

Investor-State Dispute Settlement under the TPPA

Our government is negotiating an international agreement that could have a huge effect on the lives of ordinary kiwis. It's called the Trans-Pacific Partnership Agreement (TPPA), and it involves eleven Asian and Pacific-rim countries, including the United States. If it goes ahead, we risk damage to our innovative economy, our pristine environment, our health, and the ability to shape our own future.

Because the negotiations are being conducted in secret, what we know about the TPPA comes from leaked documents and detective work. This is not acceptable. We live in a democracy, which means we have the right to know what is done in our name and to have a say.

One of many causes for concern around the TPPA is that it would give overseas companies special guarantees *and* the power to sue the New Zealand government offshore over new policies and laws in what is called *Investor-State Dispute Settlement* ("ISDS").

What will Investor-State Dispute Settlement mean for New Zealand under the TPPA?

A *leaked negotiating text*¹ from June 2012 shows that if the TPPA negotiations are successful an investor from any of the TPPA countries (Australia, Brunei, Canada, Chile, Malaysia, Mexico, Peru, Singapore, the United States, and Vietnam) will be able to sue the New Zealand government for millions in damages in secretive offshore tribunals. Under ISDS foreign investors could claim that new laws and regulations introduced by the New Zealand government have breached their special rights under the TPPA and seriously undermined the value of their investments. Under the leaked text, "investment" is defined extremely widely, to include almost anything a foreign company has spent money on in New Zealand – including shares, businesses, contracts, land, intellectual property rights, and even government bonds.

Putting corporate rights above New Zealand's democracy

If the TPPA is signed with its current ISDS provisions it would seriously fetter New Zealand's sovereignty, and the ability of our government to look out for our interests. We elect our governments, and should be able to rely on them to pass laws and implement policies to protect and grow New Zealand. If the TPPA is signed, our government will be looking over its shoulder to make sure it's not risking a law suit from companies with more money to spend than it does. Government decisions should be made with the people in mind, not the balance sheets of overseas companies.

Worse, if New Zealand did get sued, then millions of taxpayer dollars would be spent defending the case (the *average cost*² of defending an ISDS case is US\$8 million, but can easily exceed US\$30 million) as well as many millions more if we lost. In the last 13 years the number of ISDS cases brought to the International Centre for the



"The TPPA is billed as an agreement for the 21st century. But it will do nothing to address the challenges of financial instability, climate change, energy scarcity, job insecurity, structural poverty and inequality. Instead, it will lock future governments into a failed regime where markets rule for the next 100 years."

–Professor Jane Kelsey, Faculty of Law, University of Auckland.

Links:

1. <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>

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Investor-State Dispute Settlement under the TPPA – continued

Settlement of Investment Disputes – the main ISDS forum – has increased by 460%, and over \$719 million has been paid out under ISDS agreements with the United States alone. Just the threat of a long, expensive dispute is designed to get governments to back off. If New Zealand signs the TPPA we'll face the prospect of a government scared of making a stand, massive unnecessary spending of tax payer money on law suits, or both.

Disadvantaging kiwi businesses

ISDS gives overseas companies an unfair advantage over kiwi businesses.

If a New Zealander feels that they are hard done by, they can take the matter to the New Zealand courts. However, if the TPPA is signed then a foreign investor who thinks that their investment has been damaged would have the option of using the New Zealand court system, or using ISDS to take the case to an international tribunal claiming a breach of their special rights under the agreement. They could even do both – in September 2012 Philip Morris **lost a case in Australia's highest court**³ about plain packaging of cigarettes, but is **continuing to sue Australia using ISDS**⁴ under an investment agreement with Hong Kong.

ISDS undermines New Zealand law

Many additional concerns about ISDS were identified by over 100 prominent lawyers and judges from most of the TPPA countries in an **open letter to the negotiators**⁵:

- the private, often secret nature of ISDS hearings lacks “the basic principles of transparency, consistency and due process” common to domestic legal systems;
- ISDS tribunals routinely put the economic interests of foreign investors ahead of the right of governments to govern their own affairs;
- orders of these extraterritorial tribunals can undermine the separation of powers by requiring the executive to override rulings of the judiciary;
- many of the judges in these ad hoc arbitration tribunals also appear as lawyers in similar cases, in a way that would be unethical for judges in domestic courts.

Unsurprisingly, the jurists concluded that ISDS “is not a fair, independent, and balanced method for the resolution of disputes between sovereign nations and private investors”.

No economic benefit from ISDS

It is unclear how anyone other than big overseas companies will benefit from ISDS. Australia's Productivity Commission conducted an **extensive study**⁶ of the impacts of Australia's free trade agreements and concluded that:

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows. Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.

The Australian government refused to include ISDS in its free trade deal with the US in 2005, and it has a **policy**⁷ not to sign up to any more ISDS obligations including in the TPPA:

The [Australian] Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses.

The New Zealand government should stand up for its people, and follow Australia's lead in saying no to ISDS.

Links:

2. <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf>
3. <http://www.abc.net.au/news/2012-08-15/high-court-rules-in-favour-of-plain-packaging-laws/4199768>
4. <https://theconversation.edu.au/why-bilateral-investment-treaties-are-the-last-refuge-of-big-tobacco-8880>
5. <http://tpplegal.wordpress.com/open-letter/>
6. http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf
7. <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>
8. www.itsourfuture.org.nz/take-action/
9. www.avaaz.org/en/stop_the_corporate_death_star/
10. www.itsourfuture.org.nz/news/

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