

The real story on foreign investment and ISDS in the TPPA-11

IT'S OUR FUTURE

The Labour-led government has made a number of claims regarding the revised Trans-Pacific Partnership Agreement among the eleven non-US parties (TPPA-11), especially relating to investment.

Those claims are part-truths, with significant omissions.

The text of the renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership lists the provisions of the old TPPA they have agreed to suspend - not remove.

The special protections that foreign investors rely on to challenge a country's laws, policies and judicial decisions have not been suspended. They remain totally intact.

So is the investor-state dispute settlement (ISDS) process that allows a foreign investor to enforce those investor protections against the government, through controversial offshore tribunals – a mechanism which PM Ardern has called 'a dog'.

The current government tried to get ISDS suspended, but other countries said no and it accepted that. The government has rejected ISDS in future agreements. But agreeing to it in the TPPA-11 undermines that political message and its legal effect.

The only investment provision that has been suspended (not removed) allows an investor from a TPPA country to use the ISDS process to enforce an infrastructure or natural resource contract with the government. Government actions relating to such contracts could still be subject to an ISDS case where the investor claims the government has breached one of the TPPA-11's investment rules.

The government says there is little risk from ISDS because Australia is the biggest foreign investor in NZ and it signed a side-letter agreeing not to use ISDS against NZ. That was in the original TPPA, and many before it, because the CER agreement with Australia has no enforcement mechanism. But investors are known to shop around and incorporate companies in countries that do allow ISDS.

Under TPPA-11 NZ is still fully exposed to ISDS disputes with Japan, which has the 5th largest stock of foreign investment in NZ, and Canada, with the 8th largest FDI stock.

Only Peru has promised no ISDS altogether. Side-letters from Brunei, Malaysia and Vietnam still allow their investors to bring ISDS cases under other agreements between them and NZ.

Worse still, investors suing NZ under the Singapore FTA requires NZ's consent. They can rely on the TPPA-11 to bypass that!

Canada, Chile and NZ made a non-binding and basically meaningless declaration that they will 'work together on matters relating to the evolving practice of investor state dispute settlement (ISDS)'.

Despite government spin, the right to ban foreign investors in residential housing is the same as the original TPPA. The government is rushing legislation through Parliament to include that in the Overseas Investment Act because they wouldn't be able to do so after the TPPA-11 comes into force.

The government is doing the same to allow it to restrict foreign ownership of forestry cutting rights.

Future changes to the Overseas Investment Act, such as stronger vetting of investments in water, would breach the agreement.

There are fewer protections for environment, health and other public interests in the investment chapter of TPPA than in NZ's other agreements, because the US refused to allow them. They didn't try to strengthen those protections in the TPPA-11.

The original TPPA provided for a review every 3 years. The TPPA-11 says a party can seek a review of its operation, including an amendment. In theory that includes removal of the ISDS provisions. But all the parties would have to agree. If they could not agree now, why might they agree in 3 years' time?

The TPPA-11 has flow-on effects for other agreements. China is entitled to any better treatment of investors than in the NZ China FTA in 2008. Currently NZ can vet Chinese investments above \$10 million. China gets the benefit of the locking in of higher thresholds for investment vetting in the TPPA-11 of \$200 million, or \$100 million when the investor is funded by the foreign government.