, above n 51.
[53] Kalderimis, above n 51.
[54] Kawharu, above n 7, at 1060.
[55] At 1078.
[56] At 1081.
[57] Lisa Diependaele, Ferdi De Ville and Sigrid Sterckx "Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System, New Political Economy Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System" (2017).
[58] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, annex 9-H.

current model exception does not reserve the ability to create new categories within the screening regime. During periods of negotiation this prompted complaints from the Labour Party who had a policy proposal to restrict foreign investment in residential housing.[59] Interestingly, the same party is now in government and has concluded that sensitive land can be re-defined to include residential housing.[60] This means that new categories are not necessary to fulfil the policy proposal and remain in accordance with the OIA exception. Perhaps, defining "sensitive land" in such a broad manner may attract future claims. This remains unclear. On the more likely chance that Labour managed to protect its policy regarding foreign buyers of residential land, removing the ability to add new categories remains an oversight. The Act only deals with sensitive strategic assets through a blunt financial threshold and the ever-widening definition of "sensitive land".[61] The exception does not provide the ability to create new categories to deal with issues that may arise from increased foreign investment.[62] This inability to restrict foreign investment outside of what is already contained in the act is another example of a limit on sovereignty.

E Treaty of Waitangi

Labour issued five bottom lines that must be met for the party's support of the TPP.[63] The fourth bottom line was that the Treaty of Waitangi must be upheld. The Crown's obligations to Maori must not be undermined by free trade agreements and the restrictions on regulatory autonomy. The Government have negotiated for a Treaty of Waitangi exception to be included in all free trade agreements since 2001.[64] During negotiations it was uncertain whether the same exception was going to be included in the TPP. If it was not included then it could prevent the Crown from exercising its obligations to Māori. Their actions to provide more favourable treatment would be susceptible to ISDS claims. The

[59] Amokura Kawharu "TPPA: Chapter 9 on Investment" New Zealand Expert Paper Series at 14

[60] Overseas Investment Amendment Act 2018.

[61] Kawharu, above n 59, at 14.

[62] At 14.

[63] Andrew Little "Labour will not support TPP if it undermines NZ sovereignty" (23 July 2015) <https://www.labour.org.nz/labour_will_not_support_tpp_if_it_undermines_nz_sovereignty>.

[64] Kawharu, above n 14, at 304.

CPTPP does in fact include the model exception for the Treaty of Waitangi, however, there are questions raised as to whether the model exception is enough.[65] It is possible that the exception does not cover treatment that is different but not favourable.

III CPTPP Investment Chapter and response to criticism

The TPP was introduced as the gold standard of trade agreements.[66] It was hoped the investment chapter would serve to modernise and reform ISDS to help solve the controversies of previous investment agreements.[67] Despite these lofty goals the TPP attracted significant criticism. The criticism in New Zealand was unprecedented. This section will address criticisms of the investment chapter and whether they are substantiated.

It is important to note that the investment chapters between the TPP and CPTPP remain largely the same. However, there is one important difference. The scope of ISDS is narrower in the CPTPP.[68] Provisions that allowed investors to litigate disputes under investment agreements and investment authorisations have been suspended.[69] Investors who have entered an investment contract with the New Zealand government will not be able to use ISDS if there is a dispute about the contract.[70] Additionally, investors will be unable to sue when the government amends or revokes an authorisation to invest in New Zealand.[71] Investor rights are narrowed by these changes and have therefore strengthened

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[65] At 305.

[66] See Hillary Rodham Clinton, United States Secretary of State "Remarks at Techport Australia" (Adelaide, 15 November 2012).

[67] United States Trade Representative "Upgrading and Improving Investor-State Dispute Settlement" <https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf>.

[68] New Zealand Ministry of Foreign Affairs and Trade "CPTPP v TPPP" <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/tpp-and-cptpp-the-differences-explained/>.

[69] Ibid

[70] New Zealand Ministry of Foreign Affairs and Trade "Comprehensive and Progressive Agreement for Trans-Pacific Partnership National Interest Analysis" (8 March 2018) at 38.

[71] Government of Canada "What does the CPTPP mean for Investment" <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/investment-investissement.aspx?lang=eng>.

the sovereign's ability to regulate.[72] Lastly, provisions relating to minimum standard of treatment in financial services have been suspended.[73] These changes further safeguard the sovereign's right to regulate. The chapter remains the same apart from these changes. Investors remain able to use ISDS clauses when they believe they have been discriminated against or treated unfairly resulting in a breach of an obligation under Section A of the investment chapter.

