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REGULATORY CHILL: LEARNINGS FROM NEW ZEALAND'S PLAIN PACKAGING TOBACCO LAW

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Australia's precedent-setting Tobacco Plain Packaging Act 2011 (*Cth) took two and a half years from its public announcement to come into force. The fact that New Zealand's almost identical legislation was still not in force six years after it was first mooted suggests it was subject to regulatory chill through both specific threats and systemic influences within the policy making process. This article examines the hypothesis that three elements associated with New Zealand's free trade and investment treaties combined to chill a National government that was already luke-warm on a plain packaging law: perceived risks from litigation; associated arguments pressed by politically influential industry lobbyists; and the bias in the regulatory management regime that favours minimal intervention and empowers the tobacco industry, consistent with contemporary trade agreements. It concludes that these mutually reinforcing factors delayed the passage of New Zealand's legislation, but did not see it abandoned. This suggests that health policies supported by public opinion, international health obligations, and precedents from other countries can withstand regulatory chill. But the difference from Australia also highlights the need to pay more attention to ways of neutralising those factors if a Smokefree Aotearoa New Zealand, and similarly ground-breaking public health policies, are to be achieved.*

I INTRODUCTION

The six-year unfinished saga of New Zealand's plain packaging of tobacco legislation has all the hallmarks of regulatory chill. The legislation is almost identical to Australia's precedent-setting *Tobacco Plain Packaging Act 2011* (Cth). That took only two and a half years from its inception to come into force.[1] The Australian government announced its proposed legislation in April 2010, released a consultation document and exposure draft in April 2011 and had introduced the legislation to both houses of Parliament by August 2011. This occurred despite Philip Morris Asia serving a notice of claim that it would challenge the law under the Australia Hong Kong bilateral investment treaty. The Commonwealth Parliament passed the Act in November 2011, with implementing regulations made the same month. The Act came into force a year later on 1 December 2012.

In stark contrast, the New Zealand process will have dragged on for seven years. The government announced a raft of policies in March 2011 that aimed to make Aotearoa New Zealand 'effectively smoke-free' by 2025.[2] That included *possible* alignment with Australia's

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[1] The history of the initiative is set out in: Cancer Council of Victoria, *Plain Tobacco Packaging in Australia: A Time-line of Legislative Developments and Litigation* (2014) <https://www.cancervic.org.au/plainfacts/browse.asp?ContainerID=timelineandinternationaldevelopments>.

[2] New Zealand Government, *Government Response to the Report of the Māori Affairs Committee on its Inquiry into the Tobacco Industry and the Consequences of Tobacco Use: Final Response* (Presented to the House of

plain packaging law. The consultation document was released in July 2012.[3] The Smoke-free Environments (Tobacco Plain Packaging) Bill 2013 was introduced in December 2013. The Health Select Committee heard submissions and reported in August 2014.[4] The second reading was not held until June 2016. The Bill was given the Royal assent on 14 September 2016 to come into force at an unspecified date, or in 18 months (March 2018) at the latest. A consultation and exposure draft of the implementing regulations was released in May 2016, with one month for submissions. The regulations were published a year later and the government announced the Act would finally enter into force on 14 March 2018.[5]

The divergence between Australia and New Zealand is all the more striking because the Trans-Tasman Mutual Recognition Arrangement ('TTMRA') 1998 permits any product that can be sold legally in one country to be sold in the other, including branded tobacco.[6] The Australian government had to take a permanent exemption for its plain packaging legislation to avoid the conflict with New Zealand's law.[7]

Why has the New Zealand government been so reticent to follow Australia's lead? There is unlikely to be a definitive answer until enough time has elapsed for politicians and officials to speak frankly. This article explores the most likely factors. It starts by developing a typology of *specific* and *systemic* forms of regulatory chill, expanding on work done in the context of international trade and investment agreements. The working hypothesis is that three elements related to those agreements combined to chill a government that was already luke-warm on a plain packaging law: perceived risks associated with New Zealand's free trade and investment treaties; the agency of politically influential industry lobbyists who articulated those risks; and the bias in the regulatory management regime that favours minimal intervention and empowers the tobacco industry, which is reinforced by international trade and investment rules. The article concludes that these factors are mutually reinforcing and delayed the passage of plain packaging legislation, but did not see it abandoned. That suggests health policies that are strongly supported by public opinion, international health obligations and precedents from other countries can withstand regulatory chill. But the difference between Australia and New Zealand also highlights the need for more attention to ways of neutralising those three factors if Smokefree Aotearoa New Zealand, and similarly ground-breaking public health policies, are to be achieved.

II REGULATORY CHILL

When governments are reluctant to explain, or even admit to delaying the implementation of the policies or laws to which they are publicly committed there are legitimate grounds to suspect they have been influenced by factors other than the merits. It is notoriously difficult to prove why something has not happened. It may be that governments were chilled from taking action by such considerations as threats of legal action or the potential for collateral damage to

Representatives in Accordance with Standing Order 248 (J 1), 14 March 2011) ('*Government response to Māori Affairs Committee Inquiry').*

[3] Ministry of Health (NZ), *Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand. Consultation Document* (2012) ('*Consultation on Plain Packaging Proposal').*

[4] Health Select Committee (NZ), *Smoke-free Environments (Plain Packaging Tobacco) Amendment Bill*: *Government Bill: As Reported from the Health Committee* (2014) ('*Health Select Committee Report')*

[5] Hon Nicky Wagner, 'Standardised Packaging Regulations Released' (Media Release, 8 June 2017).

[6] *Trans-Tasman Mutual Recognition Arrangement 1998*, signed 14 June 1996 (entered into force 1 May 1998) art 3.1.

[7] Schedule 1 of the *Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013* (Cth) provides for a permanent exemption.

important economic or social interests. Perhaps they made an assessment that the political costs of proceeding outweighed the gains, or they may have been reluctant starters seeking an excuse for their inaction. Decisions not to act will often be a combination of these and other factors.

Contemporary policy research has paid increasing attention to the phenomenon known as regulatory chill in influencing such decisions. The 'chilling effect' is a well known concept in the relation to free speech, where the legitimate exercise of rights is inhibited or discouraged by threats or attacks by opponents of an idea. *Regulatory* chill describes the reluctance of policy makers to adopt legislation or other regulation after factors external to the merits of the proposal are injected into the decision-making process with the intention of influencing the regulatory outcome. The most common examples are *direct* threats of, or actual, legal action or warnings that proceeding would cause undesirable economic or reputational harm. The grounds are usually speculative or rely on untested legal arguments. A more *systemic* form of chill occurs when similar considerations are internalised through the policy criteria, procedures and bureaucratic hierarchy of the government's own processes.

Regulatory chill is not a new phenomenon. However, the influence on specific policies of extrinsic factors and players outside the relevant policy community has attracted more attention in recent years as new and far-reaching international trade and investment agreements have grown in number, scope and prominence.

A *Direct Chill*

The most obvious form of chilling is where a government capitulates to specific threats of litigation directed at a proposed policy or law. Australian political scientist Kyla Tienhaara used several in-depth case studies to distill the impacts of actual or threatened litigation on environmental policy, especially foreign investors' use of international arbitration to enforce the obligations of states under bilateral investment treaties ('BITs') or investment chapters of free trade agreements ('FTAs').[8] She found three concerns were most influential: financial consequences of a loss due to litigation; reputational impacts among investors if the government is sued; and negative experience of previous litigation. The existence of enforceable external constraints could also shift the locus of power over decisions from Parliament to the executive, as trade and other economic ministries increased their influence over specific decisions. Noting the difficulty of knowing when governments are using these risks as cover for controversial action or inaction, Tienhaara stressed the need for a political science perspective when assessing how policy processes actually work, rather than purely legal assessments.[9]

Threats from the tobacco industry to bring investment disputes around the world have now become a cause célèbre.[10] An early study by Canadian constitutional scholar David Schneiderman linked Canada's decision to drop its plain packaging proposal to threats by Philip Morris International and JR Reynolds in 1994 to bring an investment dispute under the

[8] Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, 2009) 262–4.

[9] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606, 606.

[10] Vividly conveyed by comedian John Oliver in a satirical segment: 'Tobacco', *Last Week Tonight with John Oliver* (HBO) (15 February 2015) <https://www.youtube.com/watch?v=6UsHHOCH4q8>.

newly adopted North American Free Trade Agreement ('NAFTA').[11] In later writings, Schneiderman contrasted that retreat with Australia's determination to proceed with its law.[12]

B *Systemic Chill*

These examples of direct chill assume a degree of conscious deliberation by decision makers. Canadian legal scholar Gus Van Harten has stressed the institutional dimension of regulatory chill, as policy makers internalise these and related considerations.[13] Van Harten and Dayna Scott carried out empirical research on how investor–state dispute settlement ('ISDS') under the investment chapter of NAFTA impacted on environmental policy making in Ontario.[14] Interviews with policy makers about internal government processes confirmed that government ministries changed their approach to decision-making to account for concerns about ISDS. Trade ministries and trade lawyers also exerted a lot more influence over internal government decisions and pushed for a more centralised vetting process that gave them greater influence over other ministries' decisions. Once there had been one ISDS dispute, the investment rules and potential for a dispute were likely to figure much more prominently in policy makers' thinking. Several officials suspected that claims from trade officials that industry lobbies or affected businesses might bring a dispute were generated by the officials themselves, because the industries were known not to have raised them.

