10 Ways the

Trans-Pacific Partnership Agreement

Binds NZ's Future Choices

1. Open Government and Autonomy
2. Pharmac
3. Government Procurement for Economic & Social Goals
4. Broadening SOEs' Responsibilities
5. Tighter Regulation of Mining
6. Repeal of the Hobbit Law
7. Smokefree 2025
8. Reversing National's Changes to the ETS
9. An innovative, Job-creating Economy
10. Regulating Foreign Investment & Financial Speculation

IT'S OUR FUTURE NZ

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1. Open Government and Autonomy

The Trans-Pacific Partnership Agreement (TPPA) is described as a 21st century agreement that will reach further 'behind the border' than any previous free trade or investment agreement. **Parliament will have no effective say over these new rules unless they require changes to New Zealand's domestic law.**

There are around 29 chapters in the agreement, very few of which involve old-fashioned trade. Most of them aim to 'discipline' the process and content of governments' domestic policy and regulatory decisions.

In practice, the TPPA would give foreign governments and well-resourced foreign companies the right to influence our domestic decisions, and marginalise our own national priorities, advocates and agencies, including Parliament and our courts.

New rules would limit our ability to regulate in our own interests on intellectual property, investment, financial services, government procurement, etc. Many chapters have separate processes to vet and challenge a government's actions. Novel chapters on regulatory coherence and transparency aim to discipline general policy-making *processes*.

All these rules are weighted towards commercial priorities and light-handed regulation. Domestic policy makers will need to understand and comply with their extent and complexity. Health officials dealing with the Smokefree policies are already struggling to navigate such a minefield.

The most potent threat to open government and national autonomy is the Investor-State Dispute mechanism that would allow investors from TPPA countries, especially the litigious US, to sue our government directly in private offshore tribunals. The leaked TPPA investment text shows Australia has exempted itself from investor-state disputes; NZ did not.

Investors can claim compensation if a government's actions significantly harms their value or profitability. They can challenge acts of central and local governments, SOEs and even court decisions. Recent disputes involve other countries' actions on mining, medicines, stalled privatisations, climate change mitigation, vulture funds, PPP contracts, private water concessions, tobacco control. New Zealand has few agreements with such provisions, none with the US.

Known investment disputes have skyrocketed; 58 new cases were lodged in 2012, the highest ever. The US is the source of 24% of disputes. The OECD estimates average costs at US$8 million; some exceeded $30 million. The tribunals are ad hoc and secretive, with no binding precedent or appeal structure. Arbitrators are mainly drawn from global law firms that also act for investors who bring such disputes. They can award compensation for lost value and loss of future profits, with compound interest. Outcomes are unpredictable and both the rules and the choice of arbitrators bias outcomes towards investors and away from wider national interests.

Cases themselves are ultimately not the biggest risk. The invisible danger is the chilling effect that the threat of a dispute has when a government weighs up its options, including the fiscal, legal and reputational risks of an investment dispute. Habitual self-censorship is the lot of those who lack true independence.

The TPPA is a potent threat to national sovereignty over decision-making processes and institutions, and to open and accountable government.

2. Pharmac

Pharmac's 2012 annual report shows it saved the NZ taxpayer $5 billion over the past 12 years and expanded access to medicines while staying within budget. Other countries view it as a best practice model. That is why US pharmaceutical companies do not like it. As a market, NZ is peripheral. As a precedent, NZ is crucial.

National is playing word games when it says it will protect the 'fundamentals' of Pharmac. The TPPA would not force Pharmac to be dismantled. The US proposals aim to undermine how Pharmac operates. The goal is to bust the hard funding cap that gives Pharmac bargaining power with the pharmaceutical companies. Leaked texts and other information show two strategies to attack Pharmac through the TPPA:

(i) The original leaked US proposals on **patents** would affect the price Pharmac uses to decide what subsidies it offers for what medicines. All TPPA countries have rejected the US proposals.

New Zealand and four other countries have proposed an alternative that would require much more than our existing law. The US will not accept that.

The US has informally proposed an alternative that would give poorer countries more flexibility than OECD countries. This would impact on NZ and Pharmac most because we are the only OECD country in these talks that does not have an FTA with the US.

