IMPLICATIONS OF THE LEAKED TPP INVESTMENT TEXT FOR NZ

The draft text for the investment chapter of the Trans-Pacific Partnership Agreement negotiations has been leaked. From midnight 13 June (NZ time) it will be available on http://tinyurl.com/tppinvestment. The text has been authenticated. In standard style, it indicates in square brackets where aspects of the text have not been agreed. However, references to which countries support particular bracketed text have been removed.

Significance of this text for NZ: Unlike most other countries, New Zealand is not a party to many international investment agreements. This leaked text would impose much more extensive and less flexible obligations that those existing agreements. That is especially dangerous in the hands of US investors, who are notoriously litigious.

NZ has agreed to TPP investor rights to sue: Section B of the text sets out the rights of investors from TPP countries to sue governments directly in private offshore tribunals where they allege a breach of their (expansive) rights under the agreement and seek taxpayer funded compensation. These tribunals are unaccountable, there is no appeal, and the "judges" are mainly investment lawyers who also act for clients in bringing such claims. Some countries are suggesting a limited degree of transparency, but nothing like a normal court hearing, and other TPP parties are resisting even that level of openness. *Prime Minister John Key initially described the idea as "far-fetched". But footnote 20 to Section B makes it clear that only Australia has refused to give foreign investors these powers under the TPP.*

Similarities to CER Investment Protocol but that is unenforceable: The text is closest to the CER investment protocol between Australia and New Zealand, which has not yet come into force. But the TPPA goes much further because CER is not enforceable by states, let alone by investors in private offshore tribunals. The Protocol also contains general exceptions for public health, conservation, public morals, historic sites, and balance of payments emergencies that are not in the TPPA investment text. There is no exception in the text that excludes investors from Australia or New Zealand from suing the other government, although that has been promised.

Sweeping definitions of "investment": The rules cover any asset that is owned or controlled by an investor, directly or indirectly *whose characteristics include a commitment of capital or other resources, expectation of gain or profit, or assumption or risk* (Art 12.2). That covers shares (in mixed-ownership model SOEs, Mediaworks), enterprises, including subsidiaries and branches (insurance companies, News Corporation), contracts (charter schools and PPPs), licenses and permits (mining or water rights), trademarks (as per tobacco packets), land and property (mall developers, aged care chains), bonds and loans (mortgages, Earthquake Kiwi Bonds), futures and derivatives (foreign exchange, tradeable Fonterra dividend units, securitised fisheries quotas). The US wants sovereign debt, such as Government Bonds, covered as well, but that is opposed.

Sweeping coverage of "investors": an investor just needs to "attempt" to make an investment by a concrete action, such as "chanelling resources or capital in order to set up a business" or *applying* for permits and licenses.(Art 2.2, fn8). The benefits of the TPP rules could be denied to an investor from non-TPP country that was manipulating its nationality to come under the agreement (Art 12.14). This is meant to stop treaty shopping of the kind the tobacco companies are notorious for doing. But once a firm can claim "substantial business activities" in the TPP country, which can be pretty minimal, it can sue. NZ firms could try to do this too, so they get better treatment than domestic laws allow and can bypass the NZ courts.

What the NZ government cannot do: The standard rules guarantee investors will get at least as good, if not better, treatment than local firms and do not have special conditions imposed on their investments. The government could not:

- discriminate against TPP investors or their investments in favour of NZ counterparts, ie no preferences for NZers and no foreign investment restrictions, unless the right to do so is explicitly reserved in an Annex that is very hard to change (Art 12.4, 12.9).
- discriminate against TPP investors or their investments in favour of those from other countries – *this means they can take advantage of any better provisions that are in any of NZ's other investment agreements,* including some sweeping 'umbrella' clauses in the China NZ FTA and the Hong Kong New Zealand bilateral investment treaty. Again, the government could retain the right to discriminate in specific circumstances if that was explicitly reserved in an Annex that is very hard to change (Art 12.5, 12.9).
- impose performance requirements on foreign investors or investments about use of locally produced goods or services, ie Buy NZ (Art 12.7)

Additional protections for investors: TPP investors would also have special treatment that is not available to local firms and investors. They are guaranteed:

- *A "minimum standard of treatment", including "fair and equitable treatment" (Art 12.6)*. This sounds benign but is the most common ground for investment disputes, and has been interpreted to mean a legitimate expectation of a stable and predictable business environment that is not impaired by new regulatory or taxation measures. This might be argued if the government introduced stricter regulations than applied when a mining company made its initial investment, or imposed a major new tax, such as a capital gains tax on large scale property developers (unless there is a tax exception elsewhere in the agreement). Attempts to clarify its meaning use different words from other agreements, and is fertile ground for lawyers and investment tribunals to interpret (Art 12.6.2 and 3, Annex 12-B).