These scholarly analyses of regulatory chill informed legal arguments in New Zealand on whether the proposed Trans-Pacific Partnership Agreement[15] ('TPPA') could have a chilling effect on government policies towards indigenous Māori. This argument was part of a claim brought in 2015 by a number of iwi (tribes), pan-Māori organisations, and eminent individuals to the Waitangi Tribunal.[16] The claim alleged that the TPPA would breach the Crown's obligations to Māori under the *Treaty of Waitangi 1840*. The impact of ISDS on New Zealand's ability to achieve the smoke-free 2025 goal was one aspect of the claim. As discussed below, the smoke-free commitment had been triggered by a report in 2010 by the Māori Affairs Committee of the New Zealand Parliament on the disproportionate harm caused to Māori by tobacco use.[17] The legal expert appointed to assist the tribunal, Amokura Kawharu, proposed a three-tiered typology of the potential impact of the TPPA on policy:[18]

(i) *regulatory restraint*, which is imposed by the rules of the Agreement;

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[11] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008) 120–4.

[12] David Schneiderman, 'How to Govern Differently: Neo-liberalism, New Constitutionalism, and International Investment Law' in Stephen Gill and Claire Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press, 2014) 165, 173–8.

[13] Gus van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 *Journal of International Dispute Settlement* 92.

[14] Ibid.

[15] *Trans-Pacific Partnership Agreement*, concluded 5 October 2015 (not yet entered into force).

[16] The broader Waitangi Tribunal claim and report are not directly relevant to this article, but the *Report of the Waitangi Tribunal, Trans-Pacific Partnership Agreement WAI-2522* and pleadings can be accessed online: TPP Legal, *Waitangi Tribunal* (2016) <https://tpplegal.wordpress.com/waitangi-tribunal/>.

[17] Māori Affairs Committee, House of Representatives (NZ), *Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Māori* (Report 1.10A, 2010) ('*Inquiry into the Tobacco Industry*').

[18] WAI-2522 Trans-Pacific Partnership Agreement Inquiry Hearing (held in Wellington, 14–18 March 2015) ('*Waitangi Tribunal*') 649–51 (Amokura Kawharu) <https://tpplegal.files.wordpress.com/2015/12/transcript-of-hearing.pdf>.

(ii) *regulatory chill*, which occurs not only through direct threats of litigation, but includes shifts in emphasis within policy making generally as agreements become more wide-ranging; and
(iii) the *psychological effect* of officials and judicial officers not wanting their decisions to be reviewed by an international tribunal.[19]

C *Synthesis of Specific and Systemic Chill*

This author, who was the legal expert assisting the claimants before the Waitangi Tribunal, developed an alternative typology that distinguishes between the *specific* and *systemic* mechanisms in Kawharu's 'regulatory chill' category. A threat to litigate if a government proceeds with a measure, or the deterrent effect of disputes brought against other countries that have pursued similar measures, can cause a *specific* or *direct* form of chill along the lines identified by Tienhaara. The Crown's expert in the Waitangi Tribunal hearing described this process as 'prudent decisions based on risk assessment', rather than chill.[20] But the calculus is not simply actuarial or legal. Policy makers assess the legal, financial, economic and reputational risks of proceeding. Their decisions are heavily influenced by the disposition, competing priorities and relative power of different politicians, official agencies, policy advisers and government lawyers, and the access and effectiveness of the various lobbying interests and the broader public. Arguments can slow and stop a proposed government action, even if a state believes it has a compelling legal argument.

Chilling at the *systemic* level refers to mechanisms that are now built into the criteria, procedures and institutions for government decision-making through the cross-fertilisation of domestic processes and international agreements. Under the rubric of 'best practice regulation', both Australia and New Zealand have adopted neoliberal regulatory management regimes to evaluate the risks associated with different options to achieve a policy goal.[21] The in-built criteria give preference to the least burdensome evidence-based option to achieve that goal.[22] In recent years, this domestic regime has been complemented by similar criteria and processes in binding international trade agreements, which are subject to oversight and enforcement by other states.[23] The details of these rules are discussed later in the article.

Risk assessments within the domestic process feature advice on the country's international trade and investment obligations provided by trade ministries, which have assumed an elevated status in the bureaucratic hierarchy.[24] Their incursions into policy decisions unrelated to trade and commerce reflect the direct and indirect impact of contemporary trade and investment

[19] That concern was expressed by the dissenting arbitrator Professor McRae in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (2009) UNCITRAL, PCA Case No 2009–04, a NAFTA investment dispute that was discussed extensively during the claim.
[20] *Waitangi Tribunal*, above n 18 (Penelope Ridings) 420.
[21] Council of Australian Governments, *Australian Government Guide to Regulation* (2014); and Council of Australian Governments, *Best Practice Regulation: A Guide for Ministerial Councils and Nation Standard Setting Bodies* (2014); New Zealand Government, *Government Expectations for Good Regulatory Practice* (2017).
[22] Jane Kelsey, *The FIRE Economy. New Zealand's Reckoning* (Bridget Williams Books, 2015) 141–9.
[23] For a discussion of the implications of the TPPA for tobacco control policy, see Jane Kelsey, 'The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?' (2013) 39 *American Journal of Law and Medicine* 237, 246–50.
[24] Specified risk factors in the New Zealand assessment process include whether any of the legislative options have the potential to be inconsistent with or have implications for New Zealand's international obligations; and a second question relating to the TTMRA: New Zealand Treasury, *Regulatory Impact Analysis Handbook* (2013) [1.18].

agreements on a broad range of policy areas.[25] That input can be persuasive, overriding otherwise compelling arguments in favour of a policy; yet the arguments on which it is based are rarely contested or contestable, not least because their advice is commonly redacted from published documents.

The procedural element of the regulatory management regime requires that interested sectors of the public, including the affected industries within the country and offshore, are consulted at various stages of the policy process.[26] As the tobacco case study in this article shows, this has provided numerous opportunities for the tobacco lobby to present self-serving interpretations of the country's legal obligations and threaten litigation, which supplemented their input to the standard select committee processes. 'Transparency' chapters and rules have also become common in recent agreements, providing rights of input for other states and 'interested persons' into proposed laws and regulations and to have those views considered.[27] Both mechanisms are highly valued by the tobacco industry as a means to circumvent the intention of Article 5.3 of the World Health Organization's *Framework Convention on Tobacco Control* ('FCTC') to constrain the tobacco industry's ability to influence policy decisions.[28]

III NEW ZEALAND'S PLAIN PACKAGING LAW

New Zealand's most comprehensive tobacco control legislation, the *Smoke-free Environments Act 1990* (NZ), was passed back in 1990.[29] Table 1 sets out the more recent history of New Zealand's path to implementing plain packaging reform.

Table 1: Timeline to Enactment of Tobacco Plain Packaging Legislation

Date	Activity
November 2010	Māori Affairs Committee Inquiry into the Tobacco Industry and the Consequences of Tobacco Use for Māori reports to Parliament
14 March 2011	Government Response to the Report of the Māori Affairs Committee of Inquiry into the Tobacco Industry and the Consequences of Tobacco Use
27 June 2011	Philip Morris Asia files a statement of claim against Australia's *Tobacco Plain Packaging Act 2011* under the Australia Hong Kong Bilateral Investment Treaty 1993
September 2011	Cabinet agrees to actively consider introduction of plain packaging in 2012 depending on advice on regulatory impacts and implications of trade and investment agreements
December 2011	Confidence and Supply Agreement between National and Māori parties commits to work on plain packaging for cigarettes. Tariana Turia is made Associate Minister of Health

[25] For example, the review of New Zealand's patent law was influenced by assessments of potential conflicts with the TPPA then under negotiation, see: New Zealand Treasury, *Best Practice Regulation: Principles and Assessments* (2015) 23.

[26] New Zealand Treasury, above n 24, Part 3.

[27] Jane Kelsey, 'The TPPA: Treaty-making, Parliamentary Democracy and the Rule of Law' (TPPA Expert Paper Series, Paper No 1, 2015) 25–26 <https://tpplegal.files.wordpress.com/2015/12/tpp-treaty-process.pdf>.

[28] *WHO Framework Convention on Tobacco Control*, opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005) art 5.3 reads: 'In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.'

[29] A history of New Zealand's tobacco control measures is set out in *Inquiry into the Tobacco Industry*, above n 17, app D.