(ii) The US pharmaceutical industry has accused Pharmac of an 'egregious' lack of due process. The **Transparency** annex on healthcare technologies (medicines and medical devices like artificial limbs or eye lenses) aims to give Big Pharma more access to, and ability to contest, the information and formulae that Pharmac uses, more opportunities for input, and review and appeal mechanisms.

These are designed to give leverage over Pharmac's processes and decisions and could seriously blow out Pharmac's budget, if the current level of access and subsidies are maintained. The unpalatable alternative would be to reduce availability of affordable medicines. An Australian review said restrictions on generic drugs under the Australia-US FTA was costing their Pharmaceutical Benefits Scheme $200 million more a year for drugs and warned against repeating the mistake in the TPPA.

There are also risks that drug companies would threaten or bring disputes under the TPPA's investment chapter over decisions about patents by the Patent Office or the courts. US drug company Eli Lilly has just claimed $500 million in compensation from Canada under the investment chapter in NAFTA, the model for the TPPA. Canada's Supreme Court refused to grant patents for medicines because Eli Lilly had not shown the drugs would have the benefits that they asserted. Such claims aim to frighten governments and courts to find in the drug companies' favour.

The US insists the general exception for public health measures in the TPPA does not apply to the investment chapter. Even if it did, it wouldn't guarantee protection, because it has many provisos and is only a defence to a legal challenge.

A successful assault on Pharmac via the TPPA would mean medicines cost more, or subsidised drugs are less available. Drug companies would gain more leverage to increase their profits at the expense of the taxpayer or the sick and the poor.

3. Government Procurement for Economic & Social Goals

About $30 billion a year of taxpayer and ratepayer money is used by central and local government to procure goods, services and IT. It is an important tool for economic and social development, as seen with the demise of the Hillside workshops, moves by local councils to make the living wage a term of procurement contracts, and the Workplace Health and Safety Taskforce recommendation that it be used to raise private sector standards through conditions on government contractors.

Procurement is National's preferred form of privatisation. Old style contracts for construction, professional services, medicines or equipment have been overtaken by long-term private contracts for public services: PPP prisons, toll roads, charter schools, nation-wide hospital meals, Snapper, Novopay, Mangawhai sewage scheme, and the Sky City convention centre.

Labour decided in 2006 not to join the WTO's voluntary government procurement agreement. Officials warned it was too complex and prescriptive, would reduce government's discretion and increase administrative burdens on government and suppliers. National has decided to sign up**. The TPPA chapters on procurement, state-owned enterprises and investment would go much further than the WTO.**

- The government **procurement chapter** would give firms from TPPA countries full access to NZ's procurement markets (above an economic threshold and subject to a list of covered agencies). A 'level playing field' for procurement means large transnationals could readily capture the bulk of contracts and small NZ companies stand little chance of winning tenders overseas. TPPA would embed the unbalanced effect of such rules.

- The **state enterprise chapter** would cover procurement by state entities and may promote further contracting out and intensify pressure on public sector budgets, wages and jobs. SOEs have not been defined and could include entities like the ACC, public libraries, universities, Pharmac, hospitals, Health Benefits Ltd, and the Partnership Schools Authorisation Board.

- The **investment** chapter would apply to a firm set up to bid or conduct the contract, the contract itself, a facility (toll road or PPP prison), any IP they create, government bonds, etc. Recent investment disputes have been fought over failed or contested privatised water concessions, PPP construction contracts, and even government bonds. Threats of a long and expensive investment dispute are often used to get governments to settle.

  The investment chapter would also stop governments requiring foreign investors in services from TPPA countries to use a proportion of local goods, services or technology, which helps develop startup industries and maintain jobs, as a condition of investment or receiving a subsidy. (That right has already been conceded for foreign investment in goods.)

Some TPPA parties are trying to limit coverage of the procurement chapter and get a total carveout from the investment chapter - or at least from investor-enforcement. That would require consensus. There is also a big dispute over whether this applies only to central government, or covers states, regional and local governments as well.

The TPPA could stop central and local governments using publicly funded contracts to promote economic and social objectives, and make it harder and more costly to deal with PPPs and privatised contracts when they go wrong.

4. Broadening SOEs' Responsibilities

The last Labour government recognised the need to vary the state-owned enterprises model of the 1980s to better recognise public good functions and social dimensions to services. The hybrid approach of TVNZ was an example. Failed privatisations saw the creation of new SOEs - setting up Kiwibank, reversing the part-privatisation of ACC, taking back and reinvesting in NZ Rail.

