

The TPP's Threat to the Environment

The environment will be a major loser under terms put forward for the latest free trade deal

The Trans Pacific Partnership (TPP) is a proposed arrangement between New Zealand, the US and nine other Pacific Rim countries, with Japan soon to join. While labelled a "free trade" pact, its main focus is not trade - and economic gain is pursued only indirectly. It concentrates on **limiting how governments can regulate "behind the border"** in ways that affect foreign investors.

Of the TPP's nearly 30 chapters of secret text, the greatest impact on the environment would come from **the Investor State Dispute Settlement (ISDS)** provisions. Simply put, this mechanism would give foreign companies the ability to sue a government in an offshore tribunal if that company believed its reasonable investment expectations (such as its profits or asset values) had been breached. That tribunal can force the host government to pay damages to the foreign investor and there is no appeal process. It ends up **privileging foreign companies over local communities and local companies** who do not have such rights to sue.

The environment is disproportionately exposed under ISDS arrangements. Over 85% of the money paid out to date by governments under free trade deals with the US has involved claims over resources and the environment.¹

New Zealand has signed free trade deals in the past that have included ISDS provisions so this type of approach is not new.² But the rationale for including ISDS provisions at all is now under question internationally and there are specific concerns about including them in the TPP.

Why ISDS At All?

A detailed examination of ISDS provisions by the Australian Productivity Commission lead to the blunt conclusion 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" (emphasis added).³

That conclusion was informed by the observation that: “the Commission received no feedback from Australian businesses or industry associations indicating that ISDS provisions were of much value or importance to them. Indeed, as far as the Commission is aware, no Australian business has made use of ISDS provisions in Australian IIAs, including in its BRTAs.”⁴ Since that time, one Australian company has made use of the provision: no New Zealand companies have.

The commission’s stance⁵ helped shape the Gillard government’s rejection of ISDS provisions in future trade agreements:

The 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.⁶

The ISDS concept has also recently come under review in a host of countries, including India and South Africa, while Brazil has never accepted such provisions.⁷

Usurping Local Courts

It is not just that ISDS provisions give rights to foreign investors that are not available to local investors: it is that **the process can usurp local courts**.

This was made clear through a recent high profile case between the Ecuadorean government and Chevron. When extracting oil in the Amazon rainforest between 1964 and 1992, Texaco (a Chevron acquisition) severely damaged the environment and the health of local populations. After 18 years of litigation, Chevron was ordered to pay US\$18 billion in compensation by an Ecuadorean court.

However, Chevron used ISDS provisions to halt enforcement of the court order in February 2012 – and this was before the tribunal hearing the case had even established that it had jurisdiction.⁸ Note that the tribunal did not let the compensation payment for pollution be made and then hear a separate case for investment expectations not having been realised: it simply overrode the local courts. Should New Zealand be subject to provisions that could similarly override an Environment Court hearing on an RMA matter, for example?

Public Good Protections Inadequate

Free trade agreements that contain ISDS provisions generally also carry clauses to allow a government to raise environmental standards in a non-discriminatory fashion. Their wording is important, and the leaked draft of the TPP text shows weaker language than New Zealand would have sought - to align with previous agreements.

However, even with strong wording, the key problem remains that **such clauses have proven unreliable when it comes to interpretation by the tribunals**.⁹ This risk - that a government could still be successfully sued – means the **ISDS provisions have a “chilling effect”** on a government’s willingness to undertake progressive environmental reform.

A further aspect of the “chilling effect” is that foreign investors do not need to initiate a case in order to exert influence. When the average cost of simply participating in such a case is US\$8 million, if the proposed environmental reform is not strongly supported then even if the government would have a strong defence, it may nonetheless back off the reform in the face of a threat to sue.¹⁰

It is true that large corporates already have many ways to lean on governments if they choose to, but the financial penalties ISDS can deliver often make it a more potent threat than is currently available to foreign investors in all but a small number of countries. Given the propensity for US corporations to employ legal strategies, and the scale of the resources they can devote to a particular issue versus those a New Zealand government could responsibly allocate, the TPP would open up a quite different set of exposures compared to those New Zealand is accustomed to.

Vulnerable Starting Position

New Zealand starts in a vulnerable position because, in spite of innovative legislation in certain areas of environmental protection, in other areas it is behind OECD benchmarks. And regardless of the starting point, **there will be increasing pressure on New Zealand to raise standards** to underpin the clean green image it trades on.

ISDS rights could be used by a foreign entity to seek compensation from a government or local council if it, for example:

- **Changed the conditions of a mining licence**
- **Set higher minimum flows for a river** (and so reduced availability for users)
- **Raised the charge on greenhouse gas emissions** (recent changes to the ETS legislation gutted future responsibilities)
- **Set stricter rules on logging of forests** (clear fell practices are under challenge)
- **Prohibited a pesticide** (many that are banned in the EU are legal in NZ)
- **Established national legal standards for the environmental protection of water and soil** (New Zealand has essentially none).

ISDS provisions would tend to freeze low standards when these need to rise markedly.

Other TPP chapters that put pressure on environmental standards include those on: border procedures, transparency, and “regulatory coherence”, while the environment chapter seems likely to offer little, if any, net gains.¹¹

**New Zealand should reject ISDS text in the TPP,
as the Australian Government has**

¹ For descriptions of recent cases and payouts see: www.citizen.org/documents/fact-sheet-tpp-and-environment.pdf

² The free trade deal with China was the point at which New Zealand focused most effort on considering the shaping of ISDS provisions.

³ Productivity Commission 2010, *Bilateral and Regional Trade Agreements*, p 271.

⁴ Ibid, p 270

⁵ It recommended that the Australian government should “seek to avoid the inclusion of investor-state dispute settlement provisions that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors”. Ibid, p XXXVIII.

⁶ Australian Government Trade Policy Statement, April 2011, p 14.

⁷ Martin Khor, *The emerging crisis of investment treaties*, South News No. 18, 30 November 2012.

⁸ <http://www.chevron.com/documents/pdf/ecuador/SecondTribunalInterimAward.pdf>

⁹ See for example: <http://www.citizen.org/RDC-vs-Guatemala>

¹⁰ www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf

¹¹ See: www.itsourfuture.org.nz www.citizenstrade.org www.citizen.org