A Following a US-Model

Before the United States (US) pulled out of the agreement the TPP was an opportunity for New Zealand to enter into a free trade agreement with one of the world's largest markets. It would have ensured greater access to United States markets and increased investment and tourism into New Zealand.[74] New Zealand exports NZ$8 billion to the United States annually and incurs many tariffs and duties.[75] A free trade agreement would remove, or at least lower, tariffs. Furthermore, New Zealand's closest trading partner, Australia, currently has a free trade agreement with the United States (AUSFTA). Thus, strategic reasons fuelled the desire for a United States FTA. There would be a level playing field between like products of New Zealand or Australian origin. However, mentioned this desire increased tensions that New Zealand would fold in favour of the demands of the United States.

In a sense these criticisms were validated by the text of the TPP investment chapter. The TPP investment chapter is based on the United States Model BIT.[76] A linguistic analysis of the TPP with other investment agreements find that 82 per cent of the text within the TPP's investment chapter is identical to the investment chapter of the US-Colombia free

[72] Matthew P. Goodman "From TPP to CPTPP" (8 March 2018) Center for Strategic and International Studies <https://www.csis.org/analysis/tpp-cptpp>.

[73] Goodman, above n 72.

[74] New Zealand Ministry of Foreign Affairs and Trade "Trans-Pacific Partnership National Interest Analysis" (25 January 2016).

[75] New Zealand Ministry of Foreign Affairs and Trade "Trade – United States" <https://www.mfat.govt.nz/en/countries-and-regions/north-america/united-states-of-america#Trade>

[76] Kawharu, above n 7, at 1068.

trade agreement.[77] Furthermore, the other agreements closest to the TPP are FTAs and BITs concluded by either the United States or Canada.[78] The TPP aimed to improve the current standards of investment protection. However, this textual analysis suggests that it is not as innovative as proclaimed.[79] It is largely following past US treaty practice supporting the notion that the US may have dominated negotiations. [80] The US did not have to deviate from their desired provisions and protections. Thus, the US was still able to utilise its power to fulfil their demands even though 12 nations were negotiating. Furthermore, it suggests that the investment chapter of the TPP is not really the 'gold standard' of trade agreements. It is merely an extension of the US's model treaty. The unchecked demands of the US are unlikely to encourage a new era of 'high quality' trade agreements, it will merely facilitate its goals.

The past treaty practices of the other nations are relevant to this argument. As mentioned the TPP is similar to Canadian FTAs and BITs. This is largely because both countries follow the NAFTA model and progressions made subsequently. The Most Favoured Nation chapter is an example of the TPP replicating Canadian treaties.[81] Furthermore, article 9.16, Corporate Social Responsibility, is inspired from past Canadian practice.[82] Thus, US did not single-handedly control the drafting of the investment chapter. These chapters have remained the same in the CPTPP. Outside of North America, New Zealand's path of investment treaty practice has largely been inspired by the US-Model BIT. The Protocol of Investment to the New Zealand – Australia Closer Economic Trade Agreement reflects the TPP and other US model treaties.[83] However, this agreement does not include ISDS and has some changes reminiscent of provisions found in European trade agreements.[84]

[77] Wolfgang Ascher and Dmitriy Skougarevskiy "The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe" (23 November 2016) The Graduate Institute of International and Developmental Studies <www.repositry.graduate institute.ch> at 10.

[78] At 10.

[79] United States Trade Representative, above n 67.

[80] Luke Nottage "The TPP Investment Chapter and Investor–State Arbitration in Asia and Oceania: Assessing Prospects for Ratification" (2016) *MJIL* 313 at 331.

[81] Ascher, above n 78, at 11.

[82] At 11.

[83] Alvarez, above n 6, at 519

[84] At 520.

Additionally, New Zealand continued to pursue US-style commitments in negotiations for the Regional Comprehensive Economic Partnership (RCEP) agreement. RCEP is a trade agreement among the ASEAN Member States and their FTA partners.[85] The US is not and has never been party to these negotiations. Therefore, to suggest that the US succeeded at imposing its will because the TPP is almost identical to past US treaties, is misplaced. Countries are pursuing similar provisions in separate treaties.