The US has proposed a novel chapter on SOEs because it says they compete unfairly with US firms and workers by having access to cheaper debt or government equity, access to public land and infrastructure, cross-subsidising commercial activities from subsidised public functions, non-market dividends, etc.

The US definition of an SOE is apparently so vague that it could extend to universities and the Crown Research Institutes, public hospitals, the Cullen Fund, NZ on Air, Pharmac … Other countries are equally concerned, especially those with sovereign wealth funds or a large number of SOEs. There are complex reporting obligations and compliance costs, with risks that the same actions of an SOE could be challenged by a range of chapter-specific committees.

All other countries have rejected the US proposal. Australia tabled an alternative based on its National Competition Policy, which still aims to neutralise perceived advantages of state ownership. As of September, this chapter was at a standstill. But the US says its SOE chapter is a 'must have' to get through Congress.

That chapter would seriously impede the government's ability to use SOEs to respond to the failure of markets to meet social needs,It would impede:

- **Using existing government agencies for non-commercial objectives** where there is potentially commercial transnational competition (as in health or accident compensation), because this necessarily attracts some kind of government support
- **Establishing a new state entity**; even ones structured on a purely commercial model would require capital injections and initial differential support.

Alternative responses to market failure and social need would face other challenges:

- **Public funding or subsidies** could be prohibited where they are limited to national or public providers, depending on how those chapters treat subsidies and whether a country is allowed to exclude them and has done so.
- **Regulation** runs the risk of challenges under the chapters on cross-border services, investment, and/or financial services, which will have 'disciplines' that require light-handed domestic regulation and no preferences for local or public providers.

  TPPA investors could claim new regulations breach the minimum standards of treatment and indirect expropriation rules under the investment chapter and threaten to or launch an investment dispute.

  New regulations would also be subject to processes in the regulatory coherence and transparency chapters that favour light-handed regulation and give foreign firms more influence over policy decisions.

The TPPA would subordinate the economic development and social functions of SOEs to overriding commercial imperatives and impede moves to adapt or create new SOEs with a broader range of functions.

5. Tighter Regulation of Mining

Many aspects of mining are causing concern, including health and safety, remediation obligations, mining the seabed and conservation land, and fracking. The TPPA targets 'behind the border' measures of governments. That will cover all mining-related rules and decisions, including at local and regional government levels.

The biggest threat is from the investment chapter. The majority of international investment disputes involve natural resources and the environment, especially mining. **The threat of a dispute is intended to get a government to back down.**

If that fails a formal dispute can drag out for years and mining companies have big pockets for such plays. The OECD estimates that legal and arbitration costs in these cases averages US$8 million. Compensation claims of hundreds of millions, or sometimes billions, of dollars 'can seriously affect a respondent country's fiscal position'.

'Investment' includes a company that seeks to or conducts mining operations, its investors, companies that service the industry, and the actual licenses and permits.

Investors would rely on two rules: 'fair and equitable treatment' and 'indirect expropriation'. The ad hoc investment tribunals that hear investment disputes have given these rules a strongly pro-investor interpretation. Recent agreements have tried to restrict the scope of these rules, but the first time they were tested the tribunal sidestepped them. **The US insists that the (limited) exception for public health, conservation and environment does not apply to the investment chapter.**

Recent disputes by US mining companies under TPPA-style rules include:

- US mining company Lone Pine Resources has notified a US$250 million dispute against Canada under NAFTA. It claims that Quebec's two-year moratorium on fracking violates its expectation of a stable business and legal environment and its 'right to mine'.
- Occidental Petroleum received the biggest award ever of US$1.76 billion, plus $589 million in compound interest, against Ecuador in 2012 under a TPPA-style US investment treaty. The tribunal found Ecuador breached the rules on fair and equitable treatment and expropriation even though Occidental breached the contract in ways that entitled the state to cancel it.
- Chevron (previously Texaco) has fought remediation of the Amazon basin for 18 years. It wanted the case to be heard in Ecuador's courts and lost. It then claimed the US$18 billion judgement breached its rights under the US-Ecuador investment treaty. The investment tribunal's approach has been controversial, including ordering Ecuador to suspend enforcement of the national court's decision.

