Globalised Constitutional Realism:

The Trans-Pacific Partnership Agreement within New Zealand's Constitution

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"When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all ... Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."

Juan Fernández-Armesto, international arbitrator and commercial lawyer.

Introduction

Ferment is abroad in New Zealand.[1] Politicians and protesters are trading blows over a proposed treaty that is poised to change the rules of the game for international business in the twenty-first century. The Trans-Pacific Partnership Agreement (TPPA) hopes to unite twelve states under a vast liberalised market by reducing barriers and promoting regulatory coherence. But the promise of economic growth comes at a price. Robust investor rights are to be enforced through Investor-State Dispute Settlement (ISDS), a mechanism allowing investors to directly challenge state actions before arbitral tribunals. The prospect of foreign interference with legal autonomy cuts against dominant understandings of democratic government and raises important constitutional questions.

Chapter I outlines the current debate. Critics emphasise a democratic deficit in negotiations but the constitutional substance of the treaty has been neglected.

Chapter II looks at how scholars integrate the influence of treaties into New Zealand's unwritten constitution. Constitutional orthodoxy relies on an international/domestic dualism that is frustrated by the breadth of investment treaties.

Chapter III attempts to theorise the investment treaty system as a feature of the new constitutionalism of disciplinary neoliberalism. While this framework elucidates the politico-economic impetus behind investment treaties, the notion of conflicting constitutionalisms backslides into dualism.

Chapter IV identifies constitutional realism as a theoretical lens that places appropriate focus on the effect of an instrument rather than its source. The descriptive threshold of significant influence on the generic exercise of public power deconstructs dualistic treatment of the TPPA.

[1] "Ferment is abroad in the law" is the opening sentence of the article KN Llewellyn "Some Realism about Realism – Responding to Dean Pound" (1931) 44 Harv L Rev 1222, as referenced by Matthew Palmer in his explication of constitutional realism – "Ferment is abroad in American constitutional discourse": Matthew SR Palmer "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution" (2006) 54 Am J Comp L 587 at 588.

Chapter V applies globalised constitutional realism to the leaked investment chapter of the TPPA to show how ISDS would take priority over domestic courts, protection from indirect expropriation would introduce a strong takings doctrine to New Zealand's constitution, and the threat of arbitration could create a concomitant chilling effect on legislation.

Chapter VI explores the legitimacy of these constitutional changes, highlighting how disproportionate foreign influence could threaten the popular consensus through which public power maintains authority.

Ultimately, globalised constitutional realism offers a framework to conceptualise the TPPA *within* New Zealand's constitution. Beyond its sectoral impacts, the investment chapter would significantly influence the generic exercise of public power across the judicial, executive, and legislative branches of government such that binding treaty action ought to be recognised as a species of serious constitutional reform. This analysis should survive any minor amendments to the leaked text in the final agreement.

Chapter I New Zealand and the TPPA

What began as an unassuming regional bargain has morphed into a mammoth agreement embracing 40 percent of global gross domestic product (GDP) and one third of world trade.[2] Eleven states joined New Zealand at the negotiating table to craft "high standards worthy of a 21st century trade agreement": Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, the United States (U.S.), and Vietnam.[3] Along with its companion agreements, the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA), the TPPA has become synonymous with U.S. economic interests abroad.[4] A push for a definite deal stalemated in July 2015 due to tensions over automobiles, dairy tariffs, and biopharmaceutical monopolies but the parties eventually

[2] Joshua P Meltzer "The Trans-Pacific Partnership Agreement, the environment and climate change" in Tania Voon (ed) *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Publishing, Northampton, 2013) 207 at 208.

[3] Ministry of Foreign Affairs and Trade (MFAT) "Trans-Pacific Partnership (TPP) Negotiations" (25 May 2015) <www.mfat.govt.nz>

[4] The geopolitical context of these agreements is highlighted by the exclusion of prominent emerging economies such as China, Brazil, Russia, India, and South Africa.

agreed to a final text on 5 October 2015 following lengthy discussions and concessions in Atlanta.[5]

Responsibility for New Zealand's negotiations fell on the shoulders of the Ministry of Foreign Affairs and Trade (MFAT), defending the TPPA as an agreement that will "deepen economic ties … by opening up trade in goods and services, boosting investment flows, and promoting closer links across a range of economic policy and regulatory issues."[6] MFAT points to predictions of the East-West Center to support the economic promise of GDP gains of US$2 billion in the year 2025, a 0.9% increase.[7] However, the U.S. Department of Agriculture has projected a modest 0.01% increase in New Zealand's real GDP relative to a baseline scenario premised on the existing framework.[8] MFAT's failure to comprehensively eliminate beef and dairy tariffs suggests economic benefits will fall short of these estimates.

The treaty is mundanely styled as a trade agreement yet only five of the 29 chapters deal with traditional trade issues. Moreover, the parties agreed that no documents aside from the final text will be released for four years after the agreement comes into effect. It is this perceived procedural impropriety that has struck a chord with the New Zealand public.[9] Growing enclaves of dissent have sprouted throughout society.

The veil of secrecy has forced scholars to turn to leaked chapters. If these drafts accurately reflect the final text, critics believe the TPPA will catalyse many undesirable changes to New Zealand's legal landscape, including the regulation of agriculture, food safety, climate

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[5] Stuff "TPP: Trans Pacific Partnership talks fail in face of NZ, Canada dairy clash" (1 August 2015) <www.stuff.co.nz>; Jackie Calmes "Trans-Pacific Partnership Trade Deal Is Reached" *New York Times* (5 October 2015) <www.nytimes.com>

[6] MFAT "Trans-Pacific Partnership", above n 3.

[7] Ibid.

[8] As an added caveat, the "hypothetical and stylized TPP scenario" optimistically assumes "full elimination of intra-TPP agricultural and nonagricultural tariffs and tariff-rate quotas.": Mary E Burfisher, John Dyck, Birgit Meade, Lorraine Mitchell, John Wainio, Steven Zahniser, Shawn Arita, and Jayson Beckman *Agriculture in the Trans-Pacific Partnership* (ERR-176, Economic Research Service, U.S. Department of Agriculture, October 2014) at 2 and 21.

[9] Online discussion and nationwide protests have been facilitated by It's Our Future, self-styled as "a campaign to make the negotiations public, and to tell the NZ government not to trade away our future.": It's Our Future "About It's Our Future – Kiwis concerned about the TPPA" (2015) <www.facebook.com>

change policy, public health and pharmaceutical subsidies, intellectual property, government procurement, employment relations, capital controls, trade in services, financial sector regulation, and Māori interests.[10] Jane Kelsey remains the foremost scholarly critic, having edited and authored two book length investigations.[11] Kelsey highlights how the TPPA attempts to create "a seamless regulatory environment" that targets "the philosophy and processes, as well as the substance, of the parties' domestic policy and regulatory decisions".[12] Such unprecedented breadth is a conscious project of its architects. In the words of the chief executive of BusinessNZ, the TPPA will have "the capacity to reach further into domestic economies and domestic policy settings than a conventional trade agreement".[13] This would be chiefly realised through provisions in the investment chapter, notably the inclusion of ISDS as a mechanism for foreign investors to contest regulations.

The text is expected to come into force within two years once parties have complied with their domestic procedures. Under New Zealand's constitutional arrangements, treaties are largely monopolised by the executive branch. Some movement has been made in recent decades to increase legislative scrutiny over the treaty-making power.[14] The Cabinet Manual states that MFAT will identify treaties to be presented to Parliament before the executive takes binding action, whereupon it is referred to select committee.[15] MFAT prepares a National Interest Analysis covering the reasons for binding action as well as means of implementation and its implications.[16] Growing TPPA concerns indicate this process of eleventh hour examination is inadequate.[17] Accordingly, some legislative actors attempted to rein in the foreign policy prerogative. Fletcher Tabuteau MP introduced a member's bill –

[10] See generally the range of contributions to Jane Kelsey (ed) *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books, Wellington, 2010).
[11] Ibid; Kelsey *Hidden Agendas: What We Need to Know about the TPPA* (Bridget Williams Books, Wellington, 2013).
[12] Kelsey "The Trans-Pacific Partnership agreement: a gold-plated gift to the global tobacco industry?" (2013) 39(2-3) Am J Law Med 237 at 241.
[13] Phil O'Reilly, quoted in ibid, at 237.
[14] See Treasa Dunworth "The Influence of International Law in New Zealand: Some Reflections" in Caroline Morris, Jonathan Boston, and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) 319 at 320-326.
[15] Cabinet Office *Cabinet Manual 2008* at [7.113] and [7.118].
[16] Ibid, at [7.116].
[17] Dunworth "International Law" [2015] NZ L Rev 285 at 307-308.

the delicately titled Fighting Foreign Corporate Control Bill – containing a single substantive provision: "New Zealand must not enter into an agreement with one or more foreign countries that includes provision for [ISDS]".[18] The Bill was narrowly voted down (61-60) at its first reading by the National-led government.[19]

While many scholars have probed the multifarious effects of the TPPA, constitutional theory is my preferred angle of lean.[20] Kelsey highlights "constitutional concerns" due to a dearth of parliamentary scrutiny and lack of consultation with Māori and the wider public.[21] Two challenges to negotiations touch on this territory. First, following a review of the Ombudsman, Kelsey has led an application in the High Court for judicial review of MFAT's decision to refuse a request under the Official Information Act 1982 for the release of negotiating papers.[22] Second, Māori leaders filed an urgent claim in the Waitangi Tribunal alleging the Crown is failing to protect tino rangatiratanga (sovereignty) and Māori intellectual property rights.[23] These claims focus on the process rather than the constitutional substance of the agreement. Nonetheless, New Zealanders know something big is happening. Street protests and online debate have exhibited broad appeals to constitutional buzzwords such as sovereignty and democracy. As Sir Kenneth Keith suggests, undertheorised sloganeering has limited value in helping us understand what is at stake.[24] New Zealand needs a framework to make sense of the impending influence of the TPPA.

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[18] Fighting Foreign Corporate Control Bill 2015 (14-1), cl 5.

[19] (22 July 2015) 707 NZPD 59.

[20] "[E]verything in discourse depends on what I call the 'angle of lean,' the direction you are facing when you begin your discursive task.": Stanley Fish *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Duke University Press, Durham, 1989) at 32.

[21] Kelsey *Hidden Agendas*, above n 11, at 100-112.

[22] "Co-applicants in the proceedings include Consumer NZ, the Association of Salaried Medical Specialists, Greenpeace and Oxfam, among others.": Jane Kelsey "Secrecy of TPPA documents heads to court" (press release, 31 July 2015) <www.scoop.co.nz> An overt constitutional challenge appeared in Japan on the grounds that the TPPA would violate the right to life and a stable food supply under art 25 of the Constitution of Japan: Japan Times "More than 1,000 plaintiffs file lawsuit to keep Japan out of TPP" (15 May 2015) <www.japantimes.co.jp>

[23] Joint Media Statement "TAIHOA to TPPA – application for urgent Treaty hearing" (press release, 24 June 2015) <www.scoop.co.nz>

[24] After a lengthy analysis of sovereignty, Sir Kenneth issues the following advice: "Beware of slogans… And ask yourself – is your reference to sovereignty, whether of Parliament or of the State,

I do not pretend to comprehensively pick apart the nuts and bolts of the TPPA or lay out its potential consequences brick by brick. Rather, I hope to explore the properties of investment treaties and assimilate their unique influence into a coherent account of the New Zealand constitution. Theorising the relationship between constitutions and these novel creatures of international law should help to conceptually situate the sectoral impacts of the TPPA.

Chapter II The Constitutional Problem of Investment Treaties

Before exploring the idiosyncratic features of investment treaties, it is useful to consider how orthodox accounts of New Zealand's constitution integrate the influence of treaties in general. Rather than sketch a comprehensive literature review, I will present a snapshot of the mainstream treatment of this relationship. This exercise exposes the assumption of an international/domestic dualism that fails to embrace the unique features of investment treaties and places a major conceptual hurdle in the path of full-blooded analysis.

A *Constitutional Orthodoxy in New Zealand*

New Zealand is notorious (in the lofty province of legal academia, at least) for the unwritten nature of its constitution.[25] That is, it lacks a codified supreme law – a Constitution with a capital C – against which one may clearly check the nature and extent of government. As Philip Joseph observes, there is no instrument which exhibits the twin characteristics of a written constitution, namely: *fundamental* law that "establishes the organs of government and invests them with the requisite authorities," and *higher* law that "protects the constitution from ordinary amendment or repeal".[26] The blurred boundaries and contestable character as to what constitutes the constitutional makes New Zealand's home-grown scholarship particularly innovative.

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correct? Is it helpful? Do you understand what it means in the proposed context?": KJ Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 Cambridge LJ 581 at 604.

[25] "It is said that New Zealand, the United Kingdom and Israel are the only developed nations that do not have a written constitution.": Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 19.

[26] Ibid, at 127.

As a point of entry, Sir Kenneth's introduction to the Cabinet Manual sheds light on the government's understanding of the constitutional. The main features of the constitution are contained in:[27]

> … formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. *The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.*

As an international lawyer, Sir Kenneth is attentive to the global context in which New Zealand is embedded. He notes that the rise of international law has reduced the powers of the state with "important consequences for national and international constitutional processes."[28] Moreover, "[s]ome limits on constitutional change arise from … international obligations".[29] At the forefront of the government's day-to-day guidebook, we find a concise reminder of the influence of the international.

This interpretation can be contrasted with the account contained in Joseph's magisterial text. He suggests two ways in which international law might migrate into the constitutional realm. First, international law may claim constitutional status after attaining *legal* pedigree on the domestic plane and, second, international instruments may serve as *extra-legal* limitations on parliamentary power.[30] Joseph singles out a species of international law as one of nine constitutional sources: imperial legislation, New Zealand legislation ("the primary source of the modern constitution"), the common law, *customary international law*, prerogative instruments, constitutional conventions, the law and custom of Parliament, the Treaty of

[27] Rt Hon Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office *Cabinet Manual 2008*, above n 15, at 1 (emphasis added).
[28] Ibid.
[29] Ibid.
[30] Joseph *Constitutional and Administrative Law*, above n 25, at 34 and 562.

Waitangi, and authoritative scholarly works.[31] The principles of customary international law, such as sovereign immunity, are automatically incorporated into constitutional law.[32] As Treasa Dunworth points out, this source has trivial impact because it can always be overridden by domestic statutes and often the posited rule has not reached customary status.[33]

On the other hand, New Zealand is party to nearly 1,700 *treaties* embracing a galaxy of issues.[34] Joseph believes these commitments can have extra-legal constitutional influence over Parliament because:[35]

1. governments do not promote legislation in defiance or disregard of treaty obligations;
2. the courts interpret legislation with the presumption that Parliament does not intend to legislate in defiance of obligations; and
3. treaties can impose positive obligations to harmonise domestic laws.

The first and third restraints are essentially the same. That is, as a result of obligations entered into by the government of the day, present and future parliaments may be enjoined to legislate

[31] Ibid, at 25-40. Under art 38(1)(b) of the Statute of the International Court of Justice (entered into force 24 October 1945), international custom is conceived as "evidence of a general practice accepted as law". Such customs must satisfy an objective and a subjective limb: "general practice, or *usus* or *diuturnitas*, and the conviction that such practice reflects, or amounts to, law (*opinio juris*) or is required by social, economic, or political exigencies (*opinio necessitatis*).": Antonio Cassese *International Law* (2nd ed, Oxford University Press, New York, 2005) at 156.

[32] Joseph *Constitutional and Administrative Law*, above n 25, at 34. The English courts have historically seesawed between the Blackstonian doctrine of automatic incorporation and a competing doctrine which would require positive transformation by Parliament or the courts, settling on the former in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356 (HL). New Zealand has followed this approach: *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1 (CA).

