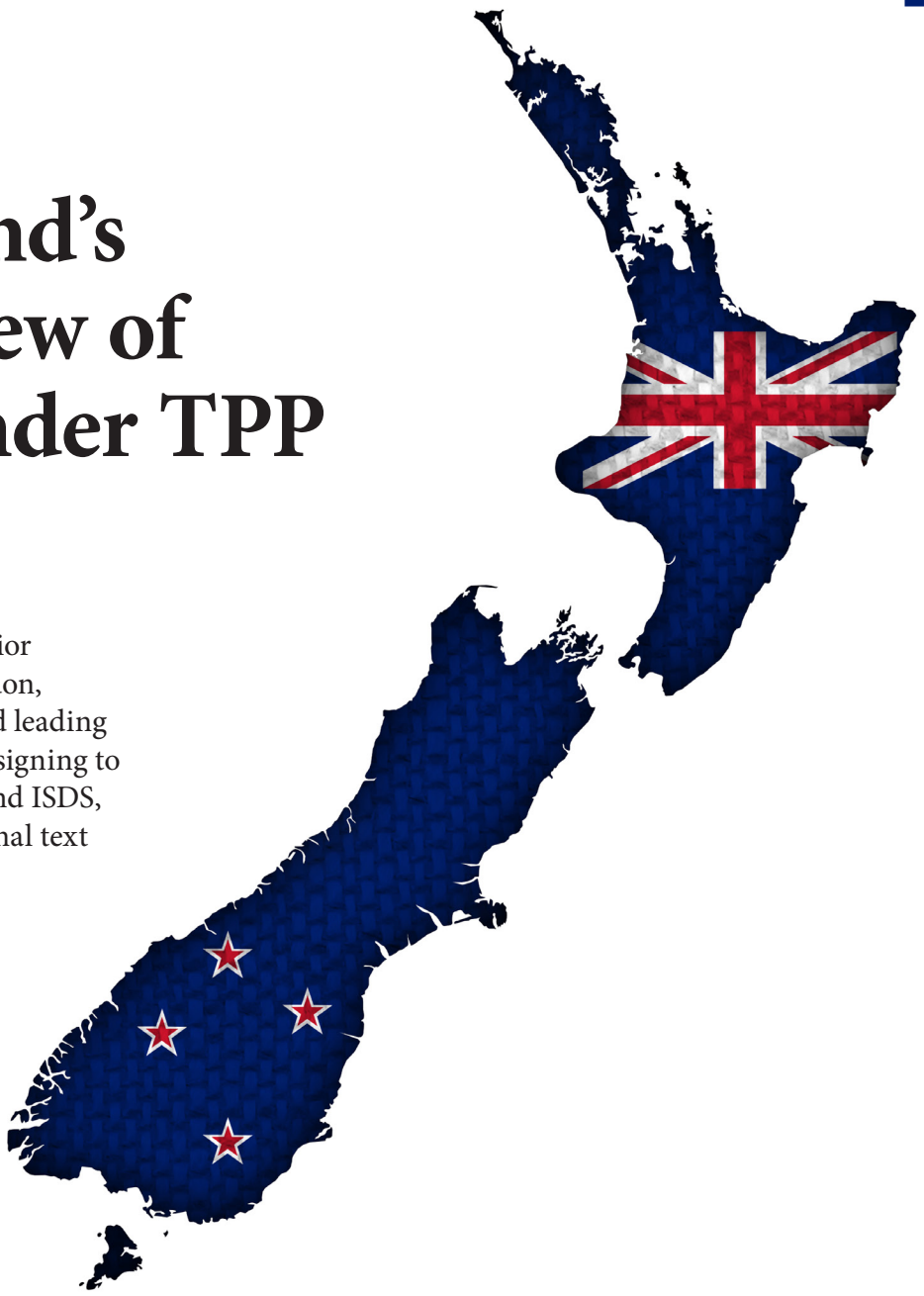
# New Zealand's cautious view of disputes under TPP



**Desley Horton** and **Rina See**, senior associates at **WilmerHale** in London, outline the debate in New Zealand leading to the Trans Pacific Partnership's signing to illustrate the main concerns around ISDS, and examine to what extent the final text addresses those concerns

The Trans-Pacific Partnership Agreement (TPP) was signed by the 12 Pacific Rim member countries on 4 February 2016 in Auckland, New Zealand, against a backdrop of controversy. Much of the opposition was concerned with the investor-state dispute settlement (ISDS) provisions in chapter 9 of the TPP.

The enigma surrounding ISDS adds to the controversy, and an arguably sensationalist series of investigative feature articles by *BuzzFeed* reporter Chris Hamby, describing ISDS as a "secret threat" and a "private, global super court" does not assist in the public's understanding and estimation of ISDS.

Alongside concerns around ISDS, a wider issue is that the discourse operates at different levels of comprehension, within and across the media, in Parliament and in academic literature, and there is a fundamental disconnect across these streams. This article draws attention to the gap between popular and legal opinion, and aims to bridge them to encourage balanced, well-informed debate.