13 March 2012	Ukraine lodges a request for consultations at the World Trade Organization challenging Australia's *Tobacco Plain Packaging Act 2011*.
23 July 2012	Consultation document: *Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand* and Regulatory Impact Statement is released
24 July 2012	New Zealand notifies the legislation to the WTO committee on Technical Barriers to Trade and invites intergovernmental submissions.
5 October 2012	Consultation is closed
21 November 2012	Analysis of submissions on the consultation document is released
18 February 2013	Cabinet agrees to legislation aligned to Australia's. Associate Minister of Health announces the government's decision to introduce the legislation.
19 February 2013	Prime Minister says the legislation may not proceed if Australia loses its legal challenges
May 2013	Ministry of Health Statement of Intent 2013–2016 sets smoke-free goals for 2018
11 December 2013	Cabinet Legislation Committee approves introduction of the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill, subject to decisions on timing of entry into force
17 December 2013	The Bill is introduced to Parliament
11 February 2014	First reading of the Bill and referral to Select Committee
28 March 2014	Submissions close
5 August 2014	Select Committee reports on the Bill, renamed The Smoke-free (Standardisation of Tobacco Packaging and Tobacco Products) Bill
6 November 2015	The TPPA text is made public with an exclusion for tobacco control measures from ISDS
11 November 2015	Cabinet Social Policy Committee authorises preparation of an exposure draft of regulations and a consultation process for 2016
17 December 2015	Philip Morris Asia loses the investment dispute challenging Australia's plain packaging laws
31 May 2016	Consultation document and exposure draft of the Standardised Tobacco Products and Packaging Draft Regulations is released
30 June 2016	Second reading of the Bill
29 July 2016	Submissions on the consultation document on the Regulations close
23 August 2016	Committee of Whole House debates the Bill
8 September 2016	Third reading of the Bill
14 September 2016	Royal assent and the Act becomes law, to come into force no later than 14 March 2018
December 2016	Cabinet decides to finalise the Regulations
4 May 2017	Informal reports that Australia has successfully defended the WTO challenge to its plain packaging law
6 June 2017	The Regulations are adopted
8 June 2017	Analysis of the submissions on the Regulations, dated May 2017, is released
14 March 2018	Date for the Act and Regulations to come into force

A *The Māori Affairs Committee*

Incremental steps over several decades have reduced overall tobacco use.[30] But persistently high smoking rates among Māori prompted the Māori Affairs Committee of Parliament in 2009 to launch an inquiry into the industry and the effects of tobacco use on Māori. The initiative was driven by the Māori Party and led by Northern Māori Member of Parliament Hone Harawira and co-leader Tariana Turia. The committee's hard-hitting report was published in November 2010 and stressed the urgency of effective action to stop smoking by Māori:[31]

[30] Hon Tariana Turia, Minister of Health (NZ), *Tobacco Control Achievements: Summary Report* (Tabled in New Zealand Parliament, 2014).
[31] *Inquiry into the Tobacco Industry*, above n 17, 10.

> With smoking rates amongst Māori double that of the general population, tobacco has a particularly devastating impact on Māori, and accounts for a significant portion of the life expectancy differential between Māori and non-Māori. More than 600 Māori die prematurely each year from smoking-related illnesses, and this loss, as well as the preceding addiction, erodes economic, social, and cultural wellbeing, and hinders Māori development aspirations and opportunities. Tobacco smoking delivers a major insult to whānau ora [health of the wider family].

The inquiry's terms of reference called for public submissions on:

- the historical actions of the tobacco industry to promote tobacco use amongst Māori;
- the impact of tobacco use on the health, economic, social and cultural wellbeing of Māori;
- the impact of tobacco use on Māori development aspirations and opportunities;
- what benefits may have accrued to Māori from tobacco use;
- what policy and legislative measures would be necessary to address the findings of the inquiry.[32]

The report's 21 heads of recommendations included: 'That the tobacco industry be required to provide tobacco products exclusively in plain packaging, harmonising with the proposed requirement in Australia from 2012'.[33]

B *The National Government's Policy*

The government responded to the report in March 2011, committing New Zealand to 'a longer term goal of reducing smoking prevalence and tobacco availability to minimal levels, thereby making New Zealand essentially a smoke-free nation by 2025'.[34] 'Minimal' was never defined, but it has been treated as meaning around 5 per cent of adults.[35] However, the government's position on plain packaging was ambivalent; this was even before Philip Morris had lodged its statement of claim in the investment dispute against Australia:

> The Government is monitoring Australia's progress on its proposal to legislate for plain packaging of tobacco products in 2012, and will consider the possibility of New Zealand aligning with Australia. New Zealand Government officials have commenced discussions with respective Australian counterparts on the possible alignment. An initial report back to Cabinet is due by 30 June 2011.[36]

In September 2011, Cabinet recognised the desirability of aligning the two countries' policies, consistent with the TTMRA, but said it would consider options ranging from full alignment with Australia to a separate regulatory regime.[37]

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[32] Ibid 13.
[33] Ibid, Recommendation 7.
[34] *Government Response to Māori Affairs Committee Inquiry,* above n 2, 4.
[35] Framework Convention Alliance, 'Smokefree 2025 Aotearoa/New Zealand', <http://www.fctc.org/publications/meeting-resources/cop7-bulletins/1491-smokefree-2025-aotearoa-new-zealand>.
[36] *Government Response to the Māori Affairs Committee Inquiry*, above n 2, 7–8.
[37] Cabinet (NZ), 'Minute of Decision: Plain Packaging of Tobacco Products' (19 September 2011) CAB Min(11) 34/6A; Cabinet Social Policy Committee (NZ), *Plain Packaging of Tobacco Products* (2011).

Following the general election in 2011, the National government signed a confidence and supply agreement with the Māori Party in which they promised to work together towards plain packaging.[38] In April 2012 the government announced a decision in principle to introduce a plain packaging regime aligned to Australia's, but that was still subject to the outcome of a public consultation process.[39] The consultation document and exposure draft were released in July 2012.[40] A total of 292 submissions were received. Some 62 per cent of submitters supported the proposal, mostly because it was a logical next step to the smoke-free 2025 targets; 38 per cent were opposed.[41] The vast bulk of domestic submitters were from the health sector, but over 60 submissions indicated links to the tobacco industry.[42] Significantly, 48 of the 292 submissions were from overseas, of whom half were from business,[43] and eighteen from government agencies and non-governmental organisations ('NGOs').

Cabinet decided in February 2013 that it would introduce the law.[44] By that time Australia was facing an investment dispute from Philip Morris Asia and an industry-sponsored challenge by three countries at the World Trade Organization ('WTO').[45] The Cabinet paper acknowledged there was a risk of legal proceedings, but expected greater certainty from Australia's cases by the time New Zealand's law was enacted; if not, the paper said its introduction could be delayed. Associate Health Minister Turia did not seek drafting instructions until August 2013.[46] The legislation was given Priority Level 5, to be referred to the Health Select Committee before the end of the calendar year. The Cabinet Legislation Committee approved introduction of the legislation in December 2013, noting that 'decisions on when to enact the legislation or when the regulations should come into force will need to take into account the progress of legal proceedings at the World Trade Organisation'.[47]

[38] *Relationship Accord and Confidence and Supply Agreement between the National Party and the Māori Party* (December 2011).
[39] Hon Tariana Turia, 'Moving Towards Plain Packaging of Tobacco Products' (Media Release, 19 April 2012) <www.scoop.co.nz/stories/PA1204/S00253/moving-towards-plain-packaging-of-tobacco-products.htm>.
[40] Ministry of Health (NZ), *Consultation on Plain Packaging Proposal*, above n 3.
[41] Allen and Clarke Policy and Regulatory Specialists Ltd, *Submissions Analysis on the Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand* (2012) 9 *('Submissions Analysis').*
[42] Ibid 6.
[43] Agroindustrias Laepe SA, Amcor, American Chamber of Commerce, British American Tobacco, Benkert Malaysia, Benkert United Kingdom, Business Action to Stop Counterfeiting and Piracy (International Chamber of Commerce), Czech Association for Branded Products, Dannemann Cigarrenfabrik GmbH, Davidoff and Cia SA, Davidoff of Geneva, Director General Foreign Trade Indonesia, Economesuisse, Emergency Committee for American Trade (US), EU Chamber of Commerce in Korea, European Cigar Manufacturers Association, General Director of External Trade Nicaragua, Imperial Tobacco, Indonesian Chamber of Commerce, Institute for Policy Innovation (US), International Trademark Foundation, Japan Intellectual Property Association, Japan Tobacco International, Ministry of Industry and Commerce Dominican Republic, Ministry of Trade Indonesia, National Association of Manufacturers (US), National Foreign Trade Council (US), Oettinger Imex AG (Switzerland), Olympus Holdings Ltd (US), Ritmeester BV (Netherlands), Tabadom Holding Inc (Chile), TSO Packaging Printers BV, US Chamber of Commerce, US Council of International Business, US-ASEAN Business Council, Washington Legal Foundation, Zopag AG (Switzerland).
[44] Cabinet (NZ) 'Minute of Decision: Plain Packaging of Tobacco Products' (18 February 2013) CAB Min(13) 4/16.
[45] Ukraine, Honduras and the Dominican Republic. Cuba and Indonesia subsequently also laid complaints, and Ukraine withdrew its complaint.
[46] Cabinet Social Policy Committee (NZ), *Tobacco Plain Packaging: Approval for Drafting* (13 August 2013).
[47] Cabinet Legislation Committee (NZ), *Smokefree Environments (Tobacco Plain Packaging) Amendment Bill* (11 December 2013) LEG Min(13) 28/7.