B OIA Exception

The National Treatment obligation is within article 9.4 of the CPTPP, unchanged from the TPP. It requires foreign investors, from the parties to the agreement, to be treated no less favourably in like circumstances than domestic investors. However, the New Zealand government has negotiated an exception to this. Decisions to reject foreign investment under the OIA are excluded from ISDS and dispute settlement provisions in both the CPTPP and TPP.[86] The new Labour-led government have included their policy banning foreign investors in residential land to the exception. The CPTPP reserves New Zealand "the right to adopt or maintain any measure that sets out the approval criteria to be applied to the categories of overseas investment that require approval under New Zealand's overseas investment regime."[87] The annex then sets out the categories. This means that New Zealand can protect decisions made under the OIA thus protecting New Zealand's screening regime. New Zealand has reserved the ability to amend the criteria within the existing categories.[88]

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[85] New Zealand Ministry for Foreign Affairs and Trade "Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership" <https://www.mfat.govt.nz/assets/FTAs-in-negotiations/RCEP/Guiding-Principles-and-Objectives-for-Negotiating-the-Regional-Comprehensive-Economic-Partnership.pdf>.

[86] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, annex 9-H.

[87] Comprehensive and Progressive Agreement for Trans-Pacific Partnership Annex II – schedule of New Zealand.

[88] Kawharu, above n 59, at 14.

The exception does not provide New Zealand with the ability to add new categories to the screening regime. This is not necessarily detrimental to New Zealand. It is liberalising New Zealand's investment regime. In turn, resulting in a flow-on effect of encouraging foreign investment. Foreign Direct Investment (FDI) is important in helping to internationalise New Zealand's economy.[89] There is some evidence supporting the notion that New Zealand's capital stocks are lacking.[90] Therefore, it is imperative to encourage further FDI. Agreements such as the CPTPP provide stronger commitments to admit foreign investment and will ensure this occurs. Increased FDI will help New Zealand strengthen its international connections, increase and move up the value chain. Treasury has identified that these factors will significantly affect New Zealand's economic future.[91] The Government has estimated that New Zealand requires up to $200 billion in foreign investment to fulfil its development targets.[92] By agreeing to ISDS provisions that conform to international law standards New Zealand generates increased confidence to foreign investors.[93] The investors are therefore comfortable in their investment as they know it will be treated with respect. There are significant political stumbling blocks within New Zealand towards fulfilling the $200 billion target, such as the importance of land to our national identity and the political tensions the notion of foreign ownership brings.[94]

New Zealand imports four times the amount of capital than it exports.[95] Inward FDI stock far outweighs that which it exports.[96] As a small country, New Zealand does not have a lot of money to export. Prior to the CPTPP New Zealand has only signed four BITs. Despite this there is already significant amount of foreign investment within New Zealand. Foreign

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[89] Kalderimis, above n 51.

[90] Kalderimis, above n 51.

[91] New Zealand Treasury Investment, Productivity and the Cost of Capital: Understanding New Zealand's "Capital Shallowness" (Productivity Paper TPRP 08/03, April 2008) at 6.

[92] New Zealand Institute of Economic Research "ISDS and Sovereignty" (September 2015) NZIER Report to Export New Zealand <https://nzier.org.nz/static/media/filer_public/bc/21/bc21a5b2-3a6b-4ba2-8cf7-2f90fd5c6909/isds_and_sovereignty.pdf> at 5.

[93] New Zealand Ministry of Foreign Affairs and Trade, above n 70 at 37.

[94] Kalderimis, above n 51.

[95] Alvarez, above n 6, at 508.

[96] At 508.

ownership represents 53.3 per cent of total capital stock in New Zealand.[97] New Zealand has a greater proportion of its economy already in foreign hands relative to other countries.[98] Thus, arguably there is no need to liberalise investment. Since New Zealand imports significantly more FDI than it exports it is more likely that New Zealand would receive more ISDS claims than in files. Therefore, ISDS provisions favour the other countries over New Zealand. However, it is a concession that the Government was willing to make.

C Treaty of Waitangi Exception

Article 29.6 of the CPTPP provides New Zealand with a Treaty of Waitangi exception.[99] It is the standard template that New Zealand includes in its trade agreements. The exception includes the term "it deems". This means that whatever New Zealand deems it necessary to accord Māori more favourable treatment it can enact. It is a self-judging exception. As mentioned, New Zealand has used this template in all trade agreements since its agreement with Singapore in 2001. However, there are issues with this exception. Its meaning and scope are not entirely clear. The term "more favourable treatment" has not been defined.[100] To assess whether something is more favourable a comparison must be made. There is no clear direction what the comparator will be. The treatment to CPTPP claimants in like circumstances, or more favourable treatment in a general sense.[101] Furthermore, must the measures which accord more favourable treatment to Māori have to solely accord that beneficial treatment to Māori? Or is it also acceptable for treatment to overflow and provide beneficial treatment to non-Māori? For the treatment to be more favourable it must be beneficial. Treatment that is different would not be enough. Therefore, measures that reflect Māori interests may not be in breach of the agreement. It is also conceivable that