Oceania Gold has indicated its willingness to use such disputes by recently buying all the shares in Canadian Pacific Rim mining, which is involved in a prolonged investment dispute with El Salvador for not granting it a mining licence.

The US also says investors should be able to use investor-state arbitration to enforce natural resources-related contracts with a TPPA state, bypassing domestic courts.

The TPPA would give the industry, especially US-affiliated mining companies, new weapons to challenge re-regulation of the mining industry by threatening long and costly disputes, as they are doing all over the world.

6. Repeal of the Hobbit Law

The *Hobbit* saga shows how easily a New Zealand government can change our labour laws under urgency and find a large additional subsidy when a prominent investor threatens to take its ball and play elsewhere.

Similar tactics are likely if a Labour government seeks to re-regulate labour markets, including repeal of the Hobbit law, strengthen workforce protections and take concrete steps to achieve a living wage.

As the Hobbit precedent showed, the facts and legal basis of their argument are irrelevant if they can manipulate the public debate and political climate. If that fails, **the TPPA would allow Hollywood to increase the fiscal and political risk by threatening to sue, and if necessary suing the government directly in an offshore investment tribunal.**

The Motion Picture Association of America - Hollywood - is a vigorous proponent of the TPPA. Prime Minister John Key discussed it with them in Hollywood in 2012. They are most interested in the intellectual property issues. But they also insist that investors must have the right to sue under the investment chapter of the TPPA.

There are a growing number of investor disputes that challenge labour laws said to have a substantial impact on the value or profitability of an investment.

- In 2005 US courier company United Parcel Service (UPS) accused state-owned Canada Post of unfair competition, in breach of its investment obligations under NAFTA. One ground was that Canada Post's wages were kept unfairly low because certain postal workers were denied the right to bargain collectively. The case failed, but the tribunal did not rule out the labour issue as a valid part of the claim.

- In another 2005 dispute Romania was accused of failing to protect the company's officials from labour unrest.

- Last year, French transnational Veolia claimed €82 million against Egypt, saying it breached the investor's rights by failing to keep payments in line with inflation and other potential cost increases. One target was Egypt's new labour laws, including a higher minimum wage, even though contract provisions provided a buffer against the financial impacts of such changes.

Again, the threat of such disputes can be as, or more, effective than an actual case.

The proposed labour chapter would not help in such cases. It is expected to exhort the various TPPA countries not to lower their labour standards to attract foreign investment. The chapter would also require the parties' laws to adopt and maintain the rights stated in the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-Up. But that does not help a policy that is designed to *raise* labour standards.

The TPPA would provide Hollywood with more leverage and new tools to deter the government from changing employment laws or the subsidies and other benefits that are made available to foreign firms.

7. Smokefree 2025

The Smokefree 2025 policy, based on the Maori Affairs Committee inquiry into the tobacco industry in 2011, is a multi-pronged strategy to protect public health and meet New Zealand's obligations under the Framework Convention on Tobacco Control (FCTC). All countries involved in the TPPA, except the US, are parties to the FCTC.

Tobacco companies have already been in battle with governments and public health groups using trade and investment agreements. These have become an important part of the tobacco lobby's toolkit as they try to scare governments away from policies that would set international precedents.

The Australian plain packaging law, introduced in 2012, has come to symbolise this battle. The tobacco industry has assisted countries to lodge challenges at the WTO and brought its own dispute under a bilateral investment treaty. The National government has deferred NZ's plain packaging law pending the outcome of these cases, demonstrating their chilling effect.

The TPPA would expand the grounds for such challenges**, creating a powerful new basis for threatening governments, alongside the WTO and other agreements.** The tobacco lobby, and the US negotiators, have proposed that:

- **Rules on technical barriers to trade,** which cover labelling and technical standards, have more teeth. Tobacco companies can tie governments up interminably with complaints that policies are not evidence-based and impact unnecessarily on commercial interests.

- **Intellectual property** rules directly protect the use of their trademarks (preventing plain packaging) and close any loopholes in the WTO agreement.

- The **investment rules** guarantee strong protections against changes in policy and law that seriously affect their profits or value of their investment (eg trade marks on packets) and can be enforced directly through international arbitration. Philip Morris is already claiming more than $1 billion against Australia. That is part of why Australia has rejected investor rights to sue in the TPPA. British American Tobacco and Imperial Tobacco have threatened to use existing agreements against NZ. The TPPA would make that much easier.