C *The Legislative Process*

The Smokefree Environments (Tobacco Plain Packaging) Amendment Bill 2013 (NZ) was introduced to the House just before it rose for 2013. No date was specified for entry into force of the Act, leaving the government's options open pending the outcome of Australia's disputes. The Bill was sent to the Health Select Committee in February 2014. Over 15 500 submissions were received, many in standard form, with 32 heard orally. The Committee reported back in August 2014.[48] Aside from being renamed the Smokefree Environments (Tobacco Standardised Packaging) Amendment Bill 2015 (NZ), the most significant amendment expanded its purposes to recognise a cultural dimension. It was allocated Category 3 priority in the 2015 legislative programme: to be passed 'if possible' during the year.[49]

The Bill then languished. It was not until 11 November 2015 that the Cabinet Social Policy Committee considered the matter again. A Cabinet paper co-sponsored by the Office of Minister of Trade and the Office of Associate Minister of Health claimed that the Bill had 'been progressing on standard parliamentary timeframes' since its introduction in December 2013 and would shortly be given a second reading.[50] However, they also acknowledged that waiting for Australia's WTO dispute to be resolved before drafting regulations would attract complaints from the Bill's supporters that 'standardised packaging could not come into force before 2019, seven years after the decision was taken to proceed'.[51]

The Associate Minister was asked to prepare an exposure draft of regulations in the first half of 2016. The consultation would be undertaken through the Ministry of Health, working closely with the Ministry of Foreign Affairs and Trade ('MFAT'). The consultation document was published in late May 2016 and submissions closed in late July 2016,[52] although the analysis was not released for another ten months.[53] Of the 61 submissions, 44 were from health or tobacco control NGOs, urging stronger regulations and inclusion of rules on compliance and enforcement.[54] A majority of the five retail organisations' submissions reprised concerns they had raised previously over new display laws: additional compliance costs, discrepancies with Australia's regulations, and the precedent effect for other products.[55] The six tobacco companies with a presence in New Zealand re-litigated the plain packaging law itself and urged government not to act until the WTO had resolved the dispute against Australia.[56]

The Cabinet decided to proceed with the regulations in December 2016,[57] but chose not to announce that publicly. The regulations were adopted in late May 2017, after it became known

[48] *Health Select Committee Report*, above n 4.
[49] Cabinet Social Policy Committee (NZ), *Standardised Tobacco Product Packaging: Update and Next Steps* SOC-15-MIN-0041 [6].
[50] Office of the Minister of Trade, Office of the Associate Minister of Health, Cabinet Social Policy Committee (NZ), *Standardised Tobacco Product Packaging: Update and Next Steps* (November 2015) [3] *('Standardised Tobacco Product Packaging').*
[51] Ibid [61].
[52] Ministry of Health (NZ), *Standardised Tobacco Products and Packaging Draft Regulations. Consultation Document* (2016) *('Consultation Document on Regulations').*
[53] Ministry of Health (NZ), *Standardised Tobacco Products Packaging Draft Regulations. Summary of Submissions* (2017) *('Summary of Submissions on Regulations').*
[54] Ibid 3–5.
[55] Ibid 5.
[56] Ibid 6.
[57] Cabinet Legislation Committee (NZ), *Smoke-free Environment Regulations 2017* (2017) [2].

informally that Australia has won the panel stage of the WTO dispute.[58] The government announced on 8 June that the Act and Regulations would come into force on 14 March 2018 (the final possible date under the Act).[59] The remainder of this article considers the specific and systemic chilling effects that might explain this prolonged legislative process: New Zealand's trade and investment agreements, the agency of industry lobbies, and the regulatory management regime.

IV TRADE AND INVESTMENT AGREEMENTS

The recent prominence of trade and investment agreements in tobacco policy debates has taken many in the health community and health policy makers by surprise. Two factors have converged to create this effect. First, tobacco control policies have become more hard-line and effective, prompting the industry to use every available means to resist. Second, international trade agreements have expanded their reach quite dramatically. They now routinely include rules on non-trade topics, notably intellectual property rights and investment, that are designed to restrict governments' policy options. As explained below, contemporary agreements also impose regulatory presumptions that favour business, and procedural obligations to ensure that foreign states and companies have prior warning and opportunities to comment on proposed regulation. Lawyers for investors have become quite audacious in exploiting investor-rights and investor-initiated enforcement of new investment chapters and old BITs.[60]

Tobacco companies have embraced these opportunities as they become increasingly marginalised from domestic policy-making, especially in the wake of the FCTC.[61] They and their support groups have also widened their constituency of support with warnings of a slippery slope: that is, acceptance of plain packaging of tobacco as compliant with international trade and investment treaties will spread to labelling of other commercial products and exports.

Warnings that measures will breach the trade and investment rules are especially potent in New Zealand. Successive governments have prided themselves on the country's reputation as an exemplary international trade citizen. New Zealand was a founding member of the *General Agreement on Tariffs and Trade* ('GATT') in 1947 and the WTO in 1995.[62] It has only one active BIT, with Hong Kong, dating from 1995,[63] but recent governments have enthusiastically negotiated new broad-ranging FTAs that increase the country's exposure to complaints when regulating intellectual property rights, technical barriers to trade, and trade in services, as well

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[58] 'Tobacco Logo Ban Said to Get WTO Backing in Landmark Case', *Bloomberg* (online), 4 May 2017, <https://www.bloomberg.com/news/articles/2017-05-04/wto-said-to-uphold-australia-s-ban-on-cigarette-logos>; Hon Todd McClay and Hon Nicky Wagner, 'New Zealand Confident on Plain Packaging WTO Case' (Media Release, 6 May 2017).

[59] Hon Nicky Wagner, 'Standardised Packaging Regulations Released' (Press Release, 8 June 2017) <http://www.scoop.co.nz/stories/PA1706/S00129/standardised-packaging-regulations-released.htm>.

[60] Cecilia Olivet and Pia Eberhardt, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom: Report* (Corporate Europe Observatory and Trans-National Institute, 2012).

[61] Jappe Eckhardt, Chris Holden and Cynthia D Callard, 'Tobacco Control and the World Trade Organization: Mapping Member States' Positions After the Framework Convention on Tobacco Control' (2016) 25 *Tobacco Control* 692, 694.

[62] *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

[63] *The Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments*, signed 6 July 1995 (entered into force 5 August 1995) art 8.3 reads: 'The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to … the protection of public health … provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.'

as to investor protections and investor enforcement.[64] Development of New Zealand's plain packaging legislation coincided with negotiations for the TPPA, where the risk of US corporations using ISDS to challenge New Zealand's health policies featured prominently.[65]

A *Specific Threats and Deterrents*

The tobacco industry and its allies, local and foreign, played to the New Zealand government's sensitivity at every opportunity. The analysis of submissions on the consultation document in 2012 shows 31 of the 292 submitters referred to the potential legal implications, many of whom were unlikely to support the proposal. They included 10 international manufacturers, seven international organisations, two manufacturer /exporter /importers, one professional association, and one international retailer.[66] In particular, their submissions alleged breaches of the WTO's *Agreement on Trade-related Intellectual Property Rights* ('TRIPS') and TBT, as well as the *Paris Convention for the Protection of Industrial Property* (1883).[67] The intellectual property rights argument was also posed as a domestic legal issue of property rights and of freedom of expression under the *Bill of Rights Act 1990* (NZ).[68]

These arguments were echoed in submissions to the Select Committee. The industry lobby focused on three issues: investment and WTO disputes; impacts on other exports of establishing a precedent for tobacco; and New Zealand's reputation. Their threats to bring an investment dispute were aggressive but vague. British American Tobacco New Zealand ('BATNZ') told the Select Committee on the plain packaging Bill in 2014 that the legislation would breach investment treaties that protected companies within their group and would entitle them to 'an arbitral award requiring New Zealand to repeal the legislation and/or pay substantial sums in compensation'.[69] Their companies would take 'all steps necessary to protect their investments from unlawful government interference'.[70] Imperial Tobacco's Global Director of Corporate Affairs Axel Gietz refused to rule out legal action when presenting its submission on the Bill.[71]

The tobacco industry was supported by umbrella lobby groups. The New Zealand Food and Grocery Council was the most important. Chief executive Katherine Rich focused on potential breaches of TRIPS and investment agreements, noting the latter allowed private companies to take action against governments.[72] While disavowing expertise on the details and likelihood of

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[64] Penelope Ridings, 'Investment Negotiations: Walking the Tightrope Between Offensive and Defensive Interests', *Insider* (online), 5 October 2016 <http://insider.thomsonreuters.co.nz/2016/10/investment-negotiations-walking-the-tightrope-between-offensive-and-defensive-interests/>.

[65] Jane Kelsey, *Hidden Agendas: What We Need to Know About the TPPA* (Bridget Williams Books, 2013), 22–6.

[66] *Submissions Analysis*, above n 41, 48.

[67] *Paris Convention for the Protection of Industrial Property* (1883), opened for signature 20 March 1883, (entered into force 7 July 1884) as revised at Stockholm 1967, 828 UNTS 306.

[68] *Submissions Analysis*, above n 41, 48.

[69] British American Tobacco (NZ), Submission No 226 to the Ministry of Health (NZ), *Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand*, 5 October 2012, 6 <https://www.health.govt.nz/system/files/documents/pages/sub_226.pdf>.

[70] Ibid 12.

[71] Imperial Tobacco New Zealand Ltd, Submission to the Health Select Committee, *Limits on Smokefree Environments (Tobacco Plain Packaging) Amendment Bill 2013*, 2014 ('*Imperial Tobacco Submission 2014'*).