[97] Statistics New Zealand "National Accounts" (March 2016) <https://www.stats.govt.nz>.
[98] Alvarez, above n 6, at 510.
[99] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 29.6.
[100] Kawharu, above n 14, at 304.
[101] At 304.

some measures will be inconsistent with obligations under the CPTPP. For example, if Māori interests are considered for a statutory decision-making process at the expense of a foreign investor.[102] The exception can capture decisions like these.

The term "more favourable" does not capture the constitutional status of Māori.[103] Māori as a community are to be treated distinctly rather than more favourably. The purpose of the Treaty of Waitangi exception is to leave the regulatory space for the Crown that it needs to fulfil its obligations under the Treaty. Therefore, enacting an exception which involves a comparative analysis is misplaced. For clarity's sake, a blanket exception would illustrate and achieve the purpose. Amokura Kawharu provides an apt 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".[104] This would allow for the necessary regulatory freedom without the complications of a uncertain comparative exercise. Furthermore, it is a limited enough exception that other countries should not object to its inclusion. It is not overly restrictive, with its limited scope on matters dealing with Māori. Therefore, other nations are unlikely to see it as a stumbling block to the liberalisation of investment, particularly so if they have agreed to the substantively similar exception already included in other agreements.

D ISDS Provisions

The ISDS provisions within the CPTPP seek to address some of the procedural concerns that have been raised worldwide in various protests. The CPTPP does not seek to revolutionise the ISDS system. However, it has attempted to create procedural safeguards to improve the system. Article 9.24 seeks to promote transparency. There is an obligation to make certain documents available to the public. The public is interested to witness how the tribunals work. There is significant distrust and cynicism due to the disconnect between the decision and the public. If information is sensitive it does not have to be released,

[102] At 305.
[103] At 305.
[104] At 306.

nevertheless it is still a strong obligation of transparency. Transparent arbitration may help legitimise the agreement in the public eyes. There are still concerns as to whether this is making ISDS legitimate or merely legitimising the current flawed system. Attempts to legitimise a flawed system risks masking a system as legitimate when it remains flawed and illegitimate.[105] Article 9.23 prevents meritless claims from proceeding by allowing the tribunal to decide that a claim has no merit and give an award on that basis. This protects states from being drawn into a potentially long arbitration process over baseless claims.

A Trans-Pacific Partnership Commission (Commission) was established by the 11 nations.[106] Interestingly, it retains that name under the CPTPP. This was to help the nations solve disputes and uncertainties. The Commission has the power to issue interpretations of the treaty to help resolve disputes and ambiguities in application.[107] With states agreeing on interpretations the hope is that it will reduce the inconsistencies of an ad hoc tribunal. As mentioned earlier, ad hoc tribunals can lead to inconsistent results and interpretations. Therefore, it is hoped that this would reign in the inconsistency of tribunals. Leading to more predictable and desired results. It has been recommended that states take a proactive approach in exercising interpretive power to encourage a coherent and predictable reading of treaty provisions.[108] The Commission's powers are supported in Article 9.25. It is difficult to ascertain at the current time whether this will have a substantive effect or whether the commission will be largely ineffective. However, parties being able to decide on interpretations is desirable from the point of view of the member-states. It gives the agreement additional flexibility to achieve what the members want. It is also a means for which the parties can re-assert their sovereignty by providing guidance to the arbitrators.[109] It may appear unfair from the point of view of investors, who would be the one bringing claims against a particular state. If the state can change the interpretation of the provision

[105] Diependaele, De Ville and Sterckx, above n 57, at 16.

[106] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 27.1

[107] Nottage, above n 81, at 339.

[108] Ling Ling He, Razeen Sappideen, "Investor-State Arbitration under Bilateral Trade and Investment Agreements: Finding Rhythm in Inconsistent Drumbeats" (2013) 47 *Journal of World Trade* 1 215 at 240.