- *Protection against expropriation or indirect expropriation* (Art 12.12): government measures that reduce the value of the investment or its expected future profits, such as re-regulating the broadcasting market to break the stranglehold of SkyTV or seriously cutting the number of pokie machines allowed in a casino.

There are two versions of Annex 12 that seek to limit the use of 'indirect expropriation'. One follows the standard US line; the other has two options, like the Annexes in NZ's agreements with China and Malaysia. They are treated by defenders of these agreements are protecting the government's right to regulate for public policy goals, but the are far from watertight. The one that NZ seems to have proposed would treat a measure that discriminates against a class of investors or breaches a contract the government had made with the investor, including in a mining license, as likely to be an indirect expropriation. Public policy measures that 'may be reasonably justified' in the protection of the public welfare' are presumed not to be indirect expropriation – but again that is a license for investors to challenge a new regulation or law.

Contracts can be enforced even if TPP rules are not breached: Investors from TPP countries could be able to enforce an investment agreement or investment authorization even where the government's action does not breach any of these rules (Art 2.2) The US has this in previous agreements. It targets certain kinds of contracts:

- those relating to natural resources a government controls, such as contracts for "exploration, extraction, refining, transportation, distribution or sale" of those resources;
- for the supply to the public on behalf of the government of services like power generation or distribution, water treatment or distribution, or telecommunications; and
- undertaking infrastructure project, such as construction of roads, bridges, dams or pipelines, that are not solely for the use of the government.

High risk in a financial crisis: Three articles will seriously restrict what can be done in a financial crisis.

(i) NZ could not restrict transfers of money in and out of NZ, when even the IMF now says capital controls are a valid tool for financial stability. The government would not even be allowed to impose controls in a balance of payments emergency (Art 12.11).

(ii) If government bonds are treated as investments, as the US wants, it would affect sovereign debt restructuring as in Argentina and Greece, giving speculators rights to recover the full value of distressed bonds they bought at bargain prices (Art 12.2).

(iii) Banks that grew too big to fail, the insurance companies that gambled on shonky securities, the finance companies that were barely regulated, and the toxic financial products themselves, would all be protected as investors and investments if they came from TPP countries. Without the financial service chapter it is not clear what rules would apply to their operations, but they could sue under the investment chapter if government re-regulated in ways that eroded their value or profitability (Art 12.2, Section B).

No guaranteed exceptions for the environment or public health: The TPP investment text is modeled on US FTAs and the general exception for public morals, public health, environment, conservation, etc in those FTAs does not apply to the investment chapter. That text has not been leaked yet, but it could be presumed the same applies in the TPP. Some countries have proposed a limited exception for public health and conservation that would let governments require foreign investors to use NZ content or locally produced goods or reward them for doing so – provided the same rules apply to New Zealand investments (Art 12.7.3(c)). But only some governments support that. Several countries are also proposing a rhetoric provision on corporate social responsibility (Art12.15*bis*)

The right to do what governments can already do: There is a circular provision that allows a government to ensure investment activity is sensitive to the environment – where that would be permitted under the agreement. So it adds nothing (Art 12.15). Some countries want to mention health, safety and labour as well – but that is opposed …

Assessing the risks: There is no apparent reason for New Zealand to adopt this text and there are abundant reasons not to. The risk of enforcement is only one concern. Threats of investors or states to sue are widely known to have a chilling effect on government decisions. In addition, the leaked TPP text on Regulatory Coherence shows that foreign firms will have a right of input from the earliest stages of policy and regulatory reform. That provides ample opportunities for leverage, especially when that is backed by a threat to sue.

What next? This is very much a preliminary analysis. It is subject to the frustration that annexes of 'non-conforming measures' that might limit New Zealand's exposure are not available, nor are many of the other chapters in the text that might heighten or lessen the concerns raised here. Hopefully, a number of people with legal expertise will engage in a debate a more detailed analysis of the text, building on the speculative debate that followed the jurists' letter that called for the exclusion of investor-state disputes from the TPP. A preliminary assessment from Public Citizen in the US can be found here.

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