[72] New Zealand Food and Grocery Council, *Introductory Statement from Katherine Rich, New Zealand Food & Grocery Council (NZFGC) on the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill* (20 May 2014) ('*NZFGC Introductory Statement'*).

retaliation, she suggested it would be interesting to know whether MFAT officials had advised the Committee on the risk of litigation, in particular the views of Indonesia (which had brought a tobacco-related dispute against the US at the WTO[73]). Rich even described ISDS as a tool that is 'modeled on basic tenets of democratic legal systems – promotes economic development by protecting investors from unequal and arbitrary action on the part of governments'.[74] Threats were often accompanied by self-serving legal interpretations. An unnamed manufacturer baldly asserted that:

> Public health justifications would not be a defence if the Government breaches an Investment Treaty through unfair, inequitable and discriminatory conduct. Even if in theory there could be a defence, given the absence of evidence that Plain Packaging would reduce tobacco consumption, the existence of suitable alternative tobacco control measures, and the fact that tobacco remains a legal product, it would be impossible for the Government to discharge its burden of proving that Plain Packaging is a proportionate, pressing and reasonable measure that is necessary for the protection of public health.[75]

The manufacturer hoped that 'legal proceedings [would] not be required, but [it would] take all measures necessary to protect our valuable property rights from unlawful interference'.[76]

Some smoke-free advocates addressed the industry threats head-on, with 31 submissions on the 2012 consultation document arguing that health policy must take primacy over actions that might infringe a company's rights, or as one said 'public health overrules commercial profit or free trade for this industry'.[77] A number acknowledged there were legal risks, but said that was no reason not to proceed. The Ministry of Health was urged not to be swayed or deterred by offshore business interests.[78]

There was a second limb of the industry arguments that sought directly to chill the policy process: the consequential risk to other products of setting a precedent on tobacco. This was almost certainly a more important consideration to the governing National Party, with its strong farming base and ideological commitment to free trade, than the smoke-free policy itself. Warnings of a slippery slope were especially potent coming from the Food and Grocery Council.[79] Katherine Rich warned the Select Committee that compromising the right of companies to use their trademarks 'will then become the beginning of standardised packaging for other products considered a health risk such as wine, confectionary and dairy products, particularly infant formula'.[80] She predicted 'the ensuing intellectual property scrap [on plain packaging of tobacco] could result in a pyrrhic victory for New Zealand':[81] if the WTO upheld the challenge to Australia's law 'then plain packaging for food and wine on which the New

<http://www.fgc.org.nz/upload/submissions/2014/Introductory%20Stmt%20to%20Select%20Cttee%20re%20Tobacco%20-%20K%20Rich%2020%20May%202014.pdf>.

[73] Indonesia brought a successful WTO dispute challenging the US ban on clove-flavoured cigarettes (*Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes* [222–23], WTO Doc WT/DS406/AB/R (4 April 2012), and joined the WTO dispute as a complainant against Australia in 2013.

[74] *NZFGC Introductory Statement*, above n 72.

[75] Quoted in *Submissions Analysis*, above n 41, 48–9.

[76] Ibid.

[77] Ibid 52.

[78] Ibid 68.

[79] New Zealand Food and Grocery Council, Submission to Parliamentary Health Committee, *The Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill 2013*, 28 March 2014 ('*Food and Grocery Council Submission'*).

[80] *NZFGC Introductory Statement*, above n 72, 2.

[81] Ibid 1.

Zealand economy has a heavy reliance, may well be at risk'.[82] Ironically, given the Council's members are deeply integrated with Australian firms, Rich suggested that a ruling of compliance with the TTMRA might well jeopardise all trade except trans-Tasman trade.[83]

The industry also played the reputation card. The Food and Grocery Council stressed New Zealand's reputation as a 'very principled country in its trading, government, community and relationships, and a good global citizen'.[84] Media reported a big US corporate lobby group had warned the plain packaging Bill both violated New Zealand's trade obligations and damaged its leadership credentials.[85]

B *The Government's Response*

Although heavily redacted, the official documents released on the government's own initiative and under New Zealand's *Official Information Act 1982* show the officials and Cabinet evaluated the potential risks relating to the WTO, ISDS and the TTMRA at every stage of the policy process. Table 1 shows a strong correlation between the timing of New Zealand's decisions and the status of Australia's WTO dispute and the ISDS case under the Hong Kong–Australia BIT. Prime Minister John Key conceded in early 2013 that the litigation was behind the delays in progressing the law.[86]

It could be argued that the government was simply seeking to ensure compliance with its legal obligations — what Kawharu referred to as 'regulatory restraint' and the Crown's expert called 'prudent decision making'. However, New Zealand's exposure to legal risk was no more, and arguably less than Australia's, because New Zealand had fewer agreements, and an exception for non-discriminatory health measures in its only bilateral investment treaty (with Hong Kong),[87] — an exception which was not in the Australian BIT. While Australia's win in the investment dispute[88] was crucial to Cabinet's decision to pass the Bill, it noted that it could still delay the Act's entry into force.[89] Presumably, Cabinet was waiting for the WTO decision as well. There had been considerable criticism in the WTO's TBT Committee when New Zealand notified the proposed law in July 2012.[90] The government joined the WTO dispute against Australia as a third party, which gave it access to the arguments and an ability to assess the likely outcome. Cabinet's decision in June 2017 to proceed was taken after the parties had received the confidential draft report, but without a formal decision.[91]

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[82] *Food and Grocery Council Submission*, above n 79, 7.
[83] Ibid 4.
[84] Ibid 6.
[85] Radio New Zealand, 'Minister Defends Plain Packaging', *Morning Report*, 14 February 2014 (William Reinsch) <http://www.radionz.co.nz/news/national/235694/minister-defends-plain-packaging>.
[86] 'Key Admits Plain Cigarette Packaging May Not Go Ahead', *TVNZ*, 19 February 2013 (on file with author). At the time, New Zealand had few bilateral investment treaties and investor chapters in free trade agreements: see Jane Kelsey, *International Trade and Investment Law Issues Relating to New Zealand's Proposed Tobacco Control Policies to Achieve an Effectively Smokefree Aotearoa New Zealand by 2025: Report to the Tobacco Control Research Turanga* (2012) 40-1 ('*Report to the Tobacco Control Research Turanga'*) 31–4.
[87] See above n 63.
[88] *Philip Morris Asia Ltd v The Commonwealth of Australia* (Award, Permanent Court of Arbitration, Case No 2012-12, December 2015).
[89] *Standardised Tobacco Product Packaging*, above n 50 [19].
[90] New Zealand, 'Notification' to WTO Committee on Technical Barriers to Trade, WTO Doc G/TBT/N/NZL/62 (24 July 2012).
[91] Associate Minister of Health, *Smoke-free Environments Legislation 2017* (Cabinet Legislation Committee (NZ), 7 June 2017) [6]–[10] *('Smoke-free Environments Legislation 2017')*.

The agreement that governments could block investor–state disputes over tobacco policies in the TPPA seems unlikely to have been a legal consideration,[92] as that agreement could not have come into force before the legislation, and the exclusion would not prevent state–state enforcement of the investment chapter or other chapters in the agreement.[93] There is no equivalent protection in the free trade agreement that New Zealand negotiated with South Korea during the same period and which came into force in December 2015.

The other legal obstacle, the TTMRA,[94] had been removed in 2013. Australia initially took a temporary exemption for tobacco products to prevent the industry by-passing the plain packaging law by importing branded tobacco products from New Zealand.[95] Temporary exemptions are meant to last for 12 months.[96] Australia took a permanent exemption in 2013 as the New Zealand government continued to prevaricate.[97]

Overall, the pure 'legal compliance' argument is unconvincing. The publicly available policy documents show the government was concerned about the *potential* for litigation and its effects, not just the legality of its actions.[98] For example, the paper for the Cabinet Committee in November 2015, entitled 'Update and Next Steps', focused on international developments.[99] The headings show the officials provided assessments of the hearings in the WTO dispute against Australia. That was followed by a large redacted section on litigation risk, which officials said informed their advice on the timeline.

The same paper discussed the industry's response to moves in other countries.[100] It noted that the United Kingdom and Ireland had both passed detailed legislation for standardised packaging to come into force from 20 May 2016 and not faced WTO or ISDS disputes, although tobacco companies had commenced domestic legal proceedings which were now before the European Court of Justice. Canada, France, Norway and Singapore had notified their intentions to the WTO. The commentary accompanying these observations was also blacked

[92] Trans-Pacific Partnership Agreement, art 29.5: 'Tobacco Control Measures: A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.'

[93] Notably Chapter 8 Technical Barriers to Trade, Chapter 9 Intellectual Property, and Chapter 10 Cross-Border Trade in Services. The exclusion also does not affect the procedural chapters that entitle the tobacco industry to have input on proposed regulation.

[94] New Zealand and Australia agreed to adopt a mutual recognition principle that goods produced in or imported into one country that can lawfully be sold in that country can also be sold lawfully in the other, without the need to comply with any of its legal requirements relating to sale. This obligation is implemented through each country's domestic laws. See *Trans-Tasman Mutual Recognition Act 1997* (NZ) s 10. See further Kelsey, above n 86, 40–1.

[95] The legislative history in the *Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013* (Cth) says: 'The *Tobacco Plain Packaging Act 2011* and these Regulations were temporarily exempted from the operation of the *Trans-Tasman Mutual Recognition Act 1997* under s 46 of that Act and s 109 of the *Tobacco Plain Packaging Act 2011*. The temporary exemption operated from 1 October 2012 until the commencement of the *Trans-Tasman Mutual Recognition Legislation Amendment (Tobacco Plain Packaging) Regulation 2013*', which provided for a permanent exemption.

[96] Trans-Tasman Mutual Recognition Arrangement 1997, [4.2.1] and [4.2.2].

[97] *Trans-Tasman Mutual Recognition Act 1997* (Cth) sch 2, pt 2.

[98] *Standardised Tobacco Product Packaging*, above n 50 [6].

[99] Ibid.

[100] Ibid [10]–[11].

out. But it is clear that these considerations were determinative in the decision in November 2015 to release regulations for consultation: 'This paper *therefore* proposes taking *a* next step towards developing the detailed regulations needed to implement' the law.[101]

The discussion of trade law issues in the Cabinet paper regarding adoption of the regulations in June 2017 was also heavily redacted.[102] While noting leaked information that Australia had prevailed in the WTO dispute, it said that could not be confirmed until the final report was released, which was not expected until late 2017 or early 2018. The paper then noted the default date for the Act to come into force was 14 March 2018. This clearly implied that March 2018 was as long as the government could legally delay the Act's implementation, whatever the contervailing considerations.