- **Regulatory coherence** and **transparency** chapters allow the tobacco companies to demand input into decisions on tobacco control policies, which the FCTC seeks to quarantine them from, and opportunities to contest the evidence. The Australian cases show the tobacco companies use these processes to harass policy makers and to compile dossiers to use in the legal challenges.

Malaysia has proposed a total carve out for tobacco from the TPPA. In response to PQs from Labour's Annette King, Tim Groser would not say if NZ supports Malaysia.

The US opposes any public health exception for the investment chapter. It has proposed its own meaningless exception that reflects a compromise between its tobacco companies and the public health lobby.

The tobacco industry uses free trade and investment agreements to pressure governments and sue them if they do not back down. The TPPA would provide powerful new tools to attack New Zealand's Smokefree policies.

8. Reversing National's Changes to the ETS

National the ETS regime imposes minimal, static obligations and puts the burden of addressing climate change on future generations. Even a move to phase in stricter obligations over time and gradually remove subsidies to emitters would be strongly resisted by commercial interests. **The TPPA could add a significant new weapon for the anti-ETS coalition's counter-attack.**

- The draft investment chapter confirms that investors could threaten or bring an investor-state dispute that seeks compensation for such regulatory changes.

- Restoring a more rigorous ETS will impact adversely on the agriculture, forestry and large industry sectors. Federated Farmers has indicated it would seek compensation if an ETS regime were to bite on farmers. Submissions made in the context of the Regulatory Responsibility Bill and Bill of Rights (Private Property Rights) Bill have claimed that various carbon emission policies can amount to 'regulatory takings'. The idea of regulatory takings informs the indirect expropriation provision in the TPPA.

- Regulatory changes to the ETS could also be challenged as breaching minimum standard of treatment provisions, which investors interpret as protecting legitimate expectations of a stable regulatory environment.

- Compensation may be sought for alleged losses to the investment's value, lost future profits, and compound interest. Swedish company Vattenfall sued Germany for €1.4 billion, in part over steps to reduce carbon dioxide emissions from a coal-fired power station after the Stern report in 2006.

- **The US has never allowed the general public interest exception to apply to the investment chapter**. The ETS might be defended using specific provisos to the expropriation and minimum standard of treatment rules, but they are uncertain and will not stop a motivated litigant. This uncertainty and the unpredictability of the tribunals means the primary purpose of threatening, or if necessary lodging, the claim – to increase the leverage that polluters hold when bargaining an outcome – is significantly advanced at little cost. .

- Australian investors may not have direct access to investor-state enforcement, but could obtain it by holding their investments through a subsidiary in another TPPA country. New Zealand corporate farmers and industries could also incorporate offshore to access rights under the TPPA that they do not have domestically and failed to secure through the Regulatory Responsibility Bill.

- Carbon credits and any derivatives or related financial instruments would be 'investments' that are protected under the cross-border financial services and investment chapters. Significant changes that damaged or negated the value of those investments could be subject to an investment dispute.

- Changes to the ETS would need legislation, which would be subject to processes in the regulatory coherence and transparency chapters, discussed in relation to Pharmac, Mining and Smokefree policies.

The TPPA's investment rules could make reform of the ETS a much tougher challenge, by reframing it from a climate issue to a property rights issue, and by allowing affected parties to pursue claims that could total billions of dollars and cannot be brought under domestic law.

9. An innovative, Job-creating Economy

The TPPA is promoted as a 21st century model, but it is premised on the 20th century neoliberal approach of self-regulating markets within a limited state that treats growing inequality and insecure employment as inevitable.

Since the Global Finance Crisis there has been growing support internationally for an approach that requires a more active state which has flexibility to respond to international and domestic changes in economic, social and environmental conditions.

Thriving economies of the 21st century will be technology driven. In some areas of advanced technology innovation, NZ is a world–leader. In the right environment, technological innovation per se and value-added manufacturing, including of agricultural products, has the potential to compensate for our limited manufacturing sector and create good quality sustainable jobs. It is also a means to diversify the economy away from our dependency on minimally transformed agricultural exports and low quality, insecure services jobs. Investors and other innovators may be attracted to NZ if the environment remains conducive.