[33] Dunworth "The Influence of International Law", above n 14, at 327-8.

[34] Admittedly, this figure embraces antiquated commitments still in force, the earliest of which appears to be the 1815 Convention of Commerce between the United Kingdom and the United States of America: MFAT "New Zealand Treaties Online" <www.treaties.mfat.govt.nz> I use the term "treaty" in the generic sense defined in art 2(1)(a) of the Vienna Convention on the Law of Treaties (opened for signature 22 May 1969, entered into force on 27 January 1980): "[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." This definition embraces bilateral and multilateral instruments styled as a treaty, convention, covenant, agreement, exchange of notes, exchange of letters, or protocol.

[35] Joseph *Constitutional and Administrative Law*, above n 25, at 563.

or not to legislate. As Joseph correctly notes, such obligations cannot defeat domestic statutes and do not circumscribe the legal scope of Parliament's powers.[36]

Despite the formal accuracy of this account, it fails to paint a complete picture. Joseph's analysis relies on New Zealand's relationship with the 1966 International Covenant on Civil and Political Rights (ICCPR) as its archetypal experience. He notes efforts to "ensure scrupulous compliance" through substantive changes to a number of statutes prior to ICCPR ratification in 1978.[37] By 1985, the Department of Justice was seriously considering the implementation of an entrenched bill but, ultimately, opted for an interpretive statutory instrument: the New Zealand Bill of Rights Act 1990 (NZBORA). [38]

The ICCPR example is instructive for two reasons. First, it reflects the weight placed on the influence of human rights while constitutional commentators have tended to neglect the nebulous momentum of investment treaties.[39] This is ostensibly due to the fact that the latter are unlikely to require positive legal expression such that Parliament's ability to control the incorporation of commitments does not come into play. The effect of investment treaties is not so much to reform policy but to lock it in through obligations that make it very difficult for future governments to pursue a more activist role in the economy. [40]

Second, Joseph's account is premised on a conceptual dualism between international law and New Zealand law. According to Antonio Cassese, the dualistic conception of the interplay between the international order and domestic systems flows from the assumption that they

[36] Ibid, at 562.
[37] Ibid, at 563.
[38] Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6. See generally Keith "The New Zealand Bill of Rights Act 1990 – An Account of Its Preparation" (2013) 11 NZJPIL 1.
[39] While Kennedy Graham believes "no issue confronts human society … more in the twenty-first century than the relationship between major international treaties and national constitutional processes," he focuses on public international law instruments like human rights covenants: Kennedy Graham "Global Treaties and the New Zealand Constitution" in Caroline Morris, Jonathan Boston, and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) 291 at 291.
[40] Ben Thirkell-White "International Economic Law and the New Zealand Constitution" in Caroline Morris, Jonathan Boston, and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) 337 at 345.

"constitute two distinct and formally separate categories of legal orders".[41] They are held to differ as to the subjects,[42] sources,[43] and content of their rules.[44] Orthodox constitutional accounts, while they vary in their emphases, conceive of the international sphere as an exogenous pressure that can be carefully mediated by domestic mechanisms. But international law is no longer simply a *jus inter potestates* governing state-to-state relations.[45] The investment treaty system exposes the outmoded nature of the dualist paradigm.[46]

B *Investment Treaties*

Foreign investment enjoys a reputation as "an engine of economic growth, a source of foreign currency income, a stimulator of the local economy, and a source of foreign skills, information and know-how."[47] In the post-war period, the creation of favourable conditions was considered essential to Third World development and the reconstruction of Europe. Investors sought certainty that their property would not be expropriated through, for example, nationalisation of industry in politically unstable states. A number of World Bank initiatives spurred treaties containing protections and dispute resolution provisions. The International Convention on the Settlement of Investment Disputes (ICSID) created a forum for settling disputes and the Multilateral Investment Guarantee Agency offered insurance against non-commercial risks.[48] As Surya Subedi observes, the 1966 formation of ICSID catalysed a "silent revolution in international foreign investment law" by allowing private companies direct access to a settlement mechanism on the international plane.[49]

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[41] Cassese *International Law*, above n 31, at 213-214.

[42] "[I]ndividuals and groups of individuals in the case of domestic legal systems, States in the case of international law": ibid, at 214.

[43] "[P]arliamentary statutes or judge-made law being the main sources of internal law, while treaties and custom are the two principal law-creating processes in international law": ibid.

[44] "[N]ational law regulating the internal functioning of the State and the relations between the State and individuals, whereas international law chiefly governs relations between sovereign States": ibid.

[45] The textbook example is the emergence of individual responsibility under international criminal law: ibid, at 217.

[46] I prefer the term *investment treaty system* over the misleading *international investment law* because, as discussed below, investment treaties do not strictly operate inter-nationally.

[47] Surya P Subedi *International Investment Law: Reconciling Policy and Principle* (2nd ed, Hart Publishing, Portland, 2012) at 81.

[48] Ibid, at 30-33.

[49] Ibid, at 31.

Investment protections have been quietly uprooted from their intended paradigm and installed in agreements between developed states. The connections created by the "noodle bowl"[50] of regional and bilateral investment treaties (BITs) typify the formalisation of legal and economic globalisation. Globalisation is broadly conceived as "the widening, deepening and speeding up of worldwide interconnectedness".[51] Ben Thirkell-White notes the rapid acceleration of *legal* globalisation in New Zealand during the 1980s through the Fourth Labour Government's "domestic choice to liberalise economic regulation (trade, finance and investment) in ways that allow or promote cross-border economic integration".[52] Throughout the 1990s, moves were made to cement these reforms through international commitments.[53] By February 2015, there were 3,268 investment treaties in force worldwide.[54]

In order to fully grasp the constitutional problem of investment treaties, it is important to linger over five key features: *ISDS*, *expropriation*, *national treatment*, *minimum standard of treatment*, and *most-favoured-nation treatment*. These provisions demonstrate the novel ways in which investment treaties straddle the international/domestic binary. Investment rules typically cover all assets an investor owns directly or indirectly, including the expectation of gain or profit.[55]

1 *ISDS*

The ISDS clause is the mainstay of the modern treaty – it serves as the gateway to the fora in which substantive protections are applied. This innovative provision emerged in North

[50] This metaphor is traceable to the "spaghetti bowl" phenomenon used to describe the spread of preferential trade agreements during the 1990s in Jagdish N Bhagwati and Arvind Panagariya (eds) *The Economics of Preferential Trade Agreements* (American Enterprise Institute, Washington, D.C., 1997) at 53. However, given the rise in Asia-Pacific trade and investment treaties, the notion of a "noodle bowl" has gained traction.

[51] David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton *Global Transformations: Politics, Economics and Culture* (Stanford University Press, Redwood City, 1999) at 2.

[52] Thirkell-White "International Economic Law", above n 40, at 340.

[53] Ibid.

[54] United Nations Conference on Trade and Development (UNCTAD) "Recent trends in IIAs and ISDS" (IIA Issues Note, No. 1, February 2015) at 1.

[55] Kelsey "How the Trans-Pacific Partnership Agreement could heighten financial instability and foreclose governments' regulatory space" (2010) 8 New Zealand Yearbook of International Law 3 at 18.

American model BITs to solve the problem of states refusing to provide written consent required under arbitration conventions.[56] Current drafting practice ensures entry into the treaty per se satisfies this jurisdiction requirement such that home state investors can automatically bring an action against a rogue host state.[57] Most treaties do not require the exhaustion of local remedies before resorting to arbitration to settle the interpretation of protections.[58] Under art 54 of ICSID, the determination of the tribunal is binding and enforceable in the legal system of the host state as if it were a final judgment of a court in that state.[59]

2 *Expropriation*

State parties are required to pay compensation for the nationalisation, expropriation, or deprivation of investor assets.[60] It is well-established that such standards require compensation for direct seizure as well as indirect expropriation.[61] Tribunals under the North American Free Trade Agreement (NAFTA) have invoked an expansive interpretation extending beyond "open, deliberate and acknowledged takings of property" to include:[62]

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[56] David Schneiderman *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, Cambridge, 2008) at 34-36. Along with the World Bank's ICSID, investment disputes may be brought before the United Nations Commission on International Trade Law, the Court of International Arbitration of the International Chamber of Commerce in Paris, the Stockholm Chamber of Commerce, or the Cairo Regional Centre for International Commercial Arbitration.

[57] Ibid, at 36.

[58] Subedi *International Investment Law*, above n 47, at 94. Parties are typically subject to very weak exhaustion requirements such as the obligation to, as far as possible, settle disputes amicably through consultations and negotiations: Free Trade Agreement between The Government of New Zealand and The Government of the People's Republic of China (signed 7 April 2008, entered into force 1 October 2008), art 152 [NZ-China FTA].

[59] Schneiderman *Constitutionalizing*, above n 56, at 36.

[60] Gus Van Harten *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford, 2007) at 82.

[61] Ibid, at 91.

[62] *Metalclad Corporation v United Mexican States (Merits)* (30 August 2000), 16 ICSID Rev 168, 40 ILM 36, 5 ICSID Rep 212, 13(1) World Trade and Arb Mat 45, para. 103.

> … covert or incidental interference with the use of property which has the effect of depriving the owner … of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

Thus, the rule encompasses regulatory takings – government measures that so impact on an interest that they amount to expropriation – in a way that echoes the high-water mark of American substantive due process during the *Lochner* era.[63] This proves problematic for proponents of any degree of regulatory intervention. As the Stiglitz Commission notes, "[b]y definition, regulations reduce profits because they restrict potentially profitable actions."[64] The widely used Hull Formula imposes a strict standard of "prompt, adequate, and effective compensation payable at fair market value, without delay, and fully realizable and transferable".[65] Measures amounting to expropriation tend to be outright prohibited unless they are in the public interest, non-discriminatory, and in accordance with the due process of law.[66]

Critics claim such provisions unduly limit regulatory autonomy. Accordingly, efforts have been made to clarify the parameters of expropriation. The United Nations Conference on Trade and Development (UNCTAD) reports the increased use of asset exclusion from definitions of investment as well as clearer obligations and exceptions in relation to the scope of indirect expropriation.[67] For example, an interpretive annex contained in U.S. BITs with Chile, Peru, and Singapore requires consideration of the economic impact on the investor, reasonable investment-backed expectations, and the character of government action.[68] This standard does little to broaden policy space compared to tests that direct arbitrators to consider the state's objectives and apply a proportionality test vis-à-vis investor impact.[69]

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[63] Schneiderman *Constitutionalizing*, above n 56, at 41 and 49.
[64] United Nations *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System* (21 September 2009) at 63, cited in Kelsey "Heighten Financial Instability", above n 55, at 20.
[65] Schneiderman *Constitutionalizing*, above n 56, at 34.
[66] Ibid.
[67] UNCTAD "Recent Trends", above n 54, at 3.
[68] Kelsey "Heighten Financial Instability", above n 55, at 20.
[69] Ibid.

3 *National Treatment*

National treatment is necessarily applied relative to the treatment of similar investors by requiring a host state to treat foreign investors no less favourably than domestic counterparts.[70] The standard emerged to dampen the protectionist impulse yet it applies to both de jure and de facto discrimination.[71] A seemingly neutral measure may affect foreign investors to a greater extent. As Gus Van Harten cautions, "governmental activity inherently involves differentiation among subjects of regulation and, if all such differentiation were prohibited, then investment treaties would scorch a wide swath of the regulatory landscape."[72] The interpretation of national treatment is a "difficult and value-laden task" because tribunals must determine "how far to cast the comparative net".[73]

4 *Minimum Standard of Treatment*

In addition to the relative standard, states must comply with an absolute floor. The minimum standard of treatment is derived from customary international law and comprises the twin limbs of "fair and equitable treatment" and "full protection and security" for investments.[74] Kelsey notes the former component has been interpreted as conferring "a right to a stable and predictable legal and business environment regarding the profitability or value of the investment at the time the investment was made."[75] This broad application has transformed the standard from a guard against the caprice of banana republics into an indefinite guarantee of a vague conception of fairness.[76]

5 *Most-Favoured-Nation Treatment*

Most-favoured-nation treatment requires the highest standard of treatment available to any foreign investor.[77] While conferral of this status has been central to trade policy for centuries, its sting is more palpable in the investment treaty system. Inclusion of such a provision allows

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[70] Van Harten *Investment Treaty Arbitration*, above n 60, at 82-84.
[71] Ibid, at 85.
[72] Ibid, at 86.
[73] Ibid, at 85.
[74] Kelsey "Heighten Financial Instability", above n 55, at 21.
[75] Ibid.
[76] Van Harten *Investment Treaty Arbitration*, above n 60, at 89.
[77] Kelsey "Heighten Financial Instability", above n 55, at 23.

investors to take advantage of more favourable protections negotiated under future treaties. This creates a "dynamic ratcheting effect where investor rights and state obligations extend far beyond what is in … the agreement itself."[78] Ripple effects are felt throughout the global economy such that protections are amplified at the expense of regulatory autonomy.

C *A Constitutional Problem*

The constitutional problem of investment treaties is that they do not respect the theoretical framework on which New Zealand's constitutional treatment of international law is premised. It should be increasingly clear that a rigid dualism between international law and domestic law is unsustainable. Dualism preserves the stability of constitutional systems as discrete objects of inquiry but can lead to a myopic disregard of the influence of the international. The investment treaty system is not a peripheral aberration that leaves Joseph's account unscathed. Rather, it reflects a structural shift; the system rides roughshod over taken-for-granted international/domestic and public/private binaries. Investment treaties are signed by states like any other public international law agreement. In practice, they involve private investors – usually transnational corporations with very deep pockets – commencing proceedings directly against a host state for its indulgence in unfavourable policies. The repertoire of protections enforced through ISDS can influence the shape of the state to a much greater extent than human rights instruments like the ICCPR. The New Zealand government can afford to ignore resolutions from the United Nations Human Rights Committee, created under the First Optional Protocol to the ICCPR, or the Attorney-General's reports of inconsistency under s 7 of NZBORA.[79] Any fallout from human rights indifference will likely take a purely political form. The threat of immense arbitration damages creates a disciplining effect much more binding and biting. We need to find a better way to think about these instruments and how they fit with New Zealand's constitutional arrangements.

[78] Ibid, at 24.

[79] See, respectively, JS Davidson "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" [2001] NZ L Rev 125 and Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443.

Chapter III Theorising the Investment Treaty System

A *Competing Paradigms*

Scholars are grappling with theoretical problems posed by the rise of investment treaties. Comparing the task to biological struggles to categorise the platypus, Anthea Roberts notes the investment treaty system "grafts private international law dispute resolution mechanisms onto public international law treaties … permit[ting] challenges to governmental conduct in a manner reminiscent of judicial review under domestic public law."[80] A number of conceptual analogues have been proposed to guide its development: public international law, private commercial arbitration, international trade law, domestic public law, international human rights law, environmental law, constitutional law, and global administrative law.[81] The actors invoking these analogies focus on different factors depending on their professional assumptions regarding the role of law, the state, and dispute resolution.[82] It is worth recalling Miles' Law – *where you stand depends on where you sit*. A private law paradigm emphasises equality of arms between parties whereas a public law paradigm prefers deference to the state, as well as transparent proceedings open to interested parties such as non-governmental organisations as amici.[83] In the same way that the platypus was classified as a monotreme, Roberts believes the investment treaty system may come to be seen as *sui generis*: "It is dramatically different from anything previously known in the international sphere."[84]

B *The New Constitutionalism of Disciplinary Neoliberalism*

Much of the literature surrounding the development of investment treaties falls outside of my constitutional focus. However, a burgeoning body of critical scholarship interrogates the system as a feature of *new constitutionalism*. This concept received nascent articulation in

[80] Anthea Roberts "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107 Am J Int'l L 45 at 45-46.
[81] Ibid, at 55.
[82] Ibid.
[83] Ibid, at 48 and 55.
[84] Jan Paulsson "Arbitration Without Privity" (1995) 10 ICSID Rev 232 at 256, cited in ibid, at 94.

the work of neo-Gramscian political economist Stephen Gill and has come to embrace a range of transformations:[85]

> [N]ew constitutional forms are emerging from the expansion of constitution-making throughout the world, the increasing juridification of international trade and investment laws, the articulation of an autonomous *lex mercatoria* and the emergence of global administrative laws that are knitting the world together under the promise of the global rule of law.