For example, although well-known figures such as academic Joseph Stiglitz and United States Senator Elizabeth Warren have raised valid criticisms of ISDS in mainstream channels, it is generally in the interests of ISDS critics to fuel the misinformation and rhetoric used in the media to incite change.

Attempts by lawyers with first-hand experience of ISDS to correct these misconceptions are undermined by accusations that there is an inherent conflict of interest.

The current political circumstances and attitude to the TPP in the US may mean that the TPP agreement never comes into force, and public sentiment has prevailed. Nonetheless, in the Asia-Pacific region, the debate on ISDS continues with ▶

- negotiations on the Regional Comprehensive Economic Partnership (RCEP), which excludes the US but includes India and China.

While no official draft text of the RCEP has been released, a leaked version of the investment chapter provides for ISDS with similar provisions to those in the TPP. Going forward, lessons can be learnt from the TPP experience.

## The debate in New Zealand (and other Asia-Pacific nations)

In August 2015, thousands marched against the TPP across cities in New Zealand, calling for transparency, democracy and sovereignty. There were further anti-TPP protests at the signing of the agreement in February 2016, including the now-infamous clip of the Minister for Economic Development Steven Joyce being hit in the face by a plastic phallus, as a symbol of the TPP's perceived assault against New Zealand's sovereignty.


Following the signing ceremony, the US trade representative Michael Froman was asked what he would say to the protestors outside on the alleged power corporations had to "sue governments like New Zealand".

Froman responded specifically that the TPP "goes further than any agreement before" in "raising the standards, adding additional procedural and substantive safeguards, and closing loopholes" to ensure that governments can regulate in the public interest and ISDS procedures are used appropriately.

One prominent missive outlining such concerns was an open letter from a group of mostly New Zealand jurists, lawyers and legislators to TPP negotiators in May 2012. It was signed by retired judges of the New Zealand Court of Appeal, a former Attorney-General and Speaker of the House, present and former Members of Parliament, and numerous legal academics. The letter urged negotiators to exclude ISDS provisions from the TPP and future trade agreements in favor of "reasserting the integrity of domestic legal processes" because of five main objections (see inset).

In August 2016, a petition was signed by civil society organisations in Asia-Pacific opposing an ISDS clause in the RCEP. That petition referred to potential challenges to national laws on health, the environment, tax and financial regulation, and the burden on developing countries like Cambodia, Laos and Myanmar, which are typically unable to afford large awards. It also mentioned concerns about ISDS expressed by the Chief Justices of New Zealand and Australia, and Singapore's Attorney-General.

In New Zealand, **Chief Justice Sian Elias** had made a passing reference to ISDS in a 2014 speech about the challenges of globalisation. She observed that domestic human rights-based determinations could give rise to ISDS claims, and that such disputes could potentially impact upon the rule of law. In addresses delivered in 2012 and 2014, Singapore's Chief Justice and previous Attorney-General **Sundaresh Menon**, and Australia's **Chief Justice Robert French**, raised issues with the ISDS regime.

Although neither of them advocated abolishing ISDS, Menon CJ suggested greater consideration of the circumstances of developing nations and the development of a system of appeals whereas French CJ suggested precluding challenges to decisions of domestic appellate courts in investor-state arbitration.

Anti-ISDS sentiment has also permeated to Parliament. In July 2015, a member of the New

The five main objections made by New Zealand opponents to TPP were as follows:

- Arbitral awards against states often incorporate "overly expansive interpretations" of the substantive obligations in investment treaties.
- The rights of foreign investors were seen to be prioritised over the "right of states to regulate and the sovereign right of nations to govern their own affairs".
- The grant of injunctive relief by arbitral tribunals creates "severe conflicts of law" with domestic proceedings.
- Lawyers rotate between roles as arbitrators and advocates for investors "in a manner that would be unethical for judges".
- Non-investor litigants and other affected parties do not have the right to participate, which "fails to meet the basic principles of transparency, consistency and due process common to our legal systems".

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Zealand First party introduced the Fighting Foreign Corporate Control Bill, which – like the Australian Trade and Investment (Protecting the Public Interest) Bill 2014 – sought to prevent the state from entering into any agreement with ISDS provisions. The bill was narrowly voted down at the first reading, with Parliamentary speeches reflecting the tension between a perceived loss of sovereignty and economic growth.

The academic literature in New Zealand paints a different picture. Legal academic and former **Freshfields Bruckhaus Deringer** partner, based in Singapore, Professor **Lucy Reed** concludes that New Zealand is in the enviable position of having other countries' ISDS experiences to learn from without being encumbered by old-style treaties.

Fellow academic, Professor Luke Nottage observes there is a greater political appetite for ISDS, with both key political parties largely in favour, given the positive reception to the Labour government-negotiated China-New Zealand free trade agreement containing an ISDS clause.

## ISDS in the TPP and more broadly

The concerns raised by ISDS sceptics in the media appear to have resonated with TPP negotiators. The draft TPP text released on 5 November 2015 contained significantly improved ISDS provisions compared to those in bilateral investment treaties (BITs) previously negotiated by TPP signatories.