[109] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP" (2016) 19 *JIEL* 27 at 32.

then it does not provide much protection. This potential problem is nullified as the 11 nations must come to a consensus on an interpretation. If they come to a consensus they can limit investors' rights by agreeing to a narrow interpretation of a particular clause within the investment chapter for example. This could be particularly useful to overcome unforeseen problems with the treaty. Thus, it is hard to assess at this stage but the Commission illustrates an attempt by the member-states to try and retain more sovereignty.

The CPTPP has created a code of conduct for arbitrators and guidelines for avoiding conflicts of interest. It is based on chapter 28 (Dispute Settlement) of the CPTPP and other relevant international laws and guidelines. This is designed to increase the independence and impartiality of arbitrators in turn resulting in legitimate decisions. Arbitrators must comply with the code of conduct and other rules of procedure.[110] The rules of procedure are to be created by the Commission.[111] With parties appointing the arbitrators, and arbitrators also able to act as counsel, independence is a significant concern.[112] There is a distortion of the separation of powers, especially so when compared to domestic courts. This is a primary concern with ISDS. If states are appointing the decision-makers then many assume that the decision makers will decide in their favour. If arbitrators are subject to a higher authority then this might not be the case. Thus, the code of conduct seeks to solve this. However, there are no clear obligations on the arbitrators. It is just an agreement for the parties to agree on a code of conduct. Therefore, it is unlikely it will be an effective mechanism for encouraging independent decision making.

The risks of ISDS that CPTPP brings have been largely overstated. 64 per cent of the inward FDI comes from CPTPP nations.[113] On a surface level this suggests the majority of investments are protected by ISDS. However, 80 per cent of investment from CPTPP countries is from Australia.[114] New Zealand and Australia have a side letter between

[110] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 28.10(1)(d).
[111] Art 27.2(1)(f).
[112] Schill, above n 2, at 2.
[113] New Zealand Ministry of Foreign Affairs and Trade, above n 70, at 4.
[114] At 10.

themselves precluding ISDS.[115] Therefore, the majority of investment entering the country will not be protected by ISDS. Furthermore, New Zealand has the same agreement with Peru, and further agreements prevent ISDS claims from Brunei, Malaysia and Viet Nam without the governments consent.[116] Thus, the risk of ISDS has been significantly mitigated. The CPTPP will encourage significant investment and it is therefore likely that Australia's proportion of FDI into New Zealand decreases as New Zealand's investment and trade relationships grow with the other nations. This will increase the risk of an ISDS claim. Despite this the various side letters New Zealand has entered mitigate the risk of a claim with the 1majority of investment precluded from an ISDS claim.

E Improving Regulatory Space

Following the Philip Morris claims in Australia, the CPTPP provides an exception for governments to enact tobacco measures that might otherwise be inconsistent with the agreement.[117] Therefore, those specific concerns are met, but it is uncertain whether the more general concerns of a regulatory chill will be satisfied. Article 9.16 underscores the right of nations to adopt, maintain or enforce measures to ensure that investment is conducted in a way that is sensitive to "environmental, health or other regulatory objectives".[118] This suggests that parties are given the right to regulate as they see fit. However, the provision must be "otherwise consistent" with the CPTPP. The language is rather circular. This provision gives no extra protection. It suggests that countries are free to regulate to pursue valid policy objectives, but must be consistent with the chapter. It is a redundant provision.[119] Therefore, the CPTPP has not given sovereign states any additional room to regulate. It has provided the specific tobacco exception. But there is no extra room for future problems that may arise.

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[115] At 121.

[116] At 121.

[117] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 29.6.

[118] Art 9.16.

[119] Lise Johnson and Lisa Sachs "The TPP's Investment Chapter; Entrenching, rather than reforming, a flawed system" (2015) Vale Columbia Center on Sustainable Investment.

There are further critiques of the tobacco carve-out. The tobacco carve-out undermines the legitimacy of the environmental, health and safety protections the CPTPP seeks to incorporate.[120] The tobacco carve-out can be cited in support of the idea that those protections are not enough on their own.[121] If a specific tobacco carve out is required then the other protections must be insufficient on their own.[122] The answer is that it is a political inclusion as a response to the Australia–Plain Packaging litigation.[123] However, it raises the problem of whether those protections are enough. The scope of existing Art XX exceptions of the WTO agreement is also brought into questions for the same reasons. Therefore, the tobacco exception, although well intentioned has created more problems than it has solved.

