

Investor/state arbitration, the TPP and New Zealand

Daniel Kalderimis, Partner, Chapman Tripp

LEANZ SEMINAR, WELLINGTON, 28 JULY 2015



Who's afraid of the TPPA?

THE CATCH? HARDWIRED INTO THE DESIGN OF IT ARE PROVISIONS THAT ALLOW FOR "INVESTOR/STATE DISPUTE SETTLEMENTS"...



... THAT ENABLE CORPORATIONS TO SUE GOVERNMENTS IF ANY LAWS RESTRICT THEM FROM MAKING MAXIMUM PROFITS.



Source: <http://thewireless.co.nz/articles/the-pencilword-who-s-afraid-of-the-tpa>



Source: <http://thewireless.co.nz/articles/the-pencilsword-who-s-afraid-of-the-tpa>

Editorial: New Zealand must tread carefully on Trans Pacific Partnership

Last updated 05:00, July 6 2015



Equally worrying are the TPP's "investor-state dispute settlement" mechanisms. These give big companies an opaque new forum to sue governments that pass laws they don't like. They were invented to protect companies operating in countries with dodgy records on the rule of law, but they are spreading all over the world. They have no place in New Zealand – and deserve to be dropped from the TPP.

TAIHOA to TPPA - application for urgent Treaty hearing

Wednesday, 24 June 2015, 5:15 pm
Press Release: [Joint Media Statement](#)

FOR IMMEDIATE RELEASE

TAIHOA to TPPA

24 June 2015

A group of esteemed Māori leaders and academics, including Dr Papaarangi Reid, Moana Jackson, Rikirangi Gage, Angeline Greensill, Hone Harawira and Moana Maniapoto have filed a claim and application for urgent hearing today in the Waitangi Tribunal.

The claim alleges that the government's actions in negotiating the Trans-Pacific Partnership (TPPA) are a breach of the Treaty of Waitangi and its principles.

The claimants say that the TPPA procedurally and substantively prejudices them and undermines the guarantees to Māori under the Treaty to the exercise of their tino rangatiratanga in governance decisions that affect them.





Labour will not support TPP if it undermines NZ sovereignty

by **Andrew Little** on July 23, 2015

“Labour will not support the TPP if it undermines New Zealand’s sovereignty. This means:

- Pharmac must be protected
- Corporations cannot successfully sue the Government for regulating in the public interest
- New Zealand maintains the right to restrict sales of farm land and housing to non-resident foreigner buyers
- The Treaty of Waitangi must be upheld
- Meaningful gains are made for our farmers in tariff reductions and market access

Global opposition to ISDS

- *Argentina cases*
- *Chevron v Ecuador case*
- Withdrawals from ICSID: Bolivia (2007), Ecuador (2010), Venezuela (2012)
- *Philip Morris case*
- Australian Productivity Commission
- UNCTAD

TTIPping the balance: The Crusade against Investor-State Arbitration



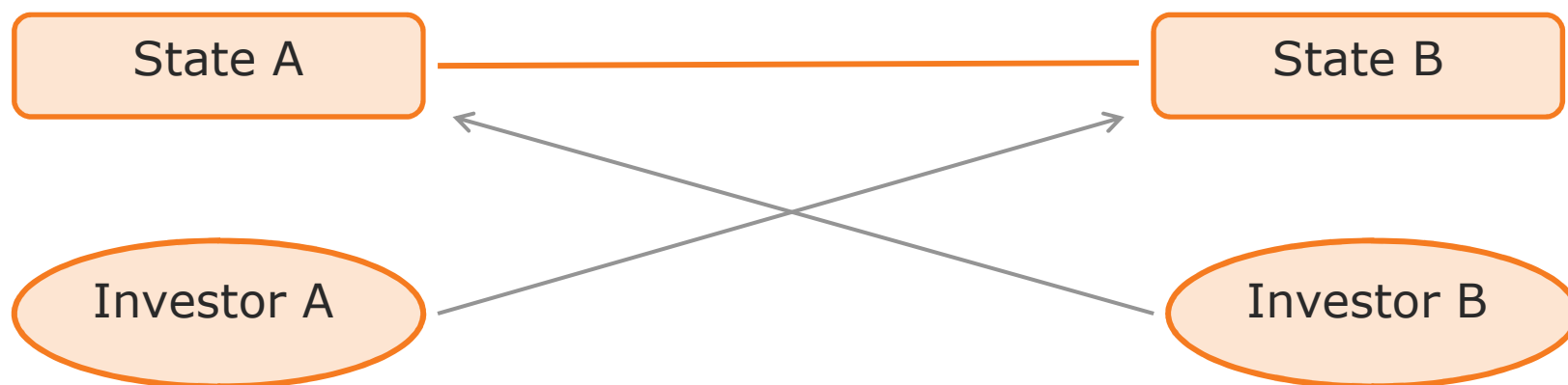
June 03 08:00
2015

 By: [Richard Allen](#)

 [Print This Article](#)

Now we know we don't like it, let's find out what it is

"Arbitration without privity"



Surely NZ shouldn't go near it?

- New Zealand has already signed up to ISDS mechanisms with 13 countries:
 - China (1988 BIT, 2008 FTA)
 - Hong Kong (1995 BIT)
 - Malaysia (2009)
 - every ASEAN country (including Singapore, Vietnam, Thailand, Indonesia) (2009)
 - South Korea (2015, still to be ratified)

Int'l investment law: a brief history

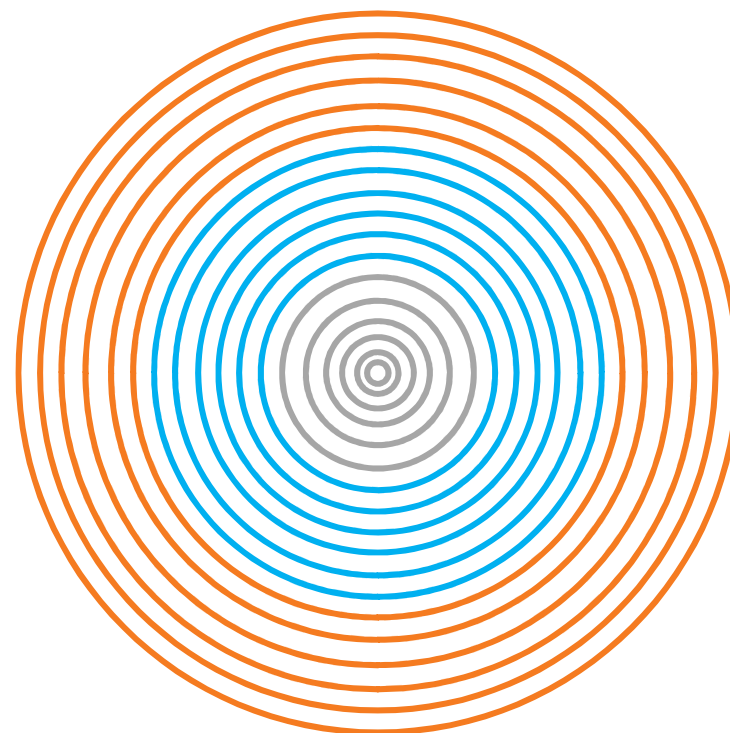
