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TRANS-PACIFIC PARTNERSHIP AGREEMENT

Chill wind or hot air?

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An AMINZ event in Auckland on 2 June will centre on concern over ISDS under the TPPA and other ways to settle international commercial disputes.

With the increase in global trade, and cross-border investment over the last 20 years in particular, it has become critical for parties to develop a means of settling disputes and for lawyers to be able to advise them. International arbitration has provided a reliable and effective means of ensuring disputes are dealt with under the rule of law; it is an accepted means for parties to settle commercial disputes, and the only effective means for dispute resolution in cross border disputes. The alternative would require one party to submit to the jurisdiction of the courts of the other. In practical terms, that would constrain most inward investment from the First World into the developing world.

This is where much of the criticism of ISDS is centred.

For private parties, agreeing to settle disputes by arbitration is the natural choice. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, signed by 24 States and adopted by 156, is proof of the success of international arbitration.

Investor state dispute resolution is just another form of arbitration, providing protection to businesses investing in other States as a normal part of international trade. Granted, ISDS is different from private arbitration in that it enables a private party to initiate arbitral proceedings against a State for breaching the provisions of the underlying investment treaty; but it is still arbitration.

By definition, States compromise their sovereign rights when they enter into treaties; that is, after-all the very nature of any bargain. What is different about ISDS is that it enables a private party to seek compensation for breaches of treaties directly, rather than through the more cumbersome State on State procedures through the WTO or International Court of Justice (which can only be instituted by consent of both parties); we should be under no illusion that if a State breaches its treaty obligations, it is still exposed to litigation as the recent, and prolonged, apples dispute with Australia illustrates.

ISDS is nothing new. New Zealand is already signatory to eight bilateral investment treaties dating back over 20 years; all but the agreement with Australia (with whom we have bilateral enforcement of court decisions) contain ISDS provisions.

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The oft repeated criticism that arbitrators comprise an unaccountable cabal is, it has to be said, a cheap shot. The reality is more prosaic – the parties have the choice of whom they select, and typically they are highly qualified and experienced arbitrators. Conversely, the selection of a judge is hardly transparent.

Similarly, the allegation of being *secretive* doesn't stand scrutiny. Investment treaty disputes are generally not confidential; in a recent arbitration in North Africa the proceedings were live-streamed live. In the case of the TPPA, except in limited circumstances, all proceedings, including the award, will be publicly available.

ISDS under the TPPA

The ISDS provisions in chapter 9 of the TPPA have been negotiated with the benefit of those earlier treaties; they are in the main conservative and more favourable to the member States than to investors.

The core protections are that the investments will not be *expropriated without compensation* (art 9.7) and that investors will get *fair and equitable treatment* (FET – art 9.6).

The obligation not to expropriate without compensation has been part of international law for decades. As a principle, it is fundamental to any mature economy. It does not restrain sovereignty: a State can expropriate, but if it does it must pay "*fair*" compensation.

Fair and equitable treatment is not a standard that can be defined precisely for all circumstances, but under the TPPA it is pegged to the standard imposed by customary international law standard (art 9.6(2)).

More critically for New Zealand, there is a general exception, applicable to all treaty protections, that regulations designed to ensure that investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives (art 9.16). Investment treaty jurisprudence has interpreted similar clauses to provide States with a wide discretion to deal with genuine public welfare measures.

Additional general exceptions deal with the Treaty of Waitangi (art 29.6), other measures favourable to Maori, Overseas Investment Approval and numerous New Zealand specific regulations and statutory regimes are carved out from the anti-discrimination protections (MFN and National Treatment).

Dispute settlement procedures

A claimant has the choice between ICSID and UNCITRAL arbitration rules; both emanate from highly respected international institutions (the World Bank and United Nations respectively).

Moreover, the TPPA incorporates its own non – negotiable procedures that apply in addition to, or instead of, the ICSID and UNCITRAL rules. These often deal with issues of public concern (e.g. transparency of proceedings).

The procedures limit the time and manner in which investor claims can be brought; they protect the State from plainly unmeritorious claims and multiple proceedings over the same matter; they allow for input from the other States regarding treaty interpretation issues that affect all member States; and they provide a high level of transparency of proceedings, when compared to international commercial arbitration between private individuals.

Much has been made of US multinationals enthusiastically suing the relatively vulnerable NZ Government over valid policy decisions. No assurances can be given that such litigation will not be commenced, however in the past the success rate for such actions have been incredibly low and usually centre on some egregious action on the part of the Government.

The procedures also directly protect outward New Zealand investment. New Zealand is a good international citizen, governed by the rule of law, and we expect our trading partners to behave accordingly. The ISDS jurisprudence to date has been over State action which falls well short of the standards we hold ourselves to; for example the Government of Zimbabwe validating the expropriation of farm investments.

The investor protections present nothing alien to the world of investment arbitration; they are plainly drafted to meet the criticism that such treaties favour investors and can become instruments of influence over government regulation.

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