Furthermore, the exception itself does not eliminate the risk of a regulatory chilling effect. The exception just prevents the use of ISDS for tobacco control measures. Other mechanisms remain open to tobacco companies if they want to contest such measures including CPTPP state-to-state dispute settlement, and also mechanisms provided by the WTO and various investment treaties that are binding on members.[124] The threat of these mechanisms may continue to dissuade states from regulatory action. Lastly, the tobacco carve-out raises slippery slope concerns.[125] Once a harmful commodity is identified, should another exception be made for that commodity, such as large soft drink cups?[126] What is different about tobacco that ensures it is the only commodity with a specific carve-out exception? In the short-term this is an insignificant concern, tobacco is unique in this sense due to the publicity the control measures and subsequent investor reactions have attracted.

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[120] Thomas J Bollyky "TPP Tobacco Exception Proves the New Rule in Trade" (4 February 2016) Council for Foreign Relations < https://www.cfr.org/expert-brief/tpp-tobacco-exception-proves-new-rule-trade>.

[121] Bollyky, above n 120.

[122] Lukasz Gruszczynski "The Trans-Pacific Partnership Agreement and the ISDS Carve-out for Tobacco Control Measures" (2015) 6 *EJRR* 4 652 at 656.

[123] At 656.

[124] At 657.

[125] At 657.

[126] Simon Lester "Domestic Tobacco Regulation and International Law: The Interaction of Trade Agreements and the Framework Convention on Tobacco Control" (2015) 49 *Journal of World* Trade 1 19, at 47.

Footnote 14 of the Investment Chapter may provide the best protection for the governments right to regulate. It states:

> "For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[127]

This may indicate that it is only measures that intentionally discriminate that will be in breach of the national treatment obligations. Measures with legitimate objectives but that coincidentally place a greater burden on foreign investors will not be captured.[128] Therefore, it appears that nations are left with sufficient policy space to regulate for public welfare. Situations analogous to Australia's ISDS claim will be avoided, even if it falls outside the tobacco exception. Investors are also left with sufficient protection as the public welfare objectives must be legitimate. States will be unable to discriminate against investors under the veil of public welfare.

Fair and equitable treatment clauses are common within investment treaties. It is the most frequently invoked standard of investment protection.[129] However, arbitrators have been criticised for their approach to these clauses, deciding on a value judgment rather than applying a norm.[130] Often the treaties themselves provide no assistance on how this clause should be interpreted. The CPTPP is no different. Despite the name change, the same problems remain. It is named the "minimum standard of treatment" and is located in article 9.6. The CPTPP simply refers to customary international law for where these standards are found. There is no extra guidance contained in the agreement. This is particularly problematic with the CPTPP purporting to be an upgraded 21st Century agreement. The

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[127] See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 9, footnote 14.

[128] Henckels, above 115, at 45-6.

[129] At 33.

[130] Stephan W. Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in Stephan W. Schill (ed.), International Investment Law and Comparative Public Law (Oxford: Oxford University Press, 2010) 151 at 152

CPTPP continues to "perpetuate an evaluative approach rather than developing a precise rule".[131] The Comprehensive Economic and Trade Agreement (CETA), a free-trade agreement between Canada and the European Union, sought to frame the obligations of the State as a list of proscribed behaviours to try and provide some clarity.[132] This reduces the discretion of the tribunals. It is likely that problems of interpretation will continue to arise within the CPTPP. The fact that it is a multilateral agreement adds to this issue. It is unlikely that eleven nations will reach a consensus as to what the minimum standard in fact entails.[133] Thus, the CPTPP has not managed to clarify the most commonly invoked investor protector provision. It is not going to solve concerns of broad arbitral discretion.[134] An agreement purporting to be one of high-standards should at least attempt to do so.

IV Path Forward for New Zealand

The CPTPP is an improvement in many ways on past investment treaties. In response to a variety of concerns, parties did attempt to leave sufficient room for the sovereign to regulate. ISDS provisions are reformed from previous investment agreements and the Labour Party appears to have achieved its goal of banning foreign ownership of residential land. Despite this the CPTPP is far from the 'gold standard' from New Zealand's point of view. This is not to suggest that New Zealand should leave the agreement. Rather, the Government can seek to reform and obtain certain provisions in future agreements. These will help ease public concern and help ensure bipartisan support for investment chapters in free trade agreements.