The US is demanding unprecedented monopoly rights over intellectual property. If it succeeds with even some of the proposals in the intellectual property chapters of the TPPA that were leaked from 2011 and August 2012, the TPPA will thwart innovation by new IT companies and downstream benefits for knowledge-intensive industries and jobs. NZ and most other TPPA countries have rejected these proposals, but most of them are apparently still on the table.

New Zealand IT companies and professionals, telecom users, e-media, Consumer NZ and Trade Me have come together in the Fairdeal Coalition to oppose rules that apply to software patents, temporary copies, digital lock devices, extended copyright terms, parallel importing, and more. These rules can only benefit intellectual property exporting countries, and the US and Japan are the TPPA's only net exporters of IP.

The Institute for IT Professionals describes the US proposals as 'stifling innovation rather than supporting it and protecting mature technology markets (such as that of the US) at the expense of rapidly developing technology export markets such as New Zealand.' Businesses, libraries, central and local governments, schools and universities, would be hit by increased charges. ISPs would face legal obligations to police the Internet on behalf of the IP rights-holders.

Consumer NZ points out that parallel imports, which make cheap goods affordable to low income families in the likes of the Warehouse, would become illegal. There is no local manufacturing capacity to make them here, and the TPPA rules are designed to deter governments from supporting new start-up industries.

The e-commerce chapter is expected to require tariff-free and GST exempt entry for goods and services purchased electronically offshore. IT data storage and processing companies could not be required to store their data in the country, leaving NZ vulnerable to another country's privacy and security rules, quality control systems, and integrity of offshore IT providers.

The TPPA would lock governments into an outmoded 20th model of monopoly property rights that stifles innovation and economic diversification in a forward looking, job creating economy.

10. Regulating Foreign Investment & Financial Speculation

NZ allows almost unrestricted foreign investment. The TPPA would limit our ability to tighten the rules by locking in a minimum threshold for vetting foreign investments. That is likely to be the new level of $100 million for Australian government investors or $477 million for non-government ones. A ratchet would apply so every time the threshold increases it would automatically be locked in; that already exists in the Singapore NZ FTA.

China and Taiwan are entitled to any better treatment we give other countries in future agreements, including the TPPA.

Hopefully National would insist on keeping the limited exceptions for fishing quotas, sensitive rural land and islands, and rights to give NZers preferences in privatisations. But moves to take back control of failed privatisations could face threats of and actual investment disputes, unless governments pay over the odds to investors from TPPA countries – even if they have asset-stripped the business.

The Global Financial Crisis and our own finance company collapses show the risks of globally integrated financial markets and industry self-regulation. The Stiglitz Commission report on the financial crisis and the IMF have both expressed concern that free trade and investment agreements, especially the US model, may prevent governments from adjusting effectively. A recent taskforce found that US agreements were the least compatible with the new thinking and policy.

The TPPA's financial services and investment chapters are based on the US model. That will make it more difficult for NZ to rein in and re-regulate the finance industry or to stem speculative and destabilising capital flows.

The right of countries in the TPPA to adopt capital controls is especially sensitive. The US requires that its FTAs guarantee unrestricted capital flows, with no exception - even for balance of payments emergencies. Over 250 globally renowned economists, including Nobel prize winners, called on the US to show more flexibility. More countries are adopting taxes on short-term inflows, regulating foreign exchange derivatives, and restricting outflows, and the IMF has approved their use.

Chile and Malaysia successfully re-regulated cross-border finance in the 1990s to prevent and mitigate severe financial crises. They and others have tabled proposals in the TPPA negotiations, but the US has rejected them.

Financial investors can threaten or bring investor-state disputes if governments move to reduce risks from the instability that the investors create. 'Investment' in the leaked TPPA text includes financial institutions and shares in them, bonds, derivatives and *sovereign debt*; several countries tried to have this removed, so far without success.

Argentina faces claims totalling $65 billion arising from the successful measures to address its financial crisis in 2001. The most outrageous involve vulture funds that bought debt on which reduced payment had already been agreed, and insist that Argentina pays on the full face value. Tribunals have produced widely varying decisions, provoking Argentina to announce it would withdraw from the World Bank's investment arbitration facility – the same one proposed in the TPPA.

The TPPA would seriously fetter NZ's ability to tighten foreign investment rules and pre-empt or respond to future financial crises, including hot money flows.