There is no question that legal risks were a factor in delaying the New Zealand legislation. As noted, New Zealand had fewer concrete legal risks under investment agreements than Australia, and similar WTO exposure, but Australia chose to stare down those risks. There are certainly grounds to infer that the threats to pursue such litigation constituted a specific or direct chill on the government, and that associated risks to reputation and other exports were another factor in delaying the legislation.

V POLITICAL AGENCY

Regulatory chill requires agency. Not every intervention by pro-tobacco interests will contribute to a specific or direct chilling effect. But many will. They will also contribute to or reinforce the systemic or institutionalised bias that chills a government's regulatory decisions. This section explores both dynamics in relation to New Zealand's plain packaging law.

New Zealand can be described as an intimate society. In a small country with relatively few powerful corporations and individuals, the corporate–state nexus is particularly close. Political party officeholders and donors, well-connected bloggers, corporate funded think tanks and their executives, and industry lobbyists have ready access to the inner circle of law makers and senior bureaucrats. There is a small revolving door of lobbyists and consultants who have been, or subsequently become, politicians or trade negotiators. These interactions take place within a very thin political system of a unitary House of Parliament. Since the introduction of a Mixed-Member Proportional Representation electoral system in 1996, however, a requirement to govern through coalitions has generated a political market in which minor parties trade their allegiance for the government's endorsement of favoured policies. As plain packaging showed, such commitments can prove fickle.

Small country syndrome also impacts on the community of public health advocates and academics. Access to funding for tobacco control research, programmes and advocacy is highly competitive, and allocations are susceptible to political sensitivities. The government buried a report by this author on the implications of New Zealand's free trade and investment agreements for the Smoke-free 2025 goal,[103] and the larger research grant of which it was part was threatened. Advocacy groups may seek to minimise such risks by not actively engaging on politically sensitive issues, such as demanding protection for tobacco control policies during trade and investment negotiations. But without their pressure, the pro-tobacco lobby can wield disproportionate influence.

[101] Ibid [15] [emphasis added].
[102] *Smoke-free Environments Legislation 2017,* above n 91, [6]–[10].
[103] *Report to the Tobacco Control Research Turanga,* above n 86.

A *Tobacco Industry Lobby*

The tobacco industry deployed a familiar raft of campaign activities and strategies to oppose plain packaging, supplemented by personal links to politicians and the governing party. Imperial Tobacco New Zealand and BATNZ have the largest commercial presence in New Zealand. During the initial public consultation in 2012 the latter launched a mass media campaign under the slogan *Agree-Disagree*, using standard industry arguments to establish a constituency of support.[104] The Ministry of Health rejected complaints that the campaign broke the law by promoting smoking, saying there were insufficient grounds for a prosecution.[105] Canadian health academics noted similarities with the anti-plain packaging campaign there by JTI-MacDonald, with the equally unwarranted title of *Both Sides of the Argument.*[106] Imperial Tobacco joined with Philip Morris and British American Tobacco in producing a multi-choice postcard targeted towards retailers and their workers and a template for retailers to fill in, and had a postcard of its own. Several generic letters were developed for retailers, one of which referred to the Australian litigation. Smokefree NZ, the Cancer Society, the Heart Foundation and Plainpacks.org also co-sponsored two postcards. The final count showed 8201 postcards in favour of the law and 11 814 opposed.

However, as in most countries, the tobacco industry had an image problem and personal appearances backfired. Imperial Tobacco's submission on the Bill in 2015 was the most verbally aggressive among the industry. It described the legislation as 'draconic', 'disproportionate and unlawful', 'premature', in breach of New Zealand investment and trade agreements, lacking an evidence base, and more.[107] At the same time, it depicted itself as a 'truly Kiwi company' committed to creating jobs, trading and sourcing with local suppliers and businesses, and collecting over $350 million in taxes and other duties. Imperial Tobacco's Global Director of Corporate Affairs, Axel Gietz, who presented their 2015 submission, returned during consultations on the tobacco packaging Regulations in 2016. The visit was a public relations disaster. Veteran public broadcaster Kim Hill lost her patience over his obfuscations,[108] and co-leader of the Māori Party called him a 'corporate executioner' and a 'peddler of death' on television.[109]

B *Pro-tobacco Lobbyists*

Big Tobacco relied on more credible lobby groups, notably the New Zealand Food and Grocery Council whose image and broader warnings about the slippery-slope effects of plain packaging were more likely to resonate with politicians, media and consumers. Their messaging, focused

[104] Topics of the television advertisements were: theft of intellectual property, effects on wine exports of breaching trade rules, copying Australia's untested laws, freedom of choice, and the slippery slope of plain labels for beer. Andrew Morehu Waa et al, 'Analysis of the Logic and Framing of a Tobacco Industry Campaign Opposing Standardised Packaging Legislation in New Zealand' (2016) *Tobacco Control* (Online First) doi:10.1136/tobaccocontrol-2016-053146.

[105] Ibid 1.

[106] Julia Smith, 'Both Sides of the Argument? JTI-MacDonald's Anti-Plain Packaging Spin in Canada' *BMJ Blog* (online), 1 November 2016 <http://blogs.bmj.com/tc/2016/11/01/both-sides-of-the-argument-jti-macdonalds-anti-plain-packaging-spin-in-canada/>.

[107] *Imperial Tobacco Submission 2014*, above n 71.

[108] Radio New Zealand, 'Axel Gietz: Tobacco and Plain Packaging' *Saturday Morning*, 26 June 2016 <http://www.radionz.co.nz/national/programmes/saturday/audio/201805885/axel-gietz-tobacco-and-plain-packaging>.

[109] Rob Stock, 'MP Marama Fox calls Imperial Tobacco Spokesman a "peddler of death" on The Nation', *Stuff* (online) 2 June 2016 <http://www.stuff.co.nz/business/81453260/mp-marama-fox-calls-imperial-tobacco-spokesman-a-peddlar-of-death-on-the-nation>

entirely on factors designed to chill the government decision, largely set the terms of the debate in the media and consultation documents.

According to the Food and Grocery Council's website, it 'promotes the role the industry plays in the health and nutrition of New Zealanders in making better diet and lifestyle choices. … [and] at all times promotes the facts about safe food and good nutrition using an evidence-based approach'.[110] Chief executive Katherine Rich was a senior National Party politician who left Parliament in 2008 after nine years in opposition. Rich presented the Council's submission to the plain packaging Bill 'on behalf of companies who sell products through supermarkets', including tobacco.[111] She said the Council supported all current laws and regulations relating to the production and sale of tobacco (although it had opposed legislation introducing new restrictions on displays in 2011).[112] In 2012 the National Party, then in government, appointed Rich to its newly established Health Promotion Authority, whose job is to lead and support nation-wide health initiatives. Both she and the government denied any conflict of interest. However, Rich resigned in 2015, despite being cleared of conflict of interest allegations arising from leaked emails that suggested links to attacks by a right-wing blogger on academics who promoted tobacco and alcohol control policies.[113]

Other pro-tobacco lobbyists had strong political connections. Carrick Graham, son of a former National Party Cabinet minister, rose from selling tobacco to become spokesman for British American Tobacco from 1996 to 2006. His communications company acted for known tobacco front groups, such as the Association of Convenience Stores.[114] Graham was quoted in an interview as bragging that: 'Victory … is when the other side starts to use his language and gets forced onto an agenda he wrote'.[115] In 2014 Graham was implicated in the covert coordinated campaign to smear public health researchers who were advocating evidence-based interventions to cut obesity, and smoking and alcohol-related diseases.[116] Graham paid a right-wing blogger to post these stories without disclosing the author (himself) or his clients, who were thought to be members of the Food and Grocery Council.[117]

C *Coalition Parties in Government*

Agency is important to achieving regulatory chill. However, agents can also neutralise or counteract chill, especially within the government itself. New Zealand's government was led throughout the plain packaging policy process by the National Party, traditionally the 'party of business' and a strong advocate of a neoliberal market economy. There is nothing to indicate that National had any real commitment to a smoke-free agenda. In addition to appointing Rich to the Health Promotion Authority, National defied criticism when it selected two former

[110] New Zealand Food and Grocery Council, *About* (2017) <http://www.fgc.org.nz/about>.
[111] *NZFGC Introductory Statement*, above n 72.
[112] New Zealand Food and Grocery Council, Submission to Parliament of New Zealand, *Smoke-free Environments (Controls and Enforcement) Amendment Bill*, 28 January 2011.
[113] Office of the Auditor-General (NZ), *Health Promotion Authority — Katherine Rich — Potential Conflict of Interest* (2015); Nicky Hager, *Dirty Politics: How Attack Politics is Poisoning New Zealand's Political Environment* (Craig Potton Publishing, 2014).
[114] Action on Smoking and Health New Zealand, *Front Groups* (2017) <http://www.ash.org.nz/the-evidence/the-tobacco-industry/tobacco-industry-conduct/front-groups/>.
[115] Peter Newport, 'Carrick Graham: Without Apologies', *North and South* (online), 18 June 2015 <http://www.noted.co.nz/currently/politics/carrick-graham-without-apologies/>.
[116] Hager, above n 113; Nathan Cowie, 'New Zealand: Dirty Politics Raises Conflict of Interest Concerns', *BMJ Blog (*online), 2 October 2014 <http://blogs.bmj.com/tc/2014/10/02/new-zealand-dirty-politics-raises-conflict-of-interest-concerns/>
[117] Newport, above n 115.

tobacco industry lobbyists as candidates for the 2014 election. One, the former Corporate Affairs Manager for Philip Morris, won a safe seat. The other, who previously held the same job, was elected on the party list.[118]

It could be argued that National took advantage of threats that were intended to chill, as a justification for delaying a policy that was unpopular with parts of its core constituency and which it had endorsed as the price of forming a coalition government. But that is too simplistic. In 2008, 2011 and 2014 National maintained an unlikely alliance with the Māori Party, which was formed in 2004 in opposition to Labour government legislation that denied Māori rights to claim ownership of the foreshore and seabed. The party's co-leader Tariana Turia held the portfolio of Associate Minister of Health from 2008 to 2014. The Māori Party spearheaded the Select Committee inquiry that reported in November 2010 and led to the Smoke-free 2025 goals announced in March 2011. The confidence and supply arrangement in 2011 included a commitment to tobacco reform, including work on plain packaging. Turia drove the smoke-free policy with the same determination as Australia's Health Minister at the time, Nicola Roxon, and deserves considerable credit for diminishing the 'chilling effect'. But she lacked power within a reluctant government to advance the legislation. Turia retired in 2014 and the party only secured two seats in that year's election. National no longer needed them to govern and their leverage over tobacco control and other policies fell accordingly.

