

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

# IT'S OUR FUTURE

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

Those claims are either wrong or part-truths, often with significant omissions. But it is hard to be precise about them because the text of the TPPA-11 is not available and apparently will not be released until it is signed.

On one hand, the government says we can see what's in it because the original text is public and basically unchanged. On the other hand, the government claims there are significant changes that make a deal that it once rejected now acceptable.

These changes involve the suspension, not removal, of certain provisions, and the adoption of side-letters with individual TPPA-11 governments. We can't see the details of either.

The TPPA-11 ministers released a list of the provisions in the old TPPA that they have agreed to suspend, pending any re-entry by the US in the future.

The special protections for foreign investors, which they rely on mostly in disputes, and the ISDS process they use to enforce them, remain untouched.

What they have suspended, not removed, is access for a foreign investor from a TPPA country to the ISDS mechanism to enforce a contract with a government on infrastructure or natural resources, where the contract doesn't specify the legal forum in which the contract would have to be enforced.

The government says other TPPA countries have agreed not to use ISDS against NZ, and this applies to Australia which is the biggest foreign investor in NZ. But that side-letter was in the original TPPA, and many before it, because there is no state-state or ISDS enforcement in the CER agreement.

The Trade Minister says other TPPA-11 countries will sign a similar letter, but won't say who. Unless all of them sign side-letters, including Japan and the US if it re-joins, NZ is still exposed.

The government has followed countries like South Africa in rejecting ISDS in future agreements. But agreeing to it in the TPPA makes a nonsense of that position.

The right to ban foreign investors in residential housing hasn't changed either. The government is rushing legislation through Parliament to include that in the Overseas Investment Act before the TPPA-11 comes into force because they wouldn't be able to do so afterwards.

Likewise, the government is consulting with Maori about including forestry cutting rights in the definition of sensitive land so it is covered by the limited protection for the Overseas Investment Act. Again, it has to do this before the TPPA-11 comes into force.

Other changes to the Overseas Investment Act, such as stronger vetting of investments in water, wouldn't be protected.

There were fewer protections for environment, health and other public interests in the TPPA than in NZ's other agreements with ISDS, because the US refused to allow them. The TPPA-11 hasn't strengthened those protections. It has kept the restrictive US wording intact.

There appears to be a new provision for future review of the TPPA-11, we don't know the nature and process for that review, when it would occur, and what it might consider. The Prime Minister says it would be after 3 years and could allow the removal of the investor-state dispute settlement (ISDS) provisions. But review provisions are usually about further liberalisation and we can't see the text. Even if it allowed removal of an obligation, the parties would have to agree. If they could not agree now, why might they agree in 3 years' time?