The ISDS provisions in the TPP have therefore been characterised as a "new model in international investment agreements" in being "innovative", and, according to the Office of the United States Trade Representative, an agreement with "stronger safeguards that [will] raise standards above virtually all of the other 3,000 plus investment agreements in force today".

The ISDS provisions are a response to many of the criticisms commentators raised about that system of dispute resolution. In particular, the preamble to the TPP provides that state parties have an "inherent right to regulate" and "resolves to preserve the flexibility of the parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives".

Although the preamble is yet to be legally interpreted, it indicates the state parties' intention to preserve their sovereign power to regulate in their national interest, meeting a key objection of ISDS. Moreover, should they be subject to a claim, Article 9.19.2 of the TPP permits state parties to make a counterclaim of their own, or to rely on a claim for set off. This addresses some of the criticisms that state parties are powerless to regulate, or are not on the same footing as claimant investors.

Second, under Article 9.29.1, arbitral tribunals cannot grant injunctive relief as a final award. Tribunals may only grant monetary damages and applicable interest, and/or grant the restitution of property (or damages in lieu thereof).

Third, state parties have agreed to develop an arbitrators' code of conduct to assuage concerns about lawyers acting in different capacities (Article 9.22.6). This code will provide specific guidance on conflicts of interest.

The final text of TPP contains several provisions designed to address "transparency, consistency and due process concerns", including: requiring that formal documents filed within the arbitration are published (under Article 9.24.1); secondly, providing that all hearings are open to the public (see Article 9.24.2); and lastly, allowing non-participants who may have an interest in the outcome to file submissions (under Article 9.23.3).

Progressively, the ISDS provisions anticipate the possibility of an appellate mechanism reviewing arbitral awards (Article 9.23.11). This is a positive step towards addressing the criticisms that ISDS lacks an effective review process, leading to inconsistent decisions between tribunals.

The ISDS provisions also restrict parties from bringing frivolous claims with procedural and punitive measures, while parties must also bring a claim within a certain timeframe, under Article 9.21.1.

- There is an accelerated review mechanism for claims that are "manifestly without legal merit" under Articles 9.23.4 and 9.23.5. Should a party pursue an unreasonable claim, the tribunal may order them to pay the prevailing party's costs and legal fees as well (similar to many courts) under Article 9.23.6.

Still, despite the criticisms, ISDS arguably represents the best (and perhaps only) mechanism by which all state parties would agree to resolve disputes. Although a supranational investment court system has been mooted as an ISDS replacement, that suggestion suffers from similar issues and creates new ones.

ISDS criticisms typically overlook its benefits when compared to its alternatives. Without ISDS, investors would be forced either to take their chances in other states' domestic courts, potentially in states that do not share common social, economic and legal traditions (as across the 12 TPP signatories); or worse, to rely on their governments to negotiate on their behalf.

ISDS provides an independent avenue to resolve disputes in countries where judicial processes and substantive rights do not meet accepted global standards, and is an attempt to find a middle ground across diverse legal cultures.

Moreover, it may encourage good governance by states. After all, states like New Zealand have never been subject to a claim despite being a party to BITs with ISDS provisions, instead of luck, this could reflect the lack of legal basis to found a claim. Without ISDS, states could also face prohibitively expensive claims in domestic courts.

The "regulatory chill" criticism of excessive cost awards exists regardless of ISDS. The customary advantage of procedural flexibility in arbitration compared to commercial litigation also applies.

**While there is always room for improvement, ISDS is not a lurid 'secret club' giving multinational corporations power over small helpless nations, as it is often made out to be**

ISDS is also finding increasing acceptance. For several Asian TPP signatories, it is the preferred mechanism of resolving disputes between investors and states because of an aversion towards litigation. This includes those traditionally communist regimes, such as China, Laos and Vietnam, who have all recently entered into bilateral investment treaties containing similar ISDS provisions. It is therefore in the interests of states wishing to strengthen their trading relationships to invest in improving ISDS, rather than abandoning it.

## Conclusion

The TPP, including the ISDS provisions, is the culmination of nearly a decade of intense negotiations. The concerns with ISDS have not gone unnoticed by those negotiating the agreement. Its ISDS provisions represent a modern approach catering to the interests of the various signatories, striking a balance between investor protection and sovereignty, and risk and opportunity.

While there is always room for improvement, ISDS is not a lurid 'secret club' giving multinational corporations power over small helpless nations, as it is often made out to be. If the public could see a more accurate portrayal of ISDS without its proponents being dismissed as biased, a fairer and more constructive debate could be had. ■

**Desley Horton** is a senior associate in WilmerHale's litigation/controversy department, and a member of the firm's international arbitration practice group in London. She has experience with representation of both private sector and government clients in international arbitration proceedings governed by various substantive and procedural laws. She has formerly practiced as a barrister in Auckland, New Zealand.

**Rina See** is a senior associate in WilmerHale's litigation/controversy department, and a member of the firm's international arbitration practice group in London. She has experience in arbitrations conducted under the auspices of several arbitral institutions and ad hoc, governed by a variety of substantive and procedural laws. Prior to joining WilmerHale, she represented private clients and governmental agencies in civil and regulatory litigation in New Zealand.