The TPP and subsequently the CPTPP sought to improve and upgrade the ISDS process. Some of these improvements were addressed in the previous section. A primary concern of ISDS critics is the inconsistency of results.[135] The addition of an appellate body would

[131] Henckels, above n 115, at 36.
[132] At 36.
[133] At 36.
[134] At 49.
[135] He, and Sappideen, above n 108, at 227.

go some way to fixing this. States and investors would have the opportunity to appeal decisions. This would allow for errors at first instance to be corrected and lead to more consistent and predictable decision-making.[136] The ability to challenge decisions may also serve to ease the concerns of the public. If the decision of the ad hoc tribunal is reviewable then concerns of bias and consistency may be substantially alleviated. That is on the presumption that the appellate body is robust. Interestingly, the parties to the TPP considered the possibility of forming an appellate mechanism.[137] However, somewhere along the lines it was decided it was not necessary. This is somewhat bemusing as during the negotiations of the TPP criticisms and coverage of ISDS dramatically increased.[138] The introduction of an appellate body would have gone some way to legitimising the process.

However, rather than trying to reform a flawed system and legitimise ISDS, perhaps New Zealand would be better off by advocating for an entirely new investment arbitration system in future investment agreements. The European Union has developed a two-tier Investment Court System (ICS). It is suggested that much of the criticism of ISDS has centred on the arbitration model of dispute resolution rather than the decisions of the arbitrators.[139] This is reflected by the significant amounts of concern to the claim brought by Philip Morris against Australia. An institutionalised approach would reflect the maturation of the ISDS system. It would reduce the ad hoc nature of current ISDS systems and replace it with permanent panel members. It would mean the arbitrators would get more experience with disputes rather than being thrust into the arena, leading to more consistent and accurate results. The ICS also seeks to promote transparency.[140] Furthermore, the investment court would reduce the problems of double-hatting and allegations of bias. If members of the panel are permanent then they are unable to 'double-hat'.[141] There is no concern that on one dispute they are the arbitrator and on another counsel for the investor thus minimising the concerns of bias. The investment court goes

[136] Diependaele, De Ville and Sterckx, above n 57, at 6.

[137] Alvarez, above n 6, at 528.

[138] Kawharu and Nottage, above n 12, at 4.

[139] At 41.

[140] Diependaele, De Ville and Sterckx, above n 57, at 6.

[141] At 6.

significantly further in legitimising the dispute settlement mechanisms. Without questions of bias plaguing the system there will be fewer concerns that the system is illegitimate and a violation of the rule of law.

The investment court model is also a more realistic option for the New Zealand government to strive for. In TPP negotiations New Zealand tried to negotiate for the exclusion of ISDS claims but was ultimately unsuccessful.[142] The Labour-led coalition appeared to suggest initially that in all future trade agreements they will ensure there are no ISDS provisions. If this is a non-negotiable policy then the investment court model may not do enough to alleviate concerns. There will still be concerns that the sovereign's right to regulate has been severely infringed. However, it is uncertain that this stance is sustainable and the ratification of the CPTPP suggests that there has been somewhat of a backtrack on this policy. As a small country, New Zealand is often the rule-taker rather than the rule-maker, with other countries pushing for ways to protect their investors it appears that the government will have to compromise and include some form of dispute settlement for foreign investors. The same position was not tenable for Australia, which adapted their approach from no ISDS to a case by case basis. [143] Therefore, a compromise must be reached. If New Zealand is going to continue to enter investment agreements then it is unlikely it will be able to avoid ISDS, or at least a form of it. Countries that export foreign investment will want to ensure that their investors are sufficiently protected. The investment court model currently appears to be the best compromise available. New Zealand's Minister for Trade has confirmed that the Government is looking at the possibility of the investment court model.[144]

The ICS is a permanent body. This has the downside of overhead costs. If New Zealand were to pursue this option then they would have to fund the court and pay for the associated

[142] New Zealand Ministry of Foreign Affairs and Trade, above n 70, at 38.

[143] Kawharu and Nottage, above n 12, at 40.

[144] At 11.

costs. In contrast, the current ISDS system has little to no overhead costs.[145] The benefit of an ad hoc tribunal from a monetary perspective is that it does not have to be paid for when it is not in use. No investor has brought an ISDS claim against New Zealand. Therefore, an ICS would significantly increase costs from the current level. Furthermore, since New Zealand has not faced an ISDS claim, the inclusion of ISDS may be a concession it is willing to make in negotiations. However, the new government's position on ISDS means this is unclear. The European Union has a desire for the ICS to develop into a multilateral investment court.[146] A multilateral form would help reduce the costs, and as a result would be preferable from a New Zealand point of view to the current ICS. The inclusion of an ICS would not address the concerns relating to the sovereign's right to regulate. The same issues would still arise if the ICS was used instead of ISDS. Whilst it is a different dispute settlement system, concerns surrounding the sovereign's right to regulate will remain. In New Zealand, the agreements would still be open to the criticism that it undermines the protection of land from foreign investment. However, a consistent, transparent and legitimate dispute settlement system will relieve a significant amount of public concern.

