

## 8. Reversing National's Changes to the ETS

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

- The draft investment chapter confirms that investors could threaten or bring an investor-state dispute that seeks compensation for such regulatory changes.
- Restoring a more rigorous ETS will impact adversely on the agriculture, forestry and large industry sectors. [Federated Farmers](#) has indicated it would seek compensation if an ETS regime were to bite on farmers. Submissions made in the context of the Regulatory Responsibility Bill and Bill of Rights (Private Property Rights) Bill have claimed that various carbon emission policies can amount to 'regulatory takings'. The idea of regulatory takings informs the indirect expropriation provision in the TPPA.
- Regulatory changes to the ETS could also be challenged as breaching minimum standard of treatment provisions, which investors interpret as protecting legitimate expectations of a stable regulatory environment.
- Compensation may be sought for alleged losses to the investment's value, lost future profits, and compound interest. Swedish company [Vattenfall sued Germany](#) for €1.4 billion, in part over steps to reduce carbon dioxide emissions from a coal-fired power station after the Stern report in 2006.
- **The US has never allowed the general public interest exception to apply to the investment chapter.** The ETS might be defended using specific provisos to the expropriation and minimum standard of treatment rules, but they are uncertain and will not stop a motivated litigant. This uncertainty and the unpredictability of the tribunals means the primary purpose of threatening, or if necessary lodging, the claim – to increase the leverage that polluters hold when bargaining an outcome – is significantly advanced at little cost. .
- Australian investors may not have direct access to investor-state enforcement, but could obtain it by holding their investments through a subsidiary in another TPPA country. New Zealand corporate farmers and industries could also incorporate offshore to access rights under the TPPA that they do not have domestically and failed to secure through the Regulatory Responsibility Bill.
- Carbon credits and any derivatives or related financial instruments would be 'investments' that are protected under the cross-border financial services and investment chapters. Significant changes that damaged or negated the value of those investments could be subject to an investment dispute.
- Changes to the ETS would need legislation, which would be subject to processes in the regulatory coherence and transparency chapters, discussed in relation to Pharmac, Mining and Smokefree policies.

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