For Gill and others, these mechanisms are intimately linked to the politico-economic project of *disciplinary neoliberalism*, that is, "processes of intensifying and deepening the scope of market disciplines associated with the increasing power of capital in organizing social and world orders".[86] This model of governance attempts to entrench pro-market reforms such as fiscal discipline, reduced public expenditure, privatisation of state-owned enterprises, free trade, and financial liberalisation.[87] In short, new constitutionalism is conceived as the institutional manifestation of a governance structure for the global economy which privileges and protects the interests of transnational capital. It achieves these ends by freezing and rolling back the regulatory landscape through commitments that "secure the formal separation of politics and economics by limiting the policy space available to governments and progressive social forces".[88]

The new constitutionalist framework helps to contextualise the impetus behind investment treaties. Adam Harmes argues the push for protection is informed by neoliberalism's "explicit and self-conscious normative project for multilevel governance".[89] In the public choice tradition of constitutional economics, intellectuals such as James Buchanan and Barry

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[85] Stephen Gill and A Claire Cutler "New constitutionalism and world order: general introduction" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 1 at 2.

[86] Ibid, at 6.

[87] Gill *Power and Resistance in the New World Order* (2nd ed, Palgrave Macmillian, Basingstoke and New York, 2008) at 137-142.

[88] Adrienne Roberts "New constitutionalism, disciplinary neo-liberalism and the locking in of indebtedness in America" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 233 at 233.

[89] Adam Harmes "New constitutionalism and multilevel governance" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 143 at 147.

Weingast advocate a "market-preserving federalism" governed by two principles: "centralize those policy capabilities that relate to protecting property rights, enforcing contracts and creating/maintaining markets," and "decentralize the policy capabilities that neoliberals do not support, including those that relate to wealth redistribution and the correction of many market failures."[90] Through this vertical separation of powers, "undesired tax and regulatory powers … will be constrained by inter-jurisdictional policy competition and the need of governments to compete for mobile citizens and firms."[91] Transnational corporations and capital-exporting states favour instruments that maintain an exit option for investment. Such measures create self-enforcing market disciplines on policy experiments. But the theoretical promise of a global regulatory race to the bottom is threatened by efforts for multilateral harmonisation in areas such as climate change policy. A rising regulatory floor makes mere market access inadequate; market presence must be preserved.[92] Accordingly, investment treaties reach further behind the border.

Market-preserving federalism cuts against mainstream mythologies of constitution-building, such as the Dworkinian mandate that "mature democracies" must entrench protections for the rights of vulnerable individuals.[93] Digging deeper into the genealogy of liberal constitutions reveals that these traditions seldom emerge through authentic we-the-people moments. The transplantation of constitutional models from the domestic to the international plane is a logical extension of historical hegemonic preservation.[94] As Ran Hirschl argues:[95]

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[90] Ibid, at 148.

[91] Ibid.

[92] "[M]ere market *access* by the transnational producers of goods and services, monitored by the [World Trade Organisation], no longer is seen as adequate. Rather, market *presence* – a firm foothold within the State – is seen as an important component of freedom of trade [and investment].": Schneiderman "Investment Rules and the New Constitutionalism" (2000) 25 Law & Soc Inquiry 757 at 759 (emphasis in original).

[93] See Ronald Dworkin *A Bill of Rights for Britain: Why British Liberty Needs Protection* (University of Michigan Press, Ann Arbor, 1990), cited in Ran Hirschl "The origins of the new constitutionalism: lessons from the 'old' constitutionalism" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 95 at 97.

[94] See Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, 2004) at 50-99.

[95] Hirschl "The origins of the new constitutionalism", above n 93, at 101.

> [C]onstitutionalization is not merely … a form of Ulysses-like self-binding against one's own desires, but rather a self-interested binding of other, credibly threatening political actors who advance rival worldviews and policy preferences.

The move towards inflexible institutions, such as a bill of rights authorising strong judicial review, invariably produces political insurance for the interests of constitutional architects. Tim Di Muzio marshals considerable evidence from the writings of James Madison to demonstrate how the Framers of the U.S. Constitution were animated not so much by the urge to constrain power from above but by the fear of grassroots efforts that would harm property owners.[96] Recognising how threats to the primacy of property can arouse "the insurance logic of constitutionalization" helps us to understand the push towards treaties which "solidify the foundations for a business-friendly global economic order that is largely beyond national political control and the vicissitudes of democratic politics".[97]

C *Conflicting Constitutionalisms?*

David Schneiderman offers a thorough exploration of the investment treaty system through the lens of new constitutionalism. Focussing on Canada's NAFTA experience, he has steadily explicated the constitution-like features of the "investment rules regime".[98] Liberal constitutions institutionalise meta-rules and procedures that stand beyond the fray of day-to-day politics and delimit possibilities for reform.[99] Schneiderman argues investment treaties advance a similar pre-commitment strategy. Like domestic constitutions, investment rules

[96] Tim Di Muzio "Toward a genealogy of the new constitutionalism: the empire of liberty and domination" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 81 at 90-93. See generally Jennifer Nedelsky *Private Property and Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (University of Chicago Press, Chicago, 1990).

[97] Hirschl "The origins of the new constitutionalism", above n 93, at 105.

[98] His earliest contribution appears to be Schneiderman "Canadian Constitutionalism and Sovereignty After NAFTA" (1994) 5 Constitutional Forum 93. He has written two books on the subject including Schneiderman *Constitutionalizing*, above n 56, and Schneiderman *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave Macmillan, Basingstoke, 2013).

[99] John Rawls *Political Liberalism* (Columbia University Press, New York, 1993) at 161, cited in Schneiderman *Constitutionalizing*, above n 56, at 3.

restrict the imaginings of future generations by placing legal limits on the authority of government, quarantining property rights from politics.[100]

This account of investment treaties – which Schneiderman labels *constitutionalist* – is not confined to the ivory tower. Former U.S. President Ronald Reagan described NAFTA's 1987 predecessor, the U.S.-Canada Free Trade Agreement, as a "new economic constitution for North America".[101] Unlike Reagan, however, most proponents of the account focus on "preserving the particular, the local, or the national in the face of pressures for further continental [or global] integration."[102] The constitutionalist description is opposed by an *internationalist* view that emphasises "the universal and the transcendent in the face of resistance by self-seeking states and national citizenries."[103] This account fiercely resists parallels drawn by constitutionalists between investment treaties and the partisan principles of U.S. constitutional law.[104] Internationalist readings of NAFTA deflate its aspirations by pointing to the origins of its mechanisms in public international law and private commercial arbitration.[105] However, placing undue weight on the international and private *source* of investment treaties detracts from their very real domestic and public *effect*.[106]

Thus, a possible answer to the question "What is the relationship between the investment treaty system and constitutional law?" is the counterintuitive notion that the investment treaty system *is* constitutional law. Schneiderman's conclusion has several potential consequences for the way we think about the constitutions of Westphalian nation-states like New Zealand.

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[100] Schneiderman *Constitutionalizing*, above n 56, at 4.

[101] Lansing Lamont "A Singular U.S.-Canada Achievement" *The New York Times* (New York, 19 January 1988) at A27, cited in ibid, at 4.

[102] Schneiderman "Constitution or model treaty? Struggling over the interpretive authority of NAFTA" in Sujit Choudry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2006) 294 at 295.

[103] Ibid, at 295-296. The internationalist sentiment is best expressed by Hon Peter Dunne MP's online defence of his position regarding the Fighting Foreign Corporate Control Bill – "I have always been a liberal, globalist, free trader, so naturally I voted against Tabuteau's conservative, xenophobic, protectionist Bill.": Peter Dunne on Twitter (22 July 2015) <www.twitter.com>

[104] Schneiderman "Constitution or model treaty?", above n 102, at 297-298.

[105] Ibid, at 304-314.

[106] This important distinction is emphasised in the following chapter.

Once alert to the constitution-like features of the investment treaty system, one can theorise its relationship with constitutions in two directions. First, from an *external* perspective, investment rules can be conceived as an emergent supra-constitutionalism.[107] This strong version of new constitutionalism imagines investment treaties as a framework that supplants the autonomy of states in the same sense as the Treaties of the European Union. Kelsey believes mainstream responses to the tension between globalisation and domestic law treat the state as either omnipotent ("states voluntarily concede the reduction of their autonomy, but their sovereignty remains inviolate") or moribund ("the emergence of a pluralist and non-state-centred system of global governance").[108] A supra-constitutionalist conception of the investment treaty system falls into the latter trap. While the premise of supra-constitutionalism fits with the impetus behind new constitutional developments, the promise of a stateless utopia tends to neglect the fact that domestic laws and institutions are not replaced by the demands of neoliberalism. Rather, they are reinvented.[109]

Indeed, from a second perspective, one can examine the *internal* effects of investment rules on domestic constitutions.[110] Schneiderman offers the case study of the sweeping reforms performed by Mexico to clear the way for NAFTA accession.[111] President Salinas made 30 amendments to the Constitution of 1917 in order to assuage the anxieties of Mexico's treaty partners.[112] A key concern had been art 27 which placed foreign investment under the jurisdiction of the domestic courts and imposed limits on foreign ownership of land and natural resources.[113] This article has been lauded as the most significant legal outcome of the

[107] Schneiderman "Investment Rules", above n 92, at 762.
[108] Kelsey "Global Economic Policy-Making: A New Constitutionalism?" (1999) 9 Otago L Rev 535 at 536.
[109] "[T]he state continues to play an important role, often as the institutional home for the enactment of the new policy regimes we associate with economic globalization. This institutional home within the state has evolved sharply over the last two decades and today consists largely of the executive branch, ministries of finance, central banks and a few specialized, often new, agencies.": Saskia Sassen "When the global inhabits the national: fuzzy interactions" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 115 at 124.
[110] Schneiderman "Investment Rules", above n 92, at 764.
[111] Ibid, at 765.
[112] Ibid, at 766.
[113] Ibid, at 765.

Mexican revolution because it provided the foundation for a strong interventionist state.[114] Nonetheless, the government neutralised its effect through a number of informal edicts.[115] While one could attribute this capitulation to Mexico's weak bargaining position, Kelsey points out how earlier governments had taken stauncher positions and that, ultimately, these reforms are symptomatic of a neoliberal administration locking in its commitments.[116]

As a further example, the constitutional settlement of post-Apartheid South Africa contains limited property protections that delicately reverse the legacy of black dispossession without disenfranchising white landowners.[117] However, the 1995 Canada-South Africa BIT did not distinguish between non-compensable deprivations and compensable expropriations.[118] Schneiderman notes that the Constitutional Court of South Africa is required to take international and foreign law into account when interpreting legislation and the Bill of Rights.[119] Thus, the Court could harmonise constitutional provisions with the BIT or stick to a strict interpretation. The latter approach would have the anomalous effect of giving Canadian investors greater rights than South African citizens.[120] This problem has dissolved as a result of South Africa's revision of its obligations following a 2009 claim from Italian granite investors.[121] The case triggered a wholesale review which determined that the socioeconomic benefit of pursuing progressive policies without the threat of arbitration outweighed termination costs.[122]

Kelsey has argued that Schneiderman's internal account carves an attractive path between the Westphalian status quo and premature assertions of supra-constitutionalism.[123] She

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[114] Ibid.
[115] Ibid, at 766.
[116] Kelsey "Global Economic", above n 108, at 547.
[117] Schneiderman *Constitutionalizing*, above n 56, at 139.
[118] Ibid, at 144-145.
[119] Ibid, at 147.
[120] Ibid, at 144.
[121] *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.
[122] See generally Mohammed Mossallam "Process Matters: South Africa's Experience Exiting its BITs" (Global Economic Governance Programme, University of Oxford, Working Paper 2015/97, January 2015).
[123] Kelsey "Global Economic", above n 108, at 546.

claims these experiences of "conflicting constitutionalisms" illustrate the nonlinear ways in which investment treaties "variously defer to national laws, supplement them and replace them, in a continuous dialectical relationship."[124] Overseas examples show that the extent to which new constitutionalism supersedes domestic forms depends on several factors, including:[125]

> [T]he geo-political and economic power of the particular state, the extent of dependence on international capital, the policy inclination of the incumbent government, the willingness of the judiciary and parliament to diverge from the executive and the potency of domestic oppositional forces.

This analysis is useful but it is an imperfect framework to theorise the relationship between constitutions and the investment treaty system. A dialectical relationship implies two ontologically distinct structures. In order for the process of supplementation to occur, an investment treaty is presently conceived as something "out there" which does not overlap with domestic constitutions. While the trope of dialectic suggests eventual synthesis, the notion of conflicting constitutionalisms mirrors the international/domestic dualism of constitutional orthodoxy, albeit in a more nuanced form.

I believe this backsliding into dualism flows from an unduly narrow and monolithic conception as to what counts as constitutional. The examples marshalled by Schneiderman and Kelsey – Mexico, South Africa, the Philippines, India, and the U.S. – are states that have written constitutions. As Matthew Palmer notes, conventional wisdom is relatively imprisoned by texts labelled "The Constitution".[126] Formalistic analysis of a finite document cannot comprehensively contain the constitutional.[127] Palmer believes that in order to

[124] Ibid, at 545-546.
[125] Ibid, at 546.
[126] Palmer "Using Constitutional Realism", above n 1, at 588.
[127] "A constitution is not just a document. It is not even a document. To understand a constitution we need to understand the pathways of power that are more than merely documentary…": Palmer "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 PLR 133 at 134.

understand a complete constitution, whether written or unwritten, it is necessary to adopt a purposive interpretation:[128]

> The generic purpose of a national constitution is to constitute an organization to exercise the power of national government… [That is,] to affect and to effect, in some way, the exercise of public power.

Palmer's approach transcends traditional limitations as to the *source* of a constitution and places emphasis on *effect*. Once attuned to this version of the constitutional, the distinction between the investment treaty system and domestic constitutional law begins to dissolve. Palmer has assembled a framework that permits a thoroughgoing deconstruction of the standard dichotomy between international and domestic law.[129]

Chapter IV Towards Globalised Constitutional Realism

A *Constitutional Realism*

Palmer calls his perspective *constitutional realism*.[130] He proceeds from the general premise that "[a] constitution is about public power and how it is exercised."[131] Public power is not conceived as Tawney's tautology ("Power over the public is public power."[132]) or the whole gamut of reviewable decisions under administrative law. Public power is that which is exercised by the three branches of government. This approach overlaps with Dicey's account of the English constitution as embracing "all rules which directly or indirectly affect the

[128] Palmer "Using Constitutional Realism", above n 1, at 594.

[129] "One deconstructs an opposition not by reversing the hierarchy of its poles but by denying to either pole the independence that makes the opposition possible in the first place.": Fish *Doing What Comes Naturally*, above n 20, at 211.