It is inherent that if New Zealand is going to continue to enter into FTAs and BITs its right to regulate will be limited by the provisions contained within said agreements. This is the trade off to achieve the liberalisation of trade and investment. For any agreement to be desirable for New Zealand, there must be a balance. The provisions within the CPTPP recognise the legitimacy of public welfare objectives. If New Zealand is able to implement legitimate policy goals without the fear of contravening the agreement, then perhaps something close to a balance has been achieved. However, the drafter's notes of the investment chapter reflect a clear intention to allow the parties to regulate for legitimate policy goals.[147] Legitimate public welfare objectives of the state will be considered in

[145] Prof Dr. Joerg Risse "A New "Investment Court System" – Reasonable Proposal or Nonstarter" (25 September 2015) Global Arbitration News <https://globalarbitrationnews.com/investment-court-system-20150925/>.

[146] European Commission "State of the Union 2017 – A Multilateral Investment Court" <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf>.

[147] See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 9, footnote 14.

assessment. The CPTPP also provides sufficient protection to investors. States will not be able to discriminate against them, rather implement legitimate policy goals.

The investment chapter of the TPP and CPTPP largely followed the US Model BIT. The approach of New Zealand to these provisions has been what can we get from these concessions.[148] Furthermore, in other trade agreements New Zealand has based its negotiations off the US model agreement.[149] With the US seemingly removing itself from the web of trade agreements it is an opportunity to take a step back and re-assess the normative value of the US-style commitments.[150] With the new Government, New Zealand appears to be positioning itself and providing soft commitments to take a pro-active role in reforming the system.[151] This is desirable. By adopting a different approach New Zealand may be able to develop into a rule-maker rather than a rule-taker. New Zealand is not large enough to influence this alone. As Luke Nottage and Amokura Kawharu suggest, Australia and New Zealand should "work together to influence the future trajectory of international investment law".[152] As a smaller country New Zealand should prefer multilateral trade negotiations. By working together New Zealand can ensure that it has a greater negotiating tool to protect its interests. This pro-active role will also further signal New Zealand's intent to become a leader within the Asian region.[153]

V Conclusion

In conclusion, the CPTPP's investment chapter is not the gold standard that the overall agreement purports to be. It is merely improving the current system. It has responded to the criticisms that investment agreements has attracted, without 're-inventing the wheel.'

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[148] Frankel S R, Lewis M K, Nixon C, Yeabsley J, 'The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy', in Recalibrating Behaviour: Smarter Regulation in a Global World, edited by Susy Frankel and Deborah Ryder (Wellington, LexisNexis, 2013), pp. 17-62.

[149] Kawharu and Nottage, above n 12 at 37.

[150] Douglas A. Irwin "The False Promise of Protectionism: Why Trump's Trade Policy Could Backfire" (May/June 2017) Foreign Affairs < https://www.foreignaffairs.com/articles/united-states/2017-04-17/false-promise-protectionism>

[151] Kawharu and Nottage, above n 12, at 40.

[152] At 38.

[153] At 41.

These improvements will not persuade the staunch critics of ISDS. New Zealand may still face conflicted opinion over ISDS and the agreement itself. New Zealand remains in an interesting position. With a new Government and the US pulling out of world trade, a new approach can be taken in future treaty negotiations. Future treaties should not blindly follow the US Model BIT and alternative approaches and improvements to ISDS should be considered, such as the investment court model. The changes in the CPTPP investment chapter provide a good model for New Zealand to promote in future agreements. This is not to say it is perfect, but it provides a basis from which future reforms can be made.

If the dispute resolution process is fair, consistent and transparent then concerns will be softened. Currently, there is a significant lack of confidence in the decisions made by an ad hoc tribunal with no appellate mechanism. This leads to significant criticisms and concerns as it has the power to curtail the regulatory space of the government. The formation of a court will ensure that the process of dispute resolution is done in an above-board and fair manner.

The provisions in the CPTPP to incorporate legitimate regulatory objectives is, if effectual, a substantive protection for New Zealand's right to regulate. In trade agreements, it is necessary for New Zealand to have the space to regulate for legitimate policy objectives whilst also ensuring investor's that they are protected. This is achieving the right balance.

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