

Fact Sheet #6: Investors Rights

The objectives of the investment chapter are to facilitate access for cross border investment between the TPPA countries and to protect investors from TPPA countries both in terms of the process of investing and their investments once made. This factsheet looks at the investment chapter.

WHAT WE GET:

- ⇒ The investment chapter provides an overall greater level of protection for New Zealanders investing in TPPA countries.

How ISDS works

Investor-state dispute settlement provisions enable foreign investors to challenge laws or policies of governments they believe have diminished their value or future profits. Where an investor alleges that a Party has breached TPPA investment rules, it can refer the matter to an ad hoc international tribunal.

There is no independent judiciary that decides international investment disputes. Arbitration tribunals operate outside a country's judicial system. Their decisions are legally binding but cannot be appealed. The arbitrators are private individuals, empowered to review a nation's laws or court decisions on matters of fundamental public interest. Arbitrators often also work as lawyers for investors - there are no agreed conflict of interest rules.

These disputes can result in massive awards and impose huge costs. A threatened dispute can get a government to back off doing something an investor doesn't like.

WHAT WE GIVE UP:

- ⇒ Foreign investors and their investments get greater protection overall than in New Zealand's existing trade and investment treaties.
- ⇒ The threshold above which a TPPA investor needs approval to buy NZ business assets doubled to \$200 million.
- ⇒ NZ can't limit speculative money flows as a precaution against a financial crisis or require foreign investors to keep profits in the country.
- ⇒ Foreign investors can't be required to 'buy local' and support local businesses and jobs as a condition of being allowed to invest.
- ⇒ New policies, regulations or even court decisions can be challenged if an investor says it unfairly damages its value or profits.
- ⇒ The commitments in the investment chapter are directly enforceable by TPPA investors through investor state arbitration which has no system of precedent and no appeal.
- ⇒ A dispute on a mining exploration licence or a PPP water contract may also go to the offshore investment tribunals, even without claiming a breach of the TPPA rules.
- ⇒ There is no requirement that investors to seek remedies in New Zealand courts before initiating a claim under the TPPA.

TPPA FACTS

THE TPPA GIVES MORE POWER TO FOREIGN INVESTORS

Investors from a TPPA country have new and more extensive rights in the investment and financial services chapters and controversial power to enforce their special entitlements through international arbitration using ad hoc tribunals which have no appeal.

China, South Korea and some other countries get the benefit of stronger investment protections in the TPPA, because of the 'most-favoured-nation' clause in New Zealand's free trade deals with them.

The text includes some safeguards which are meant to clarify the rules and preserve policy space. But they are weak, unclear, or limited in their scope. The only strong protection allows countries to refuse to allow investors to sue over tobacco control measures – although TPPA states can still sue on their behalf.

IF NEW ZEALAND IS FOUND TO BE IN BREACH OF THE TPPA, THE TAXPAYER PAYS

Kiwi taxpayers would have to pay compensation to the investor for its lost investment and future profits, (compound) interest on that compensation, and costs. The award can be enforced offshore so the government can't just refuse to pay.



A DANGEROUS GAP OR A SIMPLE OVERSIGHT?

In a TPPA dispute, there is a requirement for the arbitrator to have appropriate expertise in anti-corruption, labour and environment disputes but not for health-related disputes.

CAN WE REALLY BE SUED?

The short answer is: Yes.

The investment chapter highlights the intent to increase the power of global corporations by creating supra-national tribunals where foreign firms can sue states and obtain taxpayer compensation for losses and expected future profits. These investor-state dispute settlement (ISDS) tribunals operate outside national court systems. ISDS tribunals allow multinational corporations to force governments to pay compensation for actions that don't breach New Zealand law. Often they threaten cases just to get governments to back off. In return, states hope multinationals will invest more.

The number of ISDS cases has grown hugely in recent years. Right now TransCanada is suing the US under the similar agreement NAFTA for \$15 billion to compensate for the Obama administration's decision to halt the Keystone XL pipeline due to concerns about its impact on climate change.

While New Zealand has had no ISDS cases taken against it, under TPPA we could face massive new exposure to US companies - the most litigious in the world.