Over the same period National had a coalition arrangement with the libertarian ACT Party, which champions regulatory minimalism, protection of private property rights and individual choice. ACT held the portfolio of Regulatory Responsibility and was responsible for the Cabinet statement, 'Better Regulation, Less Regulation', issued in 2010.[119] Despite that position, ACT lacked the influence to stop the government from pursuing a contrary policy. Its only MP, David Seymour, 'proudly opposed' the plain packaging Bill at the second reading in 2016, declaring it a 'major step in eroding our tradition of property rights and freedom to trade'.[120]

This contrast suggests that the political context of coalition politics impacted on the industry's moves to chill the policies, but was not determinative of the government's decision to bring the law into force in March 2018. That was both a legislative imperative, and necessary to avoid the reputational harm associated with inaction when Australia had been so proactive.

D *Tobacco Control Advocates*

The other potentially neutralising agents were the tobacco control community. As noted earlier, they mobilised to generate submissions and actively engaged throughout the prolonged policy process. Health advocates and academics were personally targeted by Carrick Graham and others on behalf of their un-named clients. University of Otago alcohol researcher Doug Sellman observed:

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[118] Editorial, 'Tobacco Stain on Would-Be MP', *Dominion Post* (online), 1 May 2014, <http://www.stuff.co.nz/dominion-post/comment/editorials/9996252/Editorial-Tobacco-stain-on-would-be-MP>.

[119] Minister of Finance and Minister of Regulatory Responsibility, 'Government Statement on Regulation: Better Regulation, Less Regulation' (Government Statement, 17 August 2009) <http://www.treasury.govt.nz/regulation/informationreleases/statement>.

[120] Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill 2016, Second Reading (30 June 2016) 51 NZPD 2111 (David Seymour) <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20160630_20160630_20>.

> I think it's had a chilling effect on public health practitioners and scientists who speak out on issues that might upset big business, like Carrick Graham's clients, and current government policy. ... I'm most concerned about the way [this] might put off bright, enthusiastic young health practitioners and scientists from getting involved in alcohol [reform] advocacy. …The most important thing is the public comes to understand that personal attacks on health professionals who speak out against vested interests are a deliberate tactic of these people to maintain their power and fortunes.[121]

The government was complicit in muzzling the health community. In 2014 the Ministry of Health launched a review of the effectiveness and value for money of tobacco control.[122] The budget for the tobacco control programme in 2014–2015 was $61.7 million. The review saw $21 million in contracts re-tendered.[123] Other projects were being re-evaluated. Those who lost their funding included the major advocacy groups: the Smokefree Coalition of 56 groups who had been catalysts for the Smokefree Aotearoa agenda over 20 years, the New Zealand arm of Action on Smoking and Health New Zealand, Smokefree Nurses, and various Māori and iwi (tribal) providers.[124] The decision to refocus the available public funding for tobacco control away from advocacy towards treatment diluted the political risk of delays in the introduction of plain packaging and the capacity for those groups to campaign actively against the TPPA and similar negotiations.

VI REGULATORY CONSTRAINTS

The industry's strategy achieved delay, but not abandonment of the plain packaging legislation. To achieve even that degree of *specific* chill requires access as well as influence. Contemporary regulatory management systems offer structured opportunities for influence; they are also an important element of *systemic* chill.

A *The Regulatory Management Regime*

The New Zealand and Australian governments are both strong proponents of a neoliberal notion of 'best practice' regulation that prescribes the presumptions, criteria and processes that policy makers must apply.[125] A bias towards minimising intrusion on commercial interests has become institutionalised through a process of regulatory impact analysis and the publication of exposure drafts of legislation and regulations for consultation with stakeholders.

As with many approaches to governance since the 1980s, the regulatory management regime has a stronger ideological bent in New Zealand than Australia. Health policy makers have to

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[121] Newport, above n 115.

[122] See SHORE and Whariki Research Centre, 'Review of Tobacco Control Services Report', (Report, 27, 2014) <https://www.health.govt.nz/system/files/documents/publications/review-of-tobacco-control-services-nov14.pdf>.

[123] Cabinet Social Policy Committee, Parliament of New Zealand, *Report Back on New Zealand's Tobacco Control Programme* (2016).

[124] The nurses' union launched a petition to secure part of increased tobacco tax for full funding for smoking cessation and advocacy services: New Zealand Nurses Organisation, 'Nurses Launch Smokefree Funding Petition', (Media Release, 4 August 2016) <http://www.scoop.co.nz/stories/PO1608/S00053/nurses-launch-smokefree-funding-petition.htm>.

[125] Jane Kelsey, 'The Emperor Has No Clothes: Long Live the Emperor' in Susan Schroeder and Lynne Chester (eds), *Challenging the Orthodoxy: Reflections on Frank Stilwell's Contribution to Political Economy* (Springer, 2013) 151, 159–64; for a sympathetic comparison of the Australian and New Zealand approaches see: Peter Carroll, 'Ex Ante Evaluation in Australia and New Zealand: The Case of Regulatory Impact Assessment', (University of Tasmania, 2014) <http://reggov2014.ibei.org/bcn-14-papers/41-19.pdf>.

comply with a 'Better Regulation, Less Regulation' directive, a Code of Good Regulatory Practice, a Best Practice Model from the Treasury, and other strictures that favour no, self- or co-regulation, and relegate directive forms of regulation (such as plain packaging) to the least desirable end of the spectrum.[126] There is an inbuilt role for MFAT to assess a proposal in light of New Zealand's trade and investment agreements. The more numerous and broad-ranging their scope, the greater MFAT's influence over policies and regulations that are the core business of other ministries. Their advice came to dominate the later Cabinet papers on implementing the plain packaging law.

Specific and systemic forms of regulatory chill converged in this process. Consultations on draft legislation and regulations gave the tobacco industry new opportunities to challenge the rationale and evidence base for plain packaging laws, in addition to making parliamentary submissions. The industry targeted New Zealand's processes from an early stage. In 2011, Philip Morris (New Zealand) told the Associate Minister of Health that 'plain packaging breaches the government's own regulatory principles'.[127] Because New Zealand's plain packaging legislation largely copied Australia's, the industry also cited the internal disagreements between government agencies and criticisms of Australia's regulatory impact analyses from IP Australia and the Office of Best Regulatory Practice (located in the Department of Finance and Deregulation) in their various interventions.[128]

The regulatory process had another less obvious, but arguably more significant, value to the industry. Australian tobacco companies built an extensive compendium of documents through these consultation processes, complemented by official information requests, which provided evidence to support the WTO and investment disputes.[129] New Zealand's Ministry of Health and MFAT were presumably aware of this, introducing a potential chilling factor into the engagement between ministries.

B *The Consultation Document and Regulatory Impact Statement 2012*

The industry used the consultations on the Bill and the Regulations to reiterate its arguments and repeat its threats, and to orchestrate an apparent groundswell of opposition. The consultation paper on the Bill was released in 2012 with the Regulatory Impact Statement (RIS) and exposure draft of the legislation.[130] It stated four purposes: *alignment* of New Zealand's requirements with those applying in Australia; *effectiveness*, with a preference for the strongest form of standardisation unless there is good reason otherwise; to *inform* New Zealand's trade partners and invite their comments; and *practicality*, with a preference for simplicity.[131]

While the process also provided a forum for health policy advocates, the consultation paper largely required them to respond to the industry's arguments. The 20 questions it posed were informed by the industry's standard complaints about plain packaging, and almost none were about health.[132] Some were adaptations of the template for such documents, for example:

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[126] Kelsey, above n 27, 141–9.
[127] Letter from Brett Taylor, General Manager, Philip Morris (NZ) Ltd to Hon Tariana Turia, Associate Minister of Health, 11 July 2011 <https://www.health.govt.nz/system/files/documents/pages/correspondence-philip-morris-nz-ltd-to-hon-tariana-turia-plain-packaging-cigarettes-july-2011.pdf>.
[128] Ibid.
[129] Kelsey, 'A Gold-Plated Gift to the Tobacco Industry', above n 23, 255–62.
[130] *Consultation on Plain Packaging Proposal*, above n 3.
[131] *Consultation Document on Regulations*, above n 52, 5.
[132] The questions are set out in *Submissions Analysis*, above n 41, app B.

- If you do not agree that plain packaging should be introduced, are there other options that you think should be adopted to address the issues above; …
- If adopted, do you think plain packaging of tobacco products might have any unintended or undesirable consequences, such as …
- What are the likely impacts that plain packaging would have for manufacturers, exporters, importers and retailers of tobacco products.