[130] Palmer "Some Realism about Relevance: Who Interprets New Zealand's Constitution?" in Jack Hodder, Sir Geoffrey Palmer, and Sir Ivor Richardson (eds) *New Zealand's Constitutional Arrangements: Where are we heading?* (New Zealand Law Society, 2005) 101; Palmer "Using Constitutional Realism", above n 1; Palmer "What is New Zealand's Constitution", above n 127; Palmer "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dalhousie LJ 1; Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565.

[131] Palmer "What is New Zealand's Constitution", above n 127, at 134.

[132] RH Tawney *Equality* (Allen & Unwin, London, 1931) at 190.

distribution or the exercise of the sovereign power in the state."[133] However, Palmer's chief influence is the institutional focus of Karl Llewellyn's legal realism.[134] As institutions, constitutions are produced by "multicausal, nonlinear, reciprocating, recursive interactions between law, the environment in which it works, and the ideas that people have about it."[135] Drawing on the Māori notion of tikanga, Palmer explains, "Our constitution is not a thing, it is a way of doing things."[136]

Constitutional realism requires diagnostic expansion from text to context. In particular, Palmer takes up Llewellyn's "insistence on evaluation of any part of the law in terms of its *effects*".[137] This methodology opens the door to sources that are not classically considered constitutional.[138] Placing focus on the real-world impact of public power highlights how a constitution is "made up of the structures, processes, principles, rules, conventions and even culture that *constitute* the ways in which government power is exercised."[139] For the realist, something should be regarded as constitutional if it plays "*a significant role in influencing the generic exercise of public power*" through any of these avenues.[140] The criteria of significance and genericism exclude features of the legal landscape that shape the state in lesser ways; to use Palmer's example, the Liquor Licensing Appeal Authority.[141] Such structures and processes are not generic to the operation of government and fail to qualify as constitutional.[142] Thus, Palmer offers a threshold that embraces John Griffith's notion of a

[133] AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan, London, 1960) at 23, cited in Palmer "What is New Zealand's Constitution", above n 127, at 135.
[134] Palmer draws on the realist conception of the U.S. Constitution contained in KN Llewellyn "The Constitution as an Institution" (1934) 34 Colum L Rev 1, cited in Palmer "What is New Zealand's Constitution", above n 127, at 135.
[135] Arthur F McEvoy "A New Realism for Legal Studies" (2005) Wis L Rev 433 at 434, cited in Palmer "Using Constitutional Realism", above n 1, at 593.
[136] Palmer "Constitutional Culture", above n 130, at 597.
[137] Palmer "Using Constitutional Realism", above n 1, at 594 (emphasis added).
[138] "[T]he criterion I suggest – affecting the reality of the exercise of power – is not limited as to source.": ibid, at 595.
[139] Palmer "What is New Zealand's Constitution", above n 127, at 134 (emphasis in original).
[140] Ibid, at 137 (emphasis added).
[141] Since 2012, the Alcohol Regulatory and Licensing Authority: ibid, at 137-138.
[142] Ibid, at 138.

"political constitution" yet escapes the vagary of his claim that "the constitution is no more and no less than what happens."[143]

Palmer suggests that, under the rubric of constitutional realism, the elements of New Zealand's constitution fall into four categories that vary as to their formality.[144] First, *constitutional conventions* are non-legal "norms of political behaviour which are generally acknowledged to have attained a significance and status worthy of general acknowledgment" such as the requirement that the Governor-General acts on ministerial advice.[145] Second, the *common law*, including the common law of Parliament, comprises constitutional rules and principles applied by the judiciary.[146] Third, the *instruments of each branch of government*, such as legislation and the Cabinet Manual, can acquire persuasive constitutional effect.[147] Finally, the interpretations of these instruments can be properly characterised as *constitutional interpretation*; that is, "the determination, *authoritative in practice*, of what an element of the constitution means as applied to a particular instance of doubt or dispute."[148] This entails Palmer's essential lesson that public office-holders possess significant and underappreciated interpretive power over the constitution.[149]

Palmer's taxonomy offers a tentative snapshot through the lens of realism. However, in the final analysis, it is culture which anchors a constitution.[150] Palmer suggests "New Zealanders' mindset or set of attitudes that relate to the exercise of public power" can be traced to a tripartite cultural cocktail: *pragmatism*, *egalitarianism*, and *authoritarianism*.[151] These features reflect the historical fact that "New Zealanders expect and demand governments to exercise power, firmly, effectively and fairly – to enable settlement, to resolve conflict, to

[143] JAG Griffith "The Political Constitution" (1979) 42 MLR 1 at 19.
[144] Palmer "What is New Zealand's Constitution", above n 127, at 138.
[145] Ibid, at 138 and 154.
[146] Ibid, at 138 and 156.
[147] Ibid, at 138-139.
[148] Ibid, at 139 and 149 (emphasis in original).
[149] Ibid, at 150.
[150] Palmer believes the concept of constitutional culture provides a social foundation to legal systems prior to theoretical devices such as Hans Kelsen's *Grundnorm* and HLA Hart's rule of recognition: Palmer "Constitutional Culture", above n 130, at 567-568.
[151] Ibid, at 569 and 575-576.

build economic infrastructure and create the welfare state."[152] Palmer has tried to "crystallise norms out of the relatively nebulous notion of constitutional culture."[153] He identifies four such norms, flowing from our Westminster heritage, which serve as rough doctrinal proxies: *representative democracy*, *parliamentary sovereignty*, *the rule of law and judicial independence*, and *an unwritten, evolving constitution*.[154] Palmer suggests the third norm is the least developed.[155]

B *Advantages of Constitutional Realism*

Constitutional realism is "a positivist version of realism that seeks to identify the nature of a constitution through observing its operation in reality."[156] As a theoretical perspective, it does not purport to conclusively describe or prescribe exhaustive features. Rather, it provides a heuristic device for determining the constitution at a given moment. This contingent approach tackles the "great difficulty in the way of a writer who attempts to sketch a living Constitution … that the object is in constant change."[157]

Constitutional realism's implicit account of such change eliminates the possibility of locating an overarching principle to necessarily guide development. To paraphrase Stanley Fish, we might say that a constitution, rather than being an object of which one would ask "how does it change?" is an *engine of change*.[158] The parameters of public power are constantly produced and reproduced by the various cogs of the constitution, each of which evolves and revolves in its particular fashion. The entrenched provisions of the Electoral Act 1993 have relative legal stability, conventions depend on the positive morality of state actors, and

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[152] Ibid, at 575.
[153] Ibid, at 578.
[154] Ibid, at 580.
[155] Ibid, at 588.
[156] Palmer "Using Constitutional Realism", above n 1, at 593.
[157] Walter Bagehot *The English Constitution* (2nd ed, Cambridge University Press, Cambridge, 2001) at 193.
[158] Fish employs this distinction to defend his account of interpretive communities: Fish *Doing What Comes Naturally*, above n 20, at 150. Palmer draws on the work of Fish to emphasis the importance of context to the task of constitutional interpretation: Palmer "What is New Zealand's Constitution", above n 127, at 148. Moreover, Palmer believes the perspective of constitutional realism is broadly similar to the neo-pragmatism of Fish's law and literature scholarship: Palmer "Indigenous Rights", above n 130, at 6.

culture is always and already operating in the background as the stable yet unsettled foundation. This piecemeal account recognises how legal, political, and sociological pressures can solidify and soften certain features of the state and the ways in which power is exercised.

The acceptance of pervasive change is by no means fatalistic. Palmer believes the classification of an instrument or practice as "constitutional" is important due to its totemic capacity to inspire or inhibit reform.[159] Dame Sian Elias observes that the label is "hotly contested" because it "stakes a claim to legitimacy and priority in the distribution of power in the legal order".[160] This is apparent when Kelsey expressed scepticism as to the use of the term by advocates of the Regulatory Responsibility Bill.[161] The Bill, which she described as "an instrument for embedded neoliberalism," contained a number of pro-market disciplines on domestic regulation.[162] Kelsey believed the constitutional ascription implied a commitment to constitutional economics and served to bolster the credibility and durability of ordinary legislation.[163] Pace Kelsey, the rhetorical weight of the label swings both ways. Properly identifying proposed constitutional reform may prompt its wholesale rejection.

Constitutional realism allows us to disentangle the descriptive and prescriptive strands of New Zealand's constitution. The framework posits a method for discerning its operation in reality without advocating normative preferences as to its content.[164] For instance, it is a

[159] Palmer "What is New Zealand's Constitution", above n 127, at 139.
[160] Sian Elias "Mapping the Constitutional" [2014] 1 NZ L Rev 1 at 1.
[161] Regulatory Responsibility Bill 2006 (71-1).
[162] Kelsey "'Regulatory Responsibility': Embedded Neoliberalism and its Contradictions" (2010) 6(2) Policy Quarterly 36 at 36. Embedded neoliberalism is broadly synonymous with the new constitutionalist notion of disciplinary neoliberalism.
[163] Ibid, at 38-39. Kelsey has informally expressed similar reluctance to describe the TPPA as a species of constitutional reform: Kelsey "Talking about the FIRE Economy" (University of Otago, 8 September 2015).
[164] Palmer "Using Constitutional Realism", above n 1, at 593. Edward Willis traces New Zealand's tradition of nominal (or descriptive) scholarship to Dicey's treatment of the English constitution as "a matter of fact, waiting to be discovered and presented in an empirical fashion.": Edward Willis "Constitutional Authority: Legitimising the Exercise of Public Power in New Zealand" [2014] NZ L Rev 265 at 270. The approach arguably has deeper historical origins in Aristotle's taxonomy of Greek constitutions in Book IV of his *Politics*.

constitutional fact that the judiciary cannot strike down primary legislation.[165] The notion may be anathema to those schooled in American constitutionalism. Conversely, the likes of Jeremy Waldron happily pick apart the undemocratic nature of the Supreme Court's function in the U.S.[166] This example reveals that it is a distinct inquiry as to whether the components of an existing constitution are legitimate. Which is not to say that constitutional realism is detached from such concerns. Rather, Palmer gives us the tools to accurately identify the complete constitution which in turn allows one to apply a normative yardstick: [167]

> If we aren't even sure what is constitutional, then our political and public discourse will surely not adequately debate constitutional changes, either prospectively or retrospectively… [W]e may also not even be aware of who is making constitutional decisions.

The recognition of the constitutional status of an issue is sure to have some effect on judicial behaviour and decisions: "[J]udges are … alive to public sensitivities … and will take care to interpret constitutional issues with corresponding care."[168] Likewise, the gravitas attached to the label can instantly elevate the stakes in the minds of politicians, the media, academia, and the wider polity.[169] Constitutional realism encourages scrutiny by ensuring issues are properly characterised such that changes and decision-makers receive a heightened degree of interest and analysis.[170]

C *Globalising Constitutional Realism*[171]

Palmer offers a useful corrective to the hermetic closure of constitutional orthodoxy because his account does not preclude the constitutional status of instruments, institutions, and actors

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[165] "Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.": *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 16.

[166] See Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346.

[167] Palmer "What is New Zealand's Constitution", above n 127, at 141.

[168] Ibid, at 139.

[169] Ibid, at 141.

[170] Ibid.

[171] In a sense, the task of "globalising constitutional realism" inverts Schneiderman's titular approach to understanding the impact of the investment treaty system – "constitutionalizing economic globalization.": Schneiderman *Constitutionalizing*, above n 56.

outside of New Zealand's strict jurisdiction. I have tried to emphasise how his polestar – significant influence on the generic exercise of public power – places focus on the *effect* of structures, processes, principles, rules, conventions, and culture. There are no prima facie limits as to the *source* of a state's constitutional components. Palmer is aware of the implications of this approach:[172]

> [C]ertain international treaties and institutional regimes would be so difficult for New Zealand to extricate itself from in reality, and so important in constraining the power of New Zealand governments, that they have achieved the status of being part of New Zealand's constitution…

The international expansion of constitutional realism – *globalised constitutional realism* – is worthy of close attention.[173] Dame Sian believes modern constitutional lawyers must "move beyond preoccupations with absolute and indivisible sovereignty".[174] Globalised constitutional realism allows scholars and laypeople alike to cast their critical glare beyond the sovereign shores of New Zealand such that the significant influence of international institutions can be constitutionally recognised and scrutinised. In short, globalised constitutional realism provides an approach that deconstructs the assumed dualism between international and domestic law.[175]

Palmer identifies some offshore candidates for constitutional status: the United Nations Charter, a number of international human rights treaties, and the economic regime created by the General Agreement on Tariffs and the General Agreement on Trade and Services.[176]

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[172] Palmer "Using Constitutional Realism", above n 1, at 615-616.

[173] "International law also provides a limit on New Zealand national government, though its nature and effect is worthy of treatment at least equivalent to this whole article.": Palmer "What is New Zealand's Constitution", above n 127, at 145.

[174] Elias "Mapping the Constitutional", above n 160, at 19.

[175] In the context of European Union law, Armin von Bogdandy makes a similar move in advancing a legal pluralism which "promotes the insight that there is an interaction among the different legal orders… [and] has far-reaching consequences for the understanding of constitutional law: any given constitution does not set up a normative *universum* anymore but is, rather, an element in a normative *pluriversum*.": Armin von Bogdandy "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law" (2008) 6 Int'l J Const L 397 at 401.

[176] Palmer "Using Constitutional Realism", above n 1, at 616.

Interpretations of these instruments by dispute resolution mechanisms, such as the World Trade Organisation, can qualify as a form of constitutional interpretation, that is, authoritative in practice in constraining the government.[177] On the other hand, Palmer doubts whether bilateral free trade agreements satisfy the criterion of genericism in the exercise of public power.[178] He neglects to consider investment treaties, which is unusual given the spotlight placed on attempts by the Organisation of Economic Cooperation and Development to negotiate a Multilateral Agreement on Investment in the late 1990s.[179] Disciplines contained in investment treaties can have a major influence on the shape of the state, including its ability to honour constitutional human rights treaties identified by Palmer. The TPPA provides an ample opportunity to demonstrate the analytical utility of globalised constitutional realism.

Chapter V The Significant Influence of the TPPA

Globalised constitutional realism allows us to think about the TPPA *within* New Zealand's constitution. Focussing on the leaked investment chapter, I will demonstrate how certain features will have significant influence on the generic exercise of public power such that, if the treaty is signed, they ought to be recognised as part of New Zealand's constitution. My explication of the content of the TPPA largely relies on critical scholarship due to its scrutiny from left-leaning academics. Nonetheless, it is important to keep in mind the descriptive focus of the constitutional label. This approach should help commentators situate surface changes in a broader context, avoiding the constitutional platonism of bare abstractions such as sovereignty. At the time of writing, the investment chapter (Chapter II, dated 20 January 2015) had been released online by WikiLeaks.[180] This working document contains all the hallmarks of investment treaties discussed above.[181]

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[177] Ibid.

[178] Ibid.

[179] See generally Kelsey *Reclaiming the Future: New Zealand and the Global Economy* (Bridget Williams Books, Wellington, 1999) at 315-352.

[180] WikiLeaks "Secret Trans-Pacific Partnership Agreement (TPP) – Investment Chapter" (25 March 2015) <wikileaks.org>

[181] Much of my analysis draws on a comprehensive report compiled by Public Citizen, a consumer advocacy think tank that has closely monitored TPPA developments through its Global Trade Watch division: Lori Wallach and Ben Beachy "Analysis of Leaked Trans-Pacific Partnership Investment Text" (2015) Global Trade Watch, Public Citizen <www.citizen.org>

While investment protections are sure to have multiple effects on public power, I believe there are three key nodes that can guide our understanding of the TPPA as a species of constitutional reform. They broadly overlap with the three branches of government – the judiciary, the executive, and the legislature – and can be cast across a spectrum ranging from direct to structural influence.[182] First, New Zealand is poised to expand a parallel legal channel through which investors can discipline public power beyond the purview of domestic courts. Second, indirect expropriation protection would effectively import a backdoor takings doctrine, thereby imposing limitations which New Zealand has historically rejected.[183] Third, there is likely to be a concomitant chilling effect on the future actions of New Zealand's (ostensibly) sovereign Parliament.