Other questions were very specific, addressing the black market for tobacco, increased costs to businesses, and time taken to serve customers. Despite setting the agenda, the industry complained that the questions were biased against it.

Their proposed alternatives foreshadowed the main argument that was likely to be used in WTO committees and litigation: that there were effective and less burdensome options for achieving the policy objectives, such as continuing the status quo, further education, additional excise tax, and increased personal responsibility.[133] The strongest (identical) remark supporting the status quo came from two international manufacturers:

> We urge the New Zealand Government to develop a rational and appropriate framework within which legitimate consumer demand for tobacco products is met and real public health goals achieved, rather than continuing to pursue an irrational approach that achieves no public health benefit.[134]

The consultation document invited comments on the RIS itself. The 15 submitters who expressed concerns were either individuals who did not support the policy or retailers and participants in the domestic or international tobacco industry.[135] Their objections included: a flawed evidence base; insufficiently robust research methodologies; lack of New Zealand specific data; no impartial, independent and thorough assessment of evidence; under-statement of the problems; over-exaggeration of the benefits; and failure to give enough weight to other policy options. BATNZ complained that the RIS made no attempt to quantify New Zealand's exposure to awards of compensation[136] (although the paper conservatively assessed the government's costs for an investment arbitration at NZ$3–6 million and under NZ$2 million for a WTO dispute).[137] A combination of three manufacturer / exporter / importers, one international manufacturer, one retailer, and three individuals deemed the RIS not fit for purpose. The summary of government's failure to 'meet the key principles for good regulation' reads like a (somewhat incoherent) complaint to an investment tribunal or WTO committee:

- proportionality (the RIS does not take into account the costs and benefits of the proposed regulatory measures)
- certainty (the tobacco industry and retailers are in an unpredictable position as the details of plain packaging requirements will not be available until after the legislation has [been] enacted)
- flexibility (the Ministry has not provided adequate analysis on the impacts and costs)
- durability (once implemented it will be hard to respond to unforeseen consequences)

[133] Ibid 56.
[134] Ibid 57.
[135] Ibid 64–5.
[136] British American Tobacco (NZ) above n 69, 70.
[137] Ministry of Health (NZ*), Regulatory Impact Statement: Plain Packaging of Tobacco Products* (2012), 12.

- transparency and accountability (the Ministry will not engage in a transparent and accountable manner and the proposal contains no performance targets or mechanisms by which to assess the effectiveness of the proposal)
- capable regulators (the Ministry lacks institutional capacity to monitor the proposal)
- growth supporting (plain packaging is likely to have a severe impact on growth).[138]

C *Parliamentary Submissions*

Attacks on the process continued in the Select Committee hearing on the Bill. Imperial Tobacco's submission claimed that the 'flawed' regulatory impact assessment 'demonstrably failed to meet the government's own standards'.[139] Gietz told the Select Committee the company wanted to engage constructively with government to achieve 'quality regulatory decisions' based on 'sound, evidence-based, reasonable and practicable regulation of tobacco products'.[140] Katherine Rich's talking points to the Select Committee on behalf of the Food and Grocery Council insisted that:

> [g]ood regulatory practice must not be abandoned for a government's position on what it believes to be the public good. All legislation must be reasonable, robust, and justified. Without such criteria being rigorously applied, there is no framework to manage the whims and fancies of any well-meaning enthusiast [and that] delays do not change the basis for regulation from bad practice to good practice.[141]

D *Supra-national Regulatory Disciplines*

The same ideological presumptions and practices are increasingly written into contemporary free trade and investment agreements that bind the government when making domestic regulatory decisions. The most familiar in the tobacco policy arena are the rules on Technical Barriers to Trade in the WTO and many FTAs.[142] These rules apply to labelling and product standards, and require the government to adopt the least trade restrictive measures that could achieve its health policy objectives, using narrow criteria that must be supported by evidence. New regulations must be notified to and can be reviewed by the TBT committee, under the spectre of a formal dispute. The WTO's TRIPS agreement and intellectual property chapters of FTAs have their own rules, criteria, review and dispute processes. More recently, the TPPA sought to mandate the use of regulatory impact assessments as 'best practice' and apply the presumption of light-touch regulation across the board, although the final text of its Regulatory Coherence chapter was diluted and unenforceable.[143]

A complementary trend in recent agreements requires governments to consult on measures that could affect their obligations under an agreement. For example, transparency obligations are no longer just requirements to make existing laws, regulations and procedures publicly available. Chapters on 'transparency' may require prior consultation with other states and 'interested persons', the consideration of their views, and sometimes explanations for why these were not accepted.[144] These stand-alone chapters are often reinforced by parallel

[138] *Submissions Analysis*, above n 41, 67.
[139] *Imperial Tobacco Submission 2014*, above n 71.
[140] Ibid 6.
[141] *NZFGC Introductory Statement*, above n 72.
[142] See *WTO Agreement on Technical Barriers to Trade*, opened for signature on 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995) art 2.2.
[143] See Kelsey, above n 22, 246–50.
[144] For example, TPPA, art 26.2.2.

requirements in particular chapters, and compliance is overseen by sectoral sub-committees of the parties. Although the TPPA is defunct in its original form, similar proposals have been promoted in negotiations for other agreements.[145]

Many of these international obligations were not in play during New Zealand's policy process for plain packaging. However, New Zealand's trade officials have been their strongest proponents, reflecting the strong ideological synergy between the international agreements and the domestic regulatory regime into the future.

VII CONCLUDING THOUGHTS

This paper tested the working hypothesis that three inter-related elements combined to chill an already reluctant New Zealand government on the plain packaging law: perceived risks associated with trade and investment obligations; arguments of highly influential industry lobbyists; and a bias in the regulatory management regime that favours minimal intervention, consistent with the international trade and investment agreements.

Six years from the first tentative policy announcement, New Zealand's plain packaging legislation had been passed but was not in force. There is no doubt that the threat of litigation under New Zealand's trade and investment agreements played a significant role in this delay. The tobacco industry and its allies used every available opportunity to wield their considerable influence. Even with redactions, it is clear from official documents that threats of trade and investment litigation, reputational factors and flow-on effects to other export industries induced caution throughout the process. The centrality of these arguments meant the policy advice on plain packaging became more heavily influenced by MFAT than by the Ministry of Health.

It could be argued that the decision to proceed reflected an assessment of the legal risk in light of Australia's success in the investment arbitration and initial WTO hearing, and the safety in numbers created by a growing number of countries adopting plain packaging laws. Equally, the government had reached the point when it could delay no longer: the Act stipulated 14 March 2018 as the default date for implementation. There was no guarantee that the tobacco industry would not bring an investment dispute or that Australia would not lose an appeal against the WTO panel's decision. But the alternative was to amend or repeal the plain packaging legislation. Presumably, the political cost of doing so would have outweighed the factors that had chilled the adoption of the law for six years.

That assessment is consistent with the government's lack of commitment to the broader Smoke-free 2025 goal. The interim smoke-free targets for 2015 and 2018 have been missed. Smoking is still strongly delineated by ethnicity and class. Tobacco use has not fallen significantly among those who smoke the most: Māori, Pacific, people on low incomes, and people with mental illness.[146] Two years after the government promised an action plan to

[145] For example, the Transparency provisions (Article III) in the General Agreement on Trade in Services; see Ellen Gould, *Analysis of the TiSA Annex on Transparency*' (Greenpeace, 2016) <https://ttip-leaks.org/wp-content/uploads/2016/11/Analysis-of-the-TiSA-Annex-on-Transparency.pdf>.

[146] Judith McCool and Chris Bullen, 'Making the Next Steps the Right Ones: Progress Towards the Smokefree Aotearoa 2025 Goal' (2016) 129 *New Zealand Medical Journal* 1439, 6–7; Louise Delany et al, 'Key Design Features of a New Smokefree Law to Help Achieve the Smokefree Aotearoa New Zealand 2025 Goal' (2016) 129 *New Zealand Medical Journal* 1439, 68.

achieve the Smoke-free 2025 goal there was not even a timetable for its development. Frustrated, tobacco-control researchers announced they would develop their own.[147]

This paper has argued that political leadership is crucial to achieving that goal in New Zealand, as it has been in Australia. At present, there are no effective political champions of tobacco-control in the governing coalition or the opposition parties. But that would still not be enough. Outside strategies are needed to neutralise the specific and systemic elements of regulatory chill, such as active campaigning to prevent new international agreements that constrain health policy, including tobacco control; rallying the health community to challenge the subordination of health policy to international trade and investment rules; strengthening the backbone of the Ministry of Health to contest the dominance of MFAT; and conducting alternative impact assessments of proposed agreements to expose the negative consequences.[148] Given the government's deliberate gutting of the tobacco-control advocacy groups, responsibility to develop and implement those strategies will fall largely to academics and the broader public health community. Unless that is done, the inertia that has been instilled into policy-making on Smokefree Aotearoa 2025 will continue to infect tobacco control strategies and comparable public health objectives for alcohol and high-sugar foods, as well as other socially progressive policies.

[147] 'Researchers to Propose New Smokefree 2025 Action Plan in Light of Government No Show', *Scoop* (online), 30 May 2017 <http://www.scoop.co.nz/stories/PO1705/S00473/researchers-to-propose-new-smokefree-2025-action-plan.htm>; see also McCool and Bullen, above n 147; Delany et al, above n 147.

[148] See eg, Katie Hirono et al, 'Negotiating Healthy Trade in Australia: Health Impact Assessment of the Proposed Trans-Pacific Partnership Agreement' (Centre for Health Equity Training Research and Evaluation, 2015).