A *Parallel Legality*

The draft text allows investors to file proceedings before a tribunal comprising three arbitrators, one appointed by each of the disputing parties and a third presiding arbitrator appointed by agreement.[184] Such tribunals are furnished with unlimited discretion to award monetary damages, restitution of property, as well as costs and attorneys' fees.[185] Moreover, the TPPA does not permit appeals from arbitral decisions.[186] These ISDS provisions would apply to all parties, thereby carving open pathways for a swarm of new investors. The

[182] Direct influence can be conceived as "[d]irect aspects of business power and influence over governments and labour in capitalist societies" such as lobbying and litigation, whereas structural influence flows from "historical structures and/or institutions that set the parameters or the limits and conditions of possibility for action in any given age.": Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) at 315 and 323.

[183] While the guaranteed minimum standard of treatment (art II.6) has been the most successfully invoked protection under earlier investment treaties, I have chosen to focus on expropriation (art II.7) because it demonstrates the most marked divergence from New Zealand's constitutional status quo: WikiLeaks "Investment Chapter", above n 180.

[184] Ibid, art II.18 and art II.21.1.

[185] Ibid, arts II.28.1-3. An earlier leak contained a proposal to standardise hourly fees for tribunalists (US$375 per hour, compared to the US$700 per hour usually charged) but this appears to have been rejected: Wallach and Beachy "Analysis", above n 181, at 4.

[186] In the event that an appellate mechanism is developed, the signatories shall consider whether awards should be subject to that mechanism: WikiLeaks "Investment Chapter", above n 180, art II.22.10.

definition of "investor" covers anyone that "attempts to make, is making, or has made an investment" in a host state.[187] "Investment" extends far beyond real property to include:[188]

> … every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

The text provides a number of investment examples: regulatory permits, intellectual property rights, financial instruments such as stocks and derivatives, "construction, management, production, concession, revenue-sharing, and other similar contracts," and "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law."[189] These expansive definitions become problematic when we consider the qualitative and quantitative differences between TPPA parties and earlier commitments. New Zealand is bound by ISDS clauses contained in agreements with China,[190] South Korea,[191] Malaysia,[192] the Association of Southeast Asian Nations and Australia,[193] Singapore,[194] Thailand, [195] and Hong Kong.[196] By virtue of the TPPA, New Zealand would be notably exposed to investors based in the U.S.[197] It is well reported that the U.S. is the most frequent home state of claimants under ISDS provisions. As at the end of 2014, approximately 130 claims had been initiated by U.S.

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[187] "[A]n investor 'attempts to make' an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses.": ibid, art II.1, footnote 10.

[188] Ibid, art II.1.

[189] Ibid.

[190] NZ-China FTA, above n 58, Chapter 11.

[191] Free Trade Agreement between New Zealand and the Republic of Korea (signed 23 March 2015), Chapter 19.

[192] The New Zealand-Malaysia Free Trade Agreement (signed 26 October 2009, entered into force 1 August 2010), Chapter 10.

[193] The Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 1 January 2010), Chapter 11.

[194] The Agreement between New Zealand and Singapore on a Closer Economic Partnership (signed 14 November 2000, entered into force 1 January 2001), Part 6.

[195] Thailand-New Zealand Closer Economic Partnership Agreement (signed 19 April 2005, entered into force 1 July 2005), Chapter 9.

[196] Investment Protocol to the New Zealand-Hong Kong, China Closer Economic Partnership (signed 29 March 2010, entered into force 1 January 2011).

[197] Approximately 18,000 U.S. corporations would be empowered to launch ISDS cases against other TPPA signatories: Wallach and Beachy "Analysis", above n 181, at 1.

investors, nearly twice as many as the second most litigious state.[198] This statistic suggests the unparalleled resources enjoyed by U.S. investors would be readily deployed to secure a liberalised market across the Pacific.

The legal community has aired its apprehensions. The Chief Justices on both sides on the Tasman worry about "general implications for national sovereignty, democratic governance and the rule of law within domestic legal systems".[199] Likewise, a number of legislators, academics, and practitioners signed an open letter calling upon negotiators to reject ISDS and reassert "the integrity of … domestic legal processes."[200] The criticisms levelled against ISDS are manifold but I believe they can be distilled into five fears as to the *uncertainty*, *partiality*, *opacity*, *duplicity*, and *priority* of the mechanism. Surveying these concerns sheds light on the constitutional consequences of ISDS under the TPPA.

1 *Uncertainty*

Uncertainty is produced by the ad hoc nature of arbitration.[201] This tailored, fact-specific approach clashes with precedent-driven judicial forms familiar to domestic notions of justice and due process. Broad definitions and substantive protections create great interpretive discretion.[202] Indeed, the uncertainty of ISDS is manifest in its inconsistent decisions – some tribunals have reached opposite conclusions despite almost identical facts and pleadings.[203]

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[198] UNCTAD "Recent Trends", above n 54, at 6.

[199] RS French, Chief Justice of Australia "Investor-State Dispute Settlement — A Cut Above the Courts?" (Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014) at 3-4. See also Dame Sian Elias, Chief Justice of New Zealand "Barbarians at the Gate: Challenges of Globalization to the Rule of Law" (World Bar Association Conference, Queenstown, 4 September 2014) at 3.

[200] "An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor–State Dispute Settlement" (press release, 8 May 2012) <tpplegal.wordpress.com>

[201] "Unlike domestic and international courts, investment tribunals are constituted for each individual case and are usually composed of highly specialised lawyers from international law firms.": Markus Krajewski *Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective* (Friedrich-Ebert-Stiftung, EU Office Brussels, 2014) at 6.

[202] Marta Latek *Investor-State Dispute Settlement (ISDS): State of play and prospects for reform* (European Parliamentary Research Service, 21 January 2014) at 4.

[203] Compare, for example, *CMS Gas Transmission Company v. The Argentine Republic (CMS v. The Argentine Republic)* (2005) ICSID Case No. ARB/01/8 and *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (LG&E v. The Argentine Republic)* (2007)

The TPPA purports to tighten the vagueness of investment treaties by replicating interpretive annexes included in recent U.S. BITs.[204] As Kelsey observes, arbitral panels would be directed to consider indirect expropriation through case-by-case analysis of non-exhaustive factors including economic impact on the investor, reasonable expectations, and the character of government action.[205] This refinement has done little to curb expansive interpretation of investor rights.[206] Furthermore, the absence of an appellate mechanism prevents the crafting of coherent and predictable jurisprudence.

2 *Partiality*

The charge of partiality relies on the fact that a small number of lawyers "rotate between roles as arbitrators and advocates for investors in a manner that would be unethical for judges."[207] These elites are mostly male (95%) and drawn from European and North American law firms.[208] Concerns have been raised as to systemic bias and corporate solidarity exhibited through the promotion of the arbitration industry by its key players.[209] Critics of domestic judicial review wonder why any polity would hand over such disproportionate power to "committees of ex-lawyers".[210] The legitimacy of *practising* lawyers taking turns in the judge's seat proves even more dubious. The TPPA would rely on weak impartiality rules set by the chosen forum. In the 48-year history of the ICSID regime,

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ICSID Case No. ARB/02/1, cited in Doug Jones "The Problem of Inconsistency and Conflicting Awards in Investment Arbitration" (German-American Lawyers' Association, Frankfurt, March 2011) at 4. Schneiderman explores this phenomenon in Schneiderman "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes" (2010) 30 Northwest J Int'l L & Bus 383.

[204] Wallach and Beachy "Analysis", above n 181, at 7.

[205] Kelsey "Heighten Financial Instability", above n 55, at 20.

[206] Wallach and Beachy "Analysis", above n 181, at 7.

[207] "An Open Letter", above n 200.

[208] Latek *Investor-State Dispute Settlement*, above n 202, at 5.

[209] Ibid at 5. See also Stavros Brekoulakis "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" (2013) 4(3) JIDS 553.

[210] James Allan "Jeremy Waldron and the Philosopher's Stone" (2008) 45 San Diego L Rev 133 at 135.

there have been only four disqualifications out of 41 challenges of exhibited bias or conflicts of interest.[211]

3 *Opacity*

Critics point to the opacity of ISDS under the TPPA. While the draft text states that "[t]he tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements," this window-dressing is undercut by provisions preventing "protected information" from public disclosure.[212] ISDS excludes the right for non-investor litigants and other affected parties to participate.[213] However, the high stakes have prompted banks, hedge funds, and insurance companies to covertly enter the fray by way of third party funding in exchange for a share of the proceeds.[214] This phenomenon is largely immune from restrictions such as the tortious heads of maintenance and champerty.[215] There is no real presumption of open justice and transparency.

4 *Duplicity*

I use the term duplicity in a twofold sense to describe both the duplication of traditional legal avenues as well as the underhandedness of this backchannel:[216]

> The leaked text reveals the [TPPA] would expand the parallel ISDS legal system by elevating tens of thousands of foreign-owned firms to the same status as sovereign governments, empowering them to privately enforce a public treaty by skirting

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[211] As an example, "[a] tribunalist ruling that Argentina had to pay Vivendi Universal $105 million for reversing a failed water privatization served on the board of a bank that was a major investor in Vivendi. The tribunalist did not disclose the conflict, much less recuse herself, and Argentina's effort to annul the ruling was dismissed.": Wallach and Beachy "Analysis", above n 181, at 3.

[212] WikiLeaks "Investment Chapter", above n 180, arts II.23.2-4.

[213] "An Open Letter", above n 200.

[214] Latek *Investor-State Dispute Settlement*, above n 202, at 5.

[215] "The law of maintenance and champerty seeks to prevent wanton and officious interfering with the disputes of others in which the intervenor has no interest and where the assistance is without justification or excuse.": Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [18.5.01].

[216] Wallach and Beachy "Analysis", above n 181, at 1.

> domestic courts and laws to directly challenge [TPPA] governments in foreign tribunals.

The creation of parallel legality was considered necessary to sidestep undeveloped legal systems during postcolonial modernisation. This justification seems shaky when New Zealand currently ranks sixth in the World Justice Project Rule of Law Index, higher than any other negotiator.[217] Indeed, the presence of a robust legal tradition led to the rejection of ISDS in favour of empowering domestic courts to resolve disputes under the 2005 Australia-United States Free Trade Agreement.[218] This alternative model, known as the Calvo doctrine, requires aliens to submit disputes to the defendant's courts.[219]

The duplicity of ISDS is best expressed by attempts to prevent investors launching claims against their own state. Previously, individuals have acquired BIT coverage by setting up business activities abroad and acquiring home investments.[220] The draft text states that if an investor "is a *natural person*, who is a permanent resident of a Party, and a national of another Party, that *natural person* may not submit a claim to arbitration against that latter Party".[221] Non-natural legal persons would fall outside of this limitation and could arrange their affairs to qualify for protection as a foreign investor.[222] Thus, ISDS under the TPPA broadens a parallel system that is only available to foreign investors and shrewd New Zealand companies. Ordinary New Zealanders must continue to rely on a domestic system marked by open justice and weaker rights.

5 *Priority*

The final fear of priority is linked to the problem of duplicity in that ISDS threatens to take precedence over New Zealand's courts. Investors favour ISDS over domestic channels, as evidenced by Philip Morris International's reliance on most-favoured-nation treatment to

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[217] The U.S. ranks nineteenth: World Justice Project "Rule of Law Around the World" (2015) <worldjusticeproject.org>

[218] Leon E Trakman "Investor–state dispute settlement under the Trans-Pacific Partnership Agreement" in Voon (ed) *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Publishing, Northampton, 2013) 179 at 194.

[219] Subedi *International Investment Law*, above n 47, at 14.

[220] Wallach and Beachy "Analysis", above n 181, at 6.

[221] WikiLeaks "Investment Chapter", above n 180, art II.1 (emphasis added).

[222] Wallach and Beachy "Analysis", above n 181 at 6.

circumvent exhaustion requirements in the 1988 Uruguay-Switzerland BIT.[223] The TPPA makes marginal attempts to curb treaty shopping through "denial of benefits" if the claimant is "owned or controlled either by persons of a non-Party" and "has no substantial business activities in the territory of any Party".[224] However, tribunals have held that a staff of two and a minor paper trail in the purported home state satisfy this threshold.[225]

ISDS could claim priority through challenges to court rulings. In 1998, a Canadian funeral home conglomerate filed a claim under NAFTA's investment chapter.[226] After being successfully sued in Mississippi for anti-competitive and predatory business practices in breach of contract, the company demanded US$725 million in compensation from the federal government on that the grounds that the punitive damages and appeal bond flowing from the jury verdict violated investor rights.[227] The U.S. argued that the judgments of domestic courts in private disputes are not "measures adopted or maintained by a Party" under art 1101, especially when the claimant has not exhausted appeals and the procedures are common internationally.[228] These arguments were rejected in an initial ruling; the tribunal accepted that a "miscarriage of justice" in the function of a civil court could be actionable under NAFTA.[229] Although jurisdiction lapsed because restructuring inadvertently stripped the claimant of its foreign status, this decision indicates that NAFTA requires the executive branch to monitor the courts on issues such as excessive damages and the failure of a judge to relax bond requirements and control inflammatory statements during proceedings.[230] Thus,

[223] Article 13 of the 2001 Australia-Uruguay BIT does not require litigation in domestic courts before lodging an arbitration claim: Jane Kelsey and Lori Wallach "Investor-State Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems" Public Citizen's Global Trade Watch (2012) <www.citizen.org>

[224] WikiLeaks "Investment Chapter", above n 180, art II.14.

[225] See *Limited Liability Company Amto v Ukraine, SCC* Case No. 080/2005, Final Award, 26 March 2008, at para. 69.

[226] Notice of Claim, *Loewen Group Inc v the United States* (Oct. 30, 1998), at para. 20, cited in Kelsey and Wallach "Investor-State Disputes", above n 223, at 5.

[227] Kelsey and Wallach "Investor-State Disputes", above n 223.

[228] Counter-Memorial of the United States of America, *Loewen Group Inc. v. the United States* (Mar. 30, 2001) at 65-186.

[229] Decision on the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction, *Loewen Group Inc. v. the United States* (Jan. 5, 2001), at para. 60.

[230] Kelsey and Wallach "Investor-State Disputes", above n 223, at 5.

ISDS can supersede decisions of the judiciary, including superior appellate courts.[231] Only four TPPA parties – Chile, Peru, Mexico, and Vietnam – are included in an annex that prevents re-litigation through ISDS of a claim decided by domestic courts.[232]

Further precedent of ISDS priority arose when an Ecuadorian court ordered Chevron to pay US$18 billion to clean up environmental damage caused by the dumping of toxins from 1964 to 1992.[233] Following the judgment, Chevron filed a claim under the 1995 U.S.-Ecuador BIT alleging a violation of fair and equitable treatment.[234] Undeniably, shadows have been cast over the merits of the Ecuadorian judgment following evidence of ghostwriting and bribery.[235] However, the tribunal controversially issued injunctive relief pending full arbitral hearings, thereby requiring the Ecuadorian government to halt the enforcement of an appellate ruling in violation of its horizontal separation of powers. This should set off alarm bells for prudent students of constitutional theory. We find ISDS staking a claim to priority over the domestic system despite Ecuador's explicit recognition that "[t]he Constitution is the supreme law of the land and prevails over any other legal regulatory framework."[236]

6 *Consequences*

The TPPA would elevate the influence of ISDS such that it significantly influences the exercise of public power and forms a very real part of New Zealand's constitution.[237] Thus,

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[231] "The principle that a State is responsible for the decisions of its municipal courts (*or at least its highest court*) supports the wider interpretation of the expression 'measure adopted or maintained by a Party' rather than the restricted interpretation advanced by the Respondent.": Hearing of Respondent's Objection to Competence and Jurisdiction, *Loewen Group Inc.*, above n 229, at para. 54 (emphasis added).

[232] WikiLeaks "Investment Chapter", above n 180, Annex II-J.

[233] Kelsey and Wallach "Investor-State Disputes", above n 223, at 6.

[234] See *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23.

[235] See *Chevron Corp. v. Donziger*, No. 11–cv–691 (LAK), 2013 WL 1896932 (S.D.N.Y. May 7, 2013).

[236] Constitution of Ecuador, art 424.

[237] Compare Kelsey's description of ISDS as "offshore judicial processes that are *outside* our constitutional framework," quoted in Bruce Munro "Scorched earth" *Otago Daily Times* (3 August 2015) <www.odt.co.nz> (emphasis added).

the determination of the scope of the TPPA by offshore technocrats would become a form of constitutional interpretation authoritative in practice.

Some of the fears associated with ISDS seem like teething problems in isolation but their cumulative weight creates concern. It is the duplicity and priority of ISDS as a form of parallel legality that stimulates the threshold criteria of significance and genericism under globalised constitutional realism. The constitutional consequences of ISDS are more obvious in written traditions containing entrenched judicial prescriptions like Ecuador or the U.S.[238] Nonetheless, while New Zealand's executive and legislative branches intersect, the ideal of the separation of powers is routinely invoked by the judiciary.[239]

A parallel legality confined to foreign investors which furnishes greater rights and compels the executive to control the courts does not fit with orthodox understandings of law and society. Lord Cooke believed the preservation of an independent judiciary to be fundamental to the legal system: "What would be constitutionally objectionable … would be to try to transfer the essentially judicial part of the work to *a body that is not a Court* in the same sense." [240] The fears of uncertainty, partiality, and opacity suggest that an ad hoc tribunal is not a court. TPPA membership would increase the quantity of potential claimants, effectively outsourcing judicial functions and allowing transnational capital to discipline the government through an alien forum. The current Chief Justice echoes Lord Cooke's sentiment, suggesting the erosion of the power of the High Court to determine the law, as well as the scope of its jurisdiction, may be "beyond the competence of the supreme legislator by reason of the constitutional allocation of powers and the rule of law."[241] The strengthening of ISDS through the foreign policy prerogative surely warrants exceptional scrutiny.

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[238] As one American journalist pondered, "Can the president and Congress, consistent with Article III [of the U.S. Constitution], assign to three private arbitrators the judicial function of deciding the merits of a TPP investor challenge?": Alan Morrison "Is the Trans-Pacific Partnership Unconstitutional?" *The Atlantic* (23 June 2015) <www.theatlantic.com>

[239] "The independence of the judiciary from the executive branch, within a constitution that reflects the separation of powers, has long been seen as inconsistent with judges being employees or agents of the Crown who act on its behalf.": *Attorney-General v Chapman* [2012] 1 NZLR 462 (SC) at [175].

[240] Sir Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164 (emphasis added).

[241] Elias "Mapping the Constitutional", above n 160, at 17.

B *Backdoor Takings Doctrine*

Within written traditions, takings jurisprudence is constitutional law par excellence. Such doctrines require compensation when property is taken by governments without the owner's consent.[242] This clearly catches physical takings, wherein the state assumes ownership, and many constitutions prohibit regulatory takings, that is, government actions that change the nature of property in a way which limits the owner's ability to use or dispose of it.[243] The necessity of entrenched safeguards against encroachment on property is firmly installed as the common sense of American constitutional theory. Cass Sunstein believes protection against takings without compensation is "indispensable on both economic and democratic grounds. Without such a provision, there is not, in fact or in law, a fully functioning system of private property."[244] Conversely, legislation is logically and hierarchically prior to property within the Westminster tradition. New Zealand's legal history reveals resistance to limits on the state's ability to regulate. However, the standard of indirect expropriation offers strong takings protection. The TPPA would complete a constitutional merry-go-round wherein Parliament and the courts reject a generic doctrine of regulatory takings and the executive subsequently enters agreements importing that standard for foreign investors. New Zealand would be forced to confront the anomaly of transnational capital enjoying greater rights than its citizens.

1 *Regulatory Takings in New Zealand?*

Takings are not unknown to New Zealand. The protection of property against government action has deep roots in English jurisprudence, as evident in *Entick v Carrington*[245] and the seminal works of Blackstone and Locke.[246] Sir Geoffrey Palmer notes that the framework for

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[242] Bryce Wilkinson *A Primer on Property Rights, Takings and Compensation* (Astra Print, Wellington, 2008) at 23.

[243] In the U.S., see *Pennsylvania Coal v Mahon* 260 US 393 (1922); in Australia, see *Smith v ANL Ltd* [2000] HCA 58, (2000) 204 CLR 493 and *Newcrest Mining (WA) Limited v The Commonwealth* (1996) 190 CLR 513 (HCA), cited in Richard Ekins and Chye-Ching Huang "Reckless Lawmaking and Regulatory Responsibility" [2011] NZ L Rev 407 at 421-422.

[244] Cass R Sunstein "On Property and Constitutionalism" (1993) 14 Cardozo L Rev 907 at 923.

[245] *Entick v Carrington* [1765] EWHC KB J98.

[246] See generally Sir William Blackstone *Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765-1769* (University of Chicago Press, Chicago, 1979) and John

compulsory acquisition under the Public Works Act 1981 evinces legislative attention to the "recognised principle that the state should not appropriate private property for a public purpose without just compensation."[247] Likewise, the Resource Management Act 1991 requires compensation in specific circumstances and s 87(1) of the Health Act 1956 provides compensation for "every person injuriously affected" if "any building, animal, or thing is destroyed" due to government efforts to curb infectious disease. The specific nature of these protections highlights how takings in New Zealand are far from generic and are necessarily mediated by Diceyan understandings of parliamentary sovereignty, namely "legislative competence and legislative supremacy."[248]

There is some evidence that it is a constitutional convention not to expropriate without just compensation.[249] For example, the Legislation Advisory Committee (LAC) Guidelines state that new "legislation should respect property rights" as a basic constitutional principle and value of New Zealand law.[250] Nonetheless, the LAC notes that the law "may allow *restrictions* on the use of property for which compensation is not always required".[251] This reflects the fact that New Zealand does not recognise a doctrine of regulatory takings, as confirmed by the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[252] The Court rejected the claim that a condition of subdivision consent requiring construction of an arterial road, causing some land to be vested in the Council as road reserve, amounted to a taking.[253] While acknowledging the common law presumption to ensure fair compensation is paid when statutes expropriate property, the Court characterised the condition as a form of regulation rather than a taking.[254] There must be "forced acquisition of a landowner's rights

Locke *Second Treatise of Government* (Barnes & Noble, New York, 2004, originally published in 1690).

[247] Sir Geoffrey Palmer "Westco Lagan v A-G" [2001] NZLJ 163 at 163.

[248] Elias "Mapping the Constitutional", above n 160, at 14.

[249] Sir Geoffrey suggests this is an analysis worth undertaking but expresses doubts whether it can be shown to have been followed in every case: Sir Geoffrey Palmer "Westco", above n 247, at 168.

[250] Legislation Advisory Committee *Legislation Advisory Committee Guidelines – Guidelines on Process and Content of Legislation 2014 edition* (October 2014) at 14.

[251] Ibid, at 14 (emphasis added).

[252] *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).

[253] Ibid, at [46].

[254] Ibid, at [45]-[47].

under a power belonging to the state which allows the landowner *no choice*" before this principle of statutory interpretation can be invoked.[255] In short, regulatory takings are not actionable in New Zealand courts.

Many interests groups have pushed towards a strong doctrine. At the turn of the century, McGechan J heard some serious constitutional arguments in *Westco Lagan Ltd v Attorney-General*.[256] The case arose from the termination of indigenous logging rights on the West Coast, a conservation policy announced by the Labour Party prior to election.[257] The new government introduced the Forests (West Coast Accord) Bill 2000 which purported to cancel an agreement for perpetual supply of rimu for sawmilling as well as explicitly prevent compensation.[258] However, the plaintiff applied for an interim injunction to prevent the Clerk of the House of Representatives from presenting the Bill to the Governor-General for Royal assent. [259] The claim was anchored in the premise that the agreement gave rise to property rights that could not be expropriated without compensation due to the 1297 version of Magna Carta (by way of s 3(1) of the Imperial Laws Application Act 1988) and NZBORA.[260] McGechan J correctly rejected these arguments in "a ringing affirmation of the independence and sovereignty of Parliament," to borrow His Honour's phraseology.[261]

Hardly chastened by the High Court's decision, proponents of takings have endeavoured to follow the wisdom of McGechan J: "If the content of legislation offends, the remedies are political".[262] Several incarnations of a regime designed to discipline the regulatory role of government have been considered over the past decade. Hon Rodney Hide MP of the ACT Party introduced a private member's bill that passed its first reading and led to the Commerce Committee's recommendation for an expert taskforce.[263] After the 2008 election, the

[255] Ibid, at [51] (emphasis added).
[256] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).
[257] Sir Geoffrey Palmer "Westco", above n 247, at 164.
[258] *Westco Lagan*, above n 256, at [2].
[259] Ibid, at [1].
[260] Ibid, at [3]. Specifically, the plaintiff pointed to NZBORA's recognition of rights regarding unreasonable search and seizure (s 21), observance of the principles of natural justice (s 27(1)), and civil proceedings against the Crown (s 27(3)).
[261] Ibid, at [97]. For detailed analysis of the decision, see Sir Palmer "Westco", above n 247.
[262] *Westco Lagan*, above n 256, at [95].
[263] Regulatory Responsibility Bill 2006 (71-1) (select committee report) at 2.

National-ACT Confidence and Supply Agreement included a commitment to establish the Regulatory Responsibility Taskforce.[264] The Taskforce issued a report, including a draft bill, on measures to improve the quality of legislation and reduce the regulatory burden on economic activity.[265] The Bill was voted down but resurfaced in 2011 as the diluted Regulatory Standards Bill.[266] In May 2015, the Commerce Committee recommended that it not be passed because "the main effect … would be to add an extra layer to existing legislative processes and practice."[267]

This sounds like dry, technical legislation. However, the constitutional effect would be substantial. As Richard Ekins and Chye-Ching Huang observe, the proposed regime articulated eleven "principles of responsible regulation" enforced through a certification regime, (most significantly) judicial declarations of incompatibility, and a direction for the courts to prefer compatible meanings when interpreting other enactments.[268] The third principle – "Taking of property" – provided that legislation should not authorise the taking or impairment of property unless it is necessary in the public interest and the owner receives full compensation.[269] This principle was premised on the finding of the Taskforce that regulatory impairments are tantamount to takings.[270] Ekins and Huang doubt the cogency of this equation, pointing to the muddled state of takings law abroad.[271] Moreover, they argue the principle "plainly brings in a very strong doctrine of regulatory takings that is foreign to our constitution."[272]

The attempt to transfer power from the democratically accountable branches to the judiciary prompted Paul Rishworth to describe the proposed regulatory regime as a second bill of

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[264] The Treasury "Regulatory Standards Bill" (7 July 2011) <www.treasury.govt.nz>
[265] Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (prepared for Hon Bill English, Minister of Finance, and Hon Rodney Hide, Minister of Regulatory Reform, 2009).
[266] Regulatory Standards Bill 2011 (277-1).
[267] Regulatory Standards Bill 2011 (277-1) (select committee report) at 2.
[268] Ekins and Huang "Reckless Lawmaking", above n 243, at 409.
[269] Regulatory Standards Bill, above n 266, cl 7(1)(c).
[270] Taskforce *Report*, above n 265, at [4.63].
[271] Ekins and Huang "Reckless Lawmaking", above n 243, at 422-423.
[272] Ibid, at 424.

rights.[273] Private property rights were rejected during the drafting of NZBORA and Parliament has twice considered members' bills proposing their amended inclusion.[274] I must bracket the complex question as to whether entrenched property rights are legitimate or desirable.[275] However, the constitutionalism by stealth exhibited by efforts for regulatory responsibility shows how NZBORA is not the only means to strengthen property. The Mana Party echoed Rishworth's bill of rights analogy: "TPPA is a Bill of Rights for corporate multinationals to plunder the New Zealand economy even more easily than they can at present."[276]

2 *Indirect Expropriation under the TPPA*

New Zealand has rejected the entrenchment of compensation for physical takings, let alone regulatory takings. However, the latter concept is broadly synonymous with TPPA protection against indirect expropriation.[277] Schneiderman believes this standard is an export of U.S. takings jurisprudence. Canadian legislative power was largely unfettered prior to NAFTA because, like NZBORA, property rights were not included in the 1982 Canadian Charter of Rights and Freedoms.[278] NAFTA's investment chapter introduced the same distrust of democracy manifest in American measures like the Fifth Amendment's limitations on

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[273] Paul Rishworth "A Second Bill of Rights for New Zealand?" (2010) 6(2) Policy Quarterly 3.

[274] The New Zealand Bill of Rights (Property Rights) Amendment Bill 1997 sponsored by Owen Jennings MP; and the New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005 (255-1) sponsored by Gordon Copeland MP. Neither bill passed its second reading: Alex MacBean "New Zealand Bill of Rights Act 1990: options for reform" in Parliamentary Library *Current issues for the 51st Parliament* (September 2014) 29 at 29.

[275] For contributions from New Zealand scholars, see Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) and Michael Taggart "Expropriation, Public Purpose and the Constitution" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 91. Two economists have weighed in on the debate: Lewis Evans and Neil Quigley "Compensation for Takings of Private Property Rights and the Rule of Law" in Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 233. Their essay received a lawyer's reply: Huang "The Constitution and Takings of Private Property" (2011) 24 NZULR 621.

[276] John Minto, Mana Vice President "TPPA Negotiations = Giving Away Sovereignty For Pie in the Sky" (press release, 3 December 2012) <www.scoop.co.nz>

[277] WikiLeaks "Investment Chapter", above n 180, art II.7 and Annex II-B.

[278] Schneiderman "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 U Toronto LJ 499 at 501.

eminent domain.[279] Schneiderman's analysis is bolstered by a requirement in the Trade Act of 2002 that treaties must apply U.S. principles and practices concerning regulatory takings and ensure that foreign investor rights do not exceed those available to U.S. property owners.[280] The latter limb has been infringed by the positive discrimination of ISDS; tribunals have pushed property logic to its limits such that foreign investors receive greater protection than that provided by the Fifth Amendment.[281] Drawing on the Canadian experience, the TPPA is poised to weave regulatory takings into New Zealand's constitutional fabric. By virtue of the broadened parallel legality of ISDS, investors would have access to a "backdoor takings doctrine that precludes proactive regulation in public health and environmental protection," as well as other politically salient sectors.[282]

The breadth of expropriation can be demonstrated by reference to NAFTA decisions.[283] In 1997, Ethyl Corporation submitted a claim against Canada for imposing a ban on the import and export of methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive classified as a dangerous toxin.[284] MMT had been used in Canadian fuel for twenty years but a move to prohibition was prompted by growing environmental, health, and consumer protection concerns.[285] Ethyl asserted this regulation amounted to, inter alia, an indirect

[279] The Fifth Amendment to the U.S. Constitution states that "[n]o person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In 1980, the Supreme Court held that a regulation may be considered a taking if it fails to "substantially advance" a legitimate state interest: *Agins v. Tiburon*, 447 U.S. 255, 260–63 (1980). This approach was recently revised – the government must pay compensation when a regulatory burden constitutes the "functional equivalent" of direct appropriation: *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 35 ELR 20147 (2005). As one commentator noted, the tone of *Lingle* continues to rebuke the doctrine of substantive due process review characterised by *Lochner v. New York* 198 U.S. 45 (1905), which overturned legislative limits on working hours in the early twentieth century: Sarah B Nelson "Lingle v. Chevron USA, Inc." (2006) 30 Harv Envtl L Rev 281 at 281.

[280] Marc R Poirier "The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist" (2003) 33 Envtl L 851 at 912.

[281] Schneiderman "How to govern differently: neo-liberalism, new constitutionalism and international investment law" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 165 at 174.

[282] Van Harten *Investment Treaty Arbitration*, above n 60, 91-92.

[283] Article II.7 of the draft TPPA mirrors art 1110 of the North American Free Trade Agreement (signed 12 December 1992, entered into force 1 January 1994).

[284] Schneiderman *Constitutionalizing*, above n 56, at 130.

[285] Ibid.

expropriation of its assets, claiming US$250 million in damages.[286] The government decided to settle after a jurisdictional decision in favour of Ethyl paved the way for a substantive hearing.[287] Canada currently relies on voluntary industry restrictions after agreeing to pay US$13 million in damages and fees, reverse the ban, and advertise the safety of MMT.[288] The net effect fits an additional limb of the new constitutionalism of disciplinary neoliberalism, namely that investor rights are complemented by a "proliferation of soft, self-regulatory and 'flexible' or 'double' legal standards" for externalities.[289]

In a nutshell, expropriation protections allow investors to discipline governments such that they promote privatisation and the rolling back of regulation. A host of past and present ISDS cases invoke indirect expropriation to challenge, inter alia, tobacco plain packaging,[290] fracking moratoriums,[291] minimum wage legislation,[292] price controls to curb financial crisis,[293] and the reversal of privatisation policies.[294] These issues have been central to party politics in recent years, especially debates over the extent to which New Zealand should (de)privatise core services and sectors such as hydroelectric energy, rail, housing, prisons, charter schools, and the nationalised accident insurance scheme. The protection of property from the electoral seesaw is justified by public choice theorists on the grounds that constitutional parameters increase cooperation and reduce the inefficient conflicts of "ordinary politics".[295] If the aforementioned issues were removed from regulatory reach, the residue would not be what most New Zealanders consider ordinary politics. Rather, it would

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[286] Ibid.

[287] See *Ethyl Corporation v Canada*, Decision on Jurisdiction, (1998) 7 ICSID Rep 12, (1999) 38 ILM 708, IIC 95 (1998), 24th June 1998, Ad Hoc Tribunal (UNCITRAL).

[288] Public Citizen "Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. Trade Deals" (April 2015) <www.citizen.org> at 11.

[289] Gill and Cutler "New constitutionalism and world order", above n 85, at 7.

[290] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

[291] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2.

[292] *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15.

[293] *CMS v. The Argentine Republic* and *LG&E v. The Argentine Republic*, above n 203. See generally Kelsey "Heighten Financial Instability", above n 55.

[294] *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13.

[295] See generally James M Buchanan "The Domain of Constitutional Economics" (1990) 1 Constitutional Political Economy 1.

abandon perennial problems and lock in what Slavoj Žižek calls *post*-politics: "[T]he conflict of global ideological visions embodied in different parties that compete for power is replaced by the collaboration of enlightened technocrats".[296]

At a glance, the draft text appears to address these concerns in an interpretive annex:[297]

> *Non-discriminatory* regulatory actions by a Party that are designed and applied to protect *legitimate* public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, *except in rare circumstances*.

Close scrutiny of this open textured provision reveals a number of investor-friendly footholds. First, public welfare regulations may create de facto discrimination if the targeted sector is dominated by foreign investors for which there are no domestic analogues, such as the fossil fuel industry. Second, the vague and contestable criterion of legitimacy is ripe for arbitral argument. Finally, even if the host state were to overcome these hurdles, the provision contemplates "rare circumstances" in which non-discriminatory regulatory actions that protect legitimate public welfare objectives will still constitute indirect expropriations. It may seem as though I am squeezing exceptions out of exceptions. That is exactly what investment lawyers are trained to do.

Aside from disciplines effected directly against the state through ISDS, the activation of art II.7 would produce an ugly puzzle for domestic actors: how should New Zealand respond to the anomaly of foreign investors gaining greater property rights than its citizens? This concern has already been raised in relation to the investment chapter in the Chinese trade agreement.[298] A broadened parallel legality is likely to push the question from the hypothetical realm into lived constitutional experience. Once investors begin to bring claims, it is conceivable that a New Zealand business could follow suit by claiming compensation for regulatory takings in our domestic courts. It is worth recalling an extra-legal constraint of international law identified by Joseph, namely that the courts interpret legislation with the presumption that Parliament does not intend to legislate in defiance of its international

[296] Slavoj Žižek *The Ticklish Subject: The Absent Centre of Political Ontology* (Verso, London, 1999) at 198.
[297] WikiLeaks "Investment Chapter", above n 180, Annex II-B, 3(b) (emphasis added).
[298] Jack Hodder "Capitalism, revolutions and our rule of law" (2012) 12 Otago L Rev 627 at 638.

obligations.[299] The increasing influence of unincorporated international instruments in the courts is well reported.[300] Consistency with human rights treaties tends to turn on whether an administrative decision-maker must exercise a statutory power in light of international obligations.[301] As we have seen, investment treaties are a somewhat different creature.

If a purported taking arose from primary legislation, the courts would no doubt toe the line drawn by McGechan J such that domestic incongruence with TPPA rights would be cast as "no more than a dark side of democracy."[302] The question of delegated legislation, however, could allow scope for innovation. A plaintiff might argue that, in light of foreign investor rights, the common law presumption to ensure fair compensation is paid when statutes expropriate property should be extended to regulatory takings. The judicial impulse towards harmonisation would be great given the unpalatable alternative of accepting weaker domestic protections. Scholars have suggested that the influence of international obligations can be subsumed under the principle of legality, the constitutional principle that broadly expressed discretions are subject to the fundamental values of the common law.[303] The use of treaties by the courts entails "judicial updating of the catalogue of values to which the common law subjects the administrative state."[304] Outside of the established pattern of human rights cases, which have a tighter fit with common law values such as habeas corpus, this reasoning seems unsound. Likewise, a move towards harmonisation could not be described as "horizontal effect," that is, the interpretive influence of (vertical) public law rights on private obligations.[305] Rather, we would witness property rights transposed from an international forum to a public law action in the domestic courts, both of which target the same state actions.

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[299] Joseph *Constitutional and Administrative Law*, above n 25, at 563.

[300] See Alice Osman "Demanding Attention: The Role of Unincorporated International Instruments in Judicial Reasoning" (2014) 12 NZJPIL 345.

[301] The trend is traceable to *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

[302] *Westco Lagan*, above n 256, at [95].

[303] David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 Oxford U Commw LJ 5 at 6.

[304] Ibid, at 34.

[305] Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*" [2004] NZ L Rev 681 at 682-684.

Through the lens of globalised constitutional realism, harmonisation of domestic and international law can be reframed as the crafting of internal constitutional coherence across parallel channels. However, to suggest that this synchrony is required would make the mistake of extracting a normative programme from a purely descriptive account.[306] Globalised constitutional realism reveals that the components of public power need not (and arguably cannot) fit seamlessly. Clusters of domestic and international actors interpret and apply constitutional issues depending on institutional pressures and principles – the courts are no exception. Ultimately, Parliament's historical rejection of property rights and regulatory principles is likely to bar departure from the Supreme Court's denial of compensation for regulatory takings in *Waitakere City Council*. While the doctrine of parliamentary sovereignty is fraying (in theory), it remains inextricable (in practice) as judicial shorthand for deference to the legislative branch.

Outside of the courtroom, there are obvious advantages to wrapping grievances in the vocabulary of private property. As soon as a child can understand language, she is taught that stealing is wrong. The lesson is reproduced through recognition of the inviolability of ownership, firmly installing "the normative resilience of property".[307] This intuition elides the dependence of property forms on processes of enclosure, commodification, and market maintenance that rely on state intervention. Such realities render a rigid dichotomy between private property and public regulation unsustainable.[308] Nonetheless, I suggest a conceivable consequence of the TPPA expropriation standard is that takings talk will come to be increasingly cashable in New Zealand's constitutional discourse. When confronted with unequal property protections, political pressures will push towards legislative parity, especially when it is legally difficult (and politically unimaginable) to strip foreign investors

[306] For detailed discussion of this common theoretical slippage, see Fish "Almost pragmatism: the jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin" in Michael Brint and William Weaver (eds) *Pragmatism in Law and Society* (Westview Press, Boulder, 1991) 47.

[307] Waldron "The Normative Resilience of Property" in McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 170.

[308] See the discussion of legal realist Robert Lee Hale in Paddy Ireland "Property and contract in contemporary corporate theory" (2003) 23 Legal Studies 453 at 489-491.

of their rights. These forces may spur the resurrection of the ACT Party's "Holy Grail" of regulatory responsibility.[309]

C *Chilling Effect on Legislation*

New Zealand was once described as "the only example of the British majoritarian system left."[310] Orthodox Westminster theory arranges institutions hierarchically with Parliament placed at its apex. There is a slippage between this narrative of boundless authority and contemporary fetters. It is trivially true that legislative activity is always embedded in historical conditions which delimit political possibilities.[311] Returning to Joseph's observation, it is equally accurate that the formal powers of Parliament survive the international commitments du jour. But the TPPA is likely to have a chilling effect on legislation that will significantly influence the exercise of public power. So far we have seen the ways in which some procedural (ISDS) and substantive (expropriation) features are poised to alter New Zealand's constitution. Both of these examples have focussed on direct influence exercised by investors through proceedings against the state. Implicit throughout these analyses has been the broader structural influence wielded by transnational capital through the proliferation of investment treaties. As Griffith quipped, "Everything that happens is constitutional. *And if nothing happened that would be constitutional also*."[312] Interrogating the conspicuous absence of state activity enriches our understanding of how public power is exercised.

The strong protection of property creates the *threat* of legal challenges which, coupled with the inter-jurisdictional mobility of capital, disciplines legislative innovation and steadily institutionalises neoliberal values within the core organs of government. Such threats need not be explicit. Vague investment protections and broad arbitral discretion creates sufficient

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[309] Nicholas Jones "Act's search for Holy Grail goes on" *New Zealand Herald* (12 May 2015) <www.nzherald.co.nz>

[310] Arend Lijphart *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984) at 19, cited in Hirschl *Towards Juristocracy*, above n 94 at 83.

[311] Legislative reform has largely coincided with the broad economic paradigms of Keynesianism and neoliberalism: Brian Roper "New Zealand Politics Post-1984" in Janine Hayward (ed) *New Zealand Government and Politics* (6th ed, Oxford University Press, Melbourne, 2015) 25 at 26.

[312] Griffith "The Political Constitution", above n 143, at 19 (emphasis added).

uncertainty to suppress policy experiments when the cost of a successfully defended ISDS case averages US$8 million.[313] Hanging like the sword of Damocles, the spectre of arbitration promotes a particular mode of governance and hinders proposals that hope to carve alternative paths to prosperity. Indeed, it is the goal of the TPPA to limit the political imaginings of national legislatures in service of cookie-cutter regulatory coherence across the regional market.

The chill has already reached New Zealand. The current government has postponed the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill, part of its plan to achieve a Smokefree New Zealand by 2025, pending the outcome of ISDS proceedings against other states.[314] Australia successfully legislated a landmark plain packaging policy to curb 15,000 annual tobacco-related fatalities.[315] Before the ink was dry, four tobacco companies had assembled their legal legions, claiming the framework amounted to unjust acquisition of trademarks contrary to the Constitution.[316] The High Court disagreed, affirming the "bedrock principle" that there can be no acquisition of property without the Commonwealth or another acquiring an interest in property.[317] Philip Morris Asia has leapfrogged this judgment by taking the claim to arbitration under Australia's BIT with Hong Kong,[318] claiming "significant financial loss, potentially amounting to billions of dollars."[319] This set of events has been cited repeatedly by critics of the TPPA. Ultimately, following a

[313] Wallach and Beachy "Analysis", above n 181, at 3.

[314] Patricia Ranald "The Trans-Pacific Partnership Agreement: Reaching behind the border, challenging democracy" (2015) 26(2) The Economic and Labour Relations Review 241 at 250.

[315] ABC News "Government to demand no frills cigarette packets" (28 April 2010) <www.abc.net.au>

[316] Constitution of Australia, s 51(xxxi).

[317] *JT Int'l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43 at 169. For detailed discussion of these proceedings, see Jonathan Liberman "Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia" (2013) 39 AJLM 361.

[318] Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (signed 15 September 1993, entered into force 15 October 1993). Philip Morris Asia claims plain packing regulation constitutes expropriation of its investments (art 6) as well as an unreasonable and discriminatory measure in breach of Australia's commitment to fair and equitable treatment (art 2(2)): Attorney-General's Department "Tobacco plain packaging – investor-state arbitration" (2015) Australian Government <www.ag.gov.au>

[319] Philip Morris Asia Limited Notice of Arbitration (21 November 2011) <www.ag.gov.au>

proposal from Malaysia, the text includes a provision that allows parties to rule out ISDS challenges over tobacco control measures.[320]

Australia's Tobacco Plain Packaging Act 2002 is a good example of how an ISDS challenge to progressive majoritarian policies can stall regulatory activity abroad. However, one need not be a radical democrat to feel the bite of the chilling effect. The capacity for change per se is a central feature of sophisticated legal systems, whether catalysed top-down or bottom-up. HLA Hart believed one of the three defects of a primitive system, along with uncertainty and inefficiency, is the *static* character of bare primary rules: "There will be no means, in such a society, of deliberately adapting the rules to changes in circumstances, either by eliminating old rules or introducing new ones".[321] The TPPA would recalibrate secondary rules of change, pushing New Zealand from what James Bryce called a *flexible* constitution that facilitates amendment to a *rigid* constitution under which certain laws may not be so easily altered.[322] The veritable entrenchment of regulatory risk tolerance would impede application of the precautionary principle to health and environmental risks as well as pragmatic responses to the threat of financial crisis such as capital controls.

Canada's NAFTA experience demonstrates how disciplines might percolate throughout domestic institutions. It was widely foreseen that Chapter 11 would have "a chilling effect on lawmakers, discouraging them from taking forceful regulatory initiatives."[323] As of January 2015, 35 out of the 77 NAFTA ISDS claims have been filed against Canada.[324] These numbers may appear to point against the hypothesis. Christine Côté found little empirical evidence of regulatory chill, reporting a low level of awareness among health, safety, and

[320] Tim Groser "TPP delivers significant benefits for NZ" New Zealand Government (press release, 6 October 2015) <www.beehive.govt.nz>

[321] HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 92-93.

[322] J Bryce *Studies in History and Jurisprudence* (Clarendon Press, Oxford, 1901) at 145-254, cited in Joseph *Constitutional and Administrative Law*, above n 25, at 20.

[323] Joshua Elcombe "Regulatory Powers vs. Investment Protection under NAFTA's Chapter 1110: *Metalclad*, *Methanex*, and *Glamis Gold*" (2010) 68 U Toronto Fac L Rev 71 at 81.

[324] It is worth noting the large number of claims based on measures introduced by provinces and municipalities for which the federal government is ultimately responsible: Scott Sinclair *NAFTA Chapter 11 Investor-State Disputes to January 1, 2015* (Canadian Centre for Policy Alternatives, 14 January 2015).

environmental regulators regarding the potential threat of an ISDS challenge.[325] Nonetheless, there are moves to institute interdepartmental deference to Canada's foreign policy engines. The Cabinet Directive on Streamlining Legislation obliges departments contemplating new regulations to consult with the Department of Foreign Affairs, Trade and Development to bring legislation in line with commitments under NAFTA.[326] As Scott Sinclair observes, such realignment has regressive impacts on the provision of public services by confining their operation within existing boundaries, applying pro-competitive regulation to previously socialised services, and bolstering the momentum toward further privatisation.[327] This erosion of public responsibility for education, healthcare, and welfare leads to a rise in personal debt as a privatised form of social provisioning.[328] The structural influence of investment treaties reorganises state apparatuses, concentrating power in the hands of executive experts and subordinating parliamentary politics to the logic of foreign investment.

New Zealand's executive branch introduces most legislative proposals and bears immediate responsibility for treaty breaches – we must consider the institutional norms of its central organs. Turning to the Cabinet Manual, it is serendipitous to find guidelines on regulatory impact analysis, constitutional issues, and international treaties clustered together when the lines are beginning to blur.[329] The former provision states that legislative proposals must be accompanied by a Regulatory Impact Statement prepared by Treasury. As Kelsey observes, this check requires regulators to "look first for market solutions, then self-regulation or the use of private supervisors, followed by the co-regulation option, with a presumption against

[325] Christine Côté "A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment" (PhD Thesis, The London School of Economics and Political Science, 2014) at 188.
[326] Sinclair "Trade agreements, the new constitutionalism and public services" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 179 at 185-186.
[327] Ibid, at 182-190.
[328] This process, described by feminist scholars as the "(re)privatization of social reproduction," is discernible through the proliferation of private credit card and mortgage debt in the U.S., as well as the explosion of personal bankruptcies: Roberts "Indebtedness in America", above n 88, at 234. New Zealand households are among the most indebted in the developed world: Kelsey *The FIRE Economy: New Zealand's Reckoning* (Bridget Williams Books, Wellington, 2015) at 96.
[329] Cabinet Office *Cabinet Manual 2008*, above n 15, at [5.71]-[5.74].

hands-on regulation."[330] Moreover, a 2014 report of the Productivity Commission recommended the strengthening of Treasury's influence and the cultivation of a favourable regulatory "culture" by appointing leaders with values compatible with desired outcomes.[331] Such efforts echo Palmer's emphasis on culture as the implicit social foundation for explicit norms. A contrived regulatory culture seems to clash with the authenticity of popular constitutional culture.

New Zealand has assembled an institutional blueprint that would streamline the chilling effect of the TPPA. The current process of voluntary Treasury scrutiny could be calcified as compliance necessity through the threat of ISDS challenges. Under our realist rubric, Regulatory Impact Statements would place greater limits on legislative power than s 7 reports under NZBORA. A number of faceless civil servants, in Treasury as well as MFAT, could be further empowered as agents of constitutional interpretation.

A potential rejoinder is that such adjustments would bolster the rule of law, a constitutional norm that Palmer identified as relatively weak. The rule of law is a contested concept that, at its most abstract level, prescribes government according to prospective law applied neutrally and objectively, as opposed to the capricious rule of men. As Joseph notes, "Rule-of-law jurisprudence throws down a major challenge: whether to recognise that there are ultimately constitutional limits on the power to legislate."[332] Debates focus on this unresolved tension as well as the extent to which the ideal is purely procedural or imbued with substantive ideological content.[333] Drawing on Hans Kelsen's idea of an utmost rule establishing the unity of a legal system, Christopher May argues the rule of law is the *Grundnorm* of new

[330] Kelsey *The FIRE Economy*, above n 328, at 143-144.
[331] New Zealand Productivity Commission *Regulatory Institutions and Practices* (June 2014) at 77, cited in ibid, at 149.
[332] Joseph *Constitutional and Administrative Law*, above n 25, at 160. These juxtaposed notions are given purposive prominence in the statutory source of New Zealand's highest court – "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.": Supreme Court Act 2003, s 3(2).
[333] See generally ibid, at 153-198 and Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011).

constitutionalism.[334] The acceptance of international treaties as a legitimate technology of governance depends on the foundational hegemony of the rule of law. But this ideal presupposes a finite zone of legal subjects. If the rule of law is the *Grundnorm* of the TPPA, to whom does it apply?

A global rule of law would posit investors and states as equal subjects. Friedrich Hayek's conception, on which disciplinary neoliberalism is premised, is essentially limited to formal rules within which individuals are free to pursue their ends without deliberate interference.[335] In the same way, TPPA protections purport to set impartial rules of the road, analogous to speed limits and traffic lights, without prescribing destinations.[336] The real effect is a one-way street towards neoliberal governance. Moreover, the fact that states cannot initiate ISDS proceedings cuts against the core of Hayek's rule of law. His emphasis on predictability is violated in a regime where states are forced to accept the consequences of capital flight with equanimity.[337] Conversely, if investors are taken to be the sole subjects then concern must be for the rule of law within the systems of member states. The parallel legality of ISDS would flout New Zealand's domestic rule of law by creating an anomalous dichotomy between actions available to citizens and investor rights.[338] The notion that the chilling effect of the TPPA will advance the rule of law is flawed no matter which way we spin it.

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[334] Christopher May "The rule of law as the *Grundnorm* of the new constitutionalism" in Gill and Cutler (eds) *New Constitutionalism and World Order* (Cambridge University Press, Cambridge, 2014) 63.

[335] FA Hayek *The Road to Serfdom* (University of Chicago Press, Chicago, 1944) at 80-96.

[336] Hayek distinguishes formal law from substantive rules through a similar analogy: ibid, at 82-83.

[337] Article II.8 states that governments "shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory.": WikiLeaks "Investment Chapter", above n 180. For detailed analysis of constraints on capital controls, see Kelsey "Heighten Financial Instability", above n 55, at 26-28.

[338] This double standard has been defended on (dubious) democratic grounds that investors are not represented within a state's political processes and therefore deserve heightened protection: see Schneiderman "Investing in Democracy? Political Process and International Investment Law" (2010) 60 U Toronto LJ 909.

Chapter VI Legitimising the Outsourcing of Public Power?[339]

The TPPA is poised to play an important part in New Zealand's constitution. Globalised constitutional realism helps us to make sense of the influence of investment treaties, thereby salvaging the project of constitutional theory from the apparent assault of economic globalisation. However, cognisance of constitutional change need not translate into endorsement. A realist approach allows New Zealanders to speak truth to power by peeling back the mask but, once we have mapped the constitutional, we are confronted with the task of normative critique. While this inquiry demands treatment at least as long as the present paper, the institutional preconditions for constitutional authority imply that the norm of representative democracy offers a suitable starting point for legitimising the outsourcing of public power.

Edward Willis has examined the underdeveloped notion of constitutional legitimacy.[340] He distinguishes this concept from sociological legitimacy, such as Palmer's analysis of constitutional culture, and the legal validity of particular rules and decisions.[341] Constitutional legitimacy, Willis argues, is an inquiry into whether perceived legitimacy has a basis in moral and political theory.[342] He is not concerned with theory in a pure academic sense. Rather, Willis wants to "unearth the rich normative vein of constitutional *principle* that serves to translate public *power* into constitutional *authority*."[343] His analysis reveals that it is not abstract principle which achieves this feat but its hard application by the courts.[344] This prompts an exploration of models of constitutionalism that recognise the true importance of judicial adjudication and moderate the emphasis on representative democracy.[345]

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[339] The title of this chapter is a variation on the subtitle to Willis "Constitutional Authority", above n 164.
[340] Ibid, at 271.
[341] Ibid, at 271-272.
[342] Ibid, at 272.
[343] Ibid, at 273 (emphasis added).
[344] Ibid, at 289.
[345] Ibid, at 273-287. For an antithetical take on judicial influence in New Zealand, see John Smillie "Who Wants Juristocracy?" (2006) 11 Otago L Rev 183.

Willis elucidates the dynamic principles (and principled dynamism) through which judges should balance competing constitutional concerns. But that is by no means the complete constitution. It has been my thesis, following Palmer, that the constitution is not just a toy for the courts to play with: "[D]isputes over a number of important constitutional elements are rarely or never litigated before the courts."[346] If we want a moral and political litmus test against which to measure the influence of the TPPA we must move beyond the borders of orthodoxy.

Willis's juxtaposition of power and authority suggests a conceptual distinction explored by political theorist Hannah Arendt. For Arendt, *power* is not a freestanding chattel like instrumental violence.[347] Rather, one must be empowered through the iterative construction of consensus. She draws on the maxim of Cicero – *potestas in populo*, power resides in the people – to highlight how power is produced by and belongs to communities. The power to act on behalf of others remains in existence only so long as the group keeps together.[348] Consequently, *authority* is derived from "institutionalised power in organised communities".[349] The essence of authority is "unquestioning recognition by those who are asked to obey".[350] It can be vested by virtue of a personal relationship or through the institutional validity of a particular office so long as obedience stems from respect, not coercion.[351]

This account of the relationship between power and authority exposes limitations to the empirical purity promised by globalised constitutional realism. The realist tacitly *presupposes* the authority of the state. Public power (to qualify as such) necessarily emanates from authoritative legislative, executive, and judicial institutions. The disproportionate influence of foreign investors could destabilise this basic authority.

In a primal (tautological) sense, a constitution is *constitutive* of political community. The operation of the TPPA within New Zealand's constitution introduces alien interests as a

[346] Palmer "What is New Zealand's Constitution", above n 127, at 149.
[347] Hannah Arendt *On Violence* (Harcourt Brace & Company, San Diego, 1970) at 41-42.
[348] Ibid, at 44.
[349] Ibid, at 46.
[350] Ibid, at 45.
[351] Ibid.

mediating influence between the state and the demos, thereby challenging the ontological foundations of public power. While everyday manifestations of power provoke pockets of disdain, the state is preserved through institutionalised empowerment. Such authority is likely to be undermined if positive law is shaped by rights unavailable to New Zealand citizens and the judiciary can be trumped by investment arbitration. As Arendt suggests, authority is eroded by popular contempt.[352] Once consensus dissolves, it ceases to make sense to talk about *New Zealand's* constitution. The subordination of state institutions to the influence of transnational capital would create what Gill and Cutler describe as a "market civilisation" in which society is "mediated and arbitrated by capitalist market mechanisms, forces and values."[353] Kelsey makes a similar observation in her critique of New Zealand's budding regulatory culture:[354]

> Embedding New Zealand deeper into a neoliberal paradigm, which has detached the state and economy from their social roots, is ultimately destructive of social wellbeing and the legitimacy of the state.

If the originary conditions for public power are reproduced through the popular empowerment of the state, the prime candidate for the maintenance of consensus seems to flow from New Zealand's egalitarian constitutional culture, as expressed by the norm of representative democracy and judicial deference to parliamentary sovereignty. As Willis notes, representative democracy is the dominant narrative of constitutional legitimacy.[355] Thus, *the descriptive focus of globalised constitutional realism contains the germ of constitutional legitimacy in its cultural foundations.*

Arendt's emphasis on consensus as the precondition for the institutional authority of public power complements Waldron's theoretical defence of the legislature. He argues the authoritative "dignity of legislation" must flow from its status as a collective achievement.[356] Majoritarian legislation, when undertaken in good faith, offers the most robust conception of equal respect that we are entitled to work with in the circumstances of intractable political

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[352] Ibid.
[353] Gill and Cutler (eds) *New Constitutionalism*, above n 182, at 319.
[354] Kelsey *The FIRE Economy*, above n 328, at 149.
[355] Willis "Constitutional Authority", above n 164, at 277.
[356] Waldron *Law and Disagreement* (Oxford University Press, New York, 1999) at 101.

disagreement.[357] While particular instances of legislative power are produced by majoritarian mechanisms, the institutional authority of the legislature is sustained by democratic consensus. The assignment of equal weight to individual votes in both the composition of Parliament and in the conduct of its business has a normative appeal that runs deep into New Zealand's constitutional culture.

Like a parasite entering a healthy host, the influence of the TPPA could devour the core organ through which the authority of the state is constituted. The fissures of resistance that have challenged the democratic deficit during negotiations suggest that the principal norm against which we must measure the TPPA within New Zealand's constitution is representative democracy, specifically the role of Parliament relative to other institutions and actors. The significant influence of the TPPA could corrode the primacy of Parliament: the broadened parallel legality of ISDS threatens to take priority over the judiciary and its recognition of parliamentary sovereignty, the importation of a strong takings doctrine for foreign investors would create an anomalous dichotomy with citizens' property rights, and the threat of arbitration could create a chilling effect on legislation and institutionalise neoliberal modes of governance. Each of these changes would be traceable to the foreign policy prerogative, not the representative vehicle for consensus.

Conclusion

Constitutional orthodoxy fails to make sense of the unprecedented breadth of investment treaties by confining New Zealand's constitution to the latter limb of an international/domestic dualism. Moreover, scholars have identified contemporary treaties as a feature of the new constitutionalism of disciplinary neoliberalism. Investment protections mirror the mechanisms of domestic constitutions by placing legal limits on the regulatory powers of government. This effectively quarantines the property rights of foreign investors from democratic politics. Palmer's constitutional realism provides a theoretical springboard to think about these constitution-like investment rules within New Zealand's constitution. Understanding the complete constitution as all those factors that significantly influence the

[357] Ibid, at 116-117.

exercise of public power dissolves the hurdle of dualism and allows international instruments and institutions to be recognised as constitutional.

The draft investment chapter of the TPPA suggests three reforms warrant constitutional attention. First, the expansion of ISDS allows transnational capital to discipline government actions beyond the purview of the judiciary. The parallel legality of arbitration fails to meet judicial standards and could compel the executive to control the domestic courts. Second, protection from indirect expropriation introduces a backdoor takings doctrine that Parliament and the courts have historically rejected. Foreign investors would enjoy privileged access to strong property rights that promote privatisation and the reduction of regulations. The incongruence with weaker rights for New Zealand citizens would produce ugly legal and political puzzles. Third, the threat of direct challenges through arbitration could create a concomitant chilling effect on legislation, catalysing structural constitutional change by subordinating parliamentary politics to the logic of foreign investment.

Globalised constitutional realism avoids domestic myopia when examining the exercise of public power by assimilating the TPPA into a coherent account of the New Zealand constitution. While theories of constitutional legitimacy warrant separate treatment, the disproportionate influence of foreign investors threatens to detach the institutions of rule from their authoritative foundation in popular consensus. Investment treaties establish the legal framework for a political economy shaped by property rights and alien institutions rather than the core organ of representative democracy. Ferment is abroad in New Zealand; the TPPA threatens to rot the constitution from the inside out.

Glossary of Acronyms

BIT	Bilateral investment treaty
GDP	Gross domestic product
ISDS	Investor-State Dispute Settlement
ICCPR	International Covenant on Civil and Political Rights
ICSID	International Convention on the Settlement of Investment Disputes
LAC	Legislation Advisory Committee
MFAT	Ministry of Foreign Affairs and Trade
MMT	Methylcyclopentadienyl manganese tricarbonyl
MP	Member of Parliament
NAFTA	North American Free Trade Agreement
NZBORA	New Zealand Bill of Rights Act 1990
TiSA	Trade in Services Agreement
TPPA	Trans-Pacific Partnership Agreement
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
U.S.	United States

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Investment Protocol to the New Zealand-Hong Kong, China Closer Economic Partnership (signed 29 March 2010, entered into force 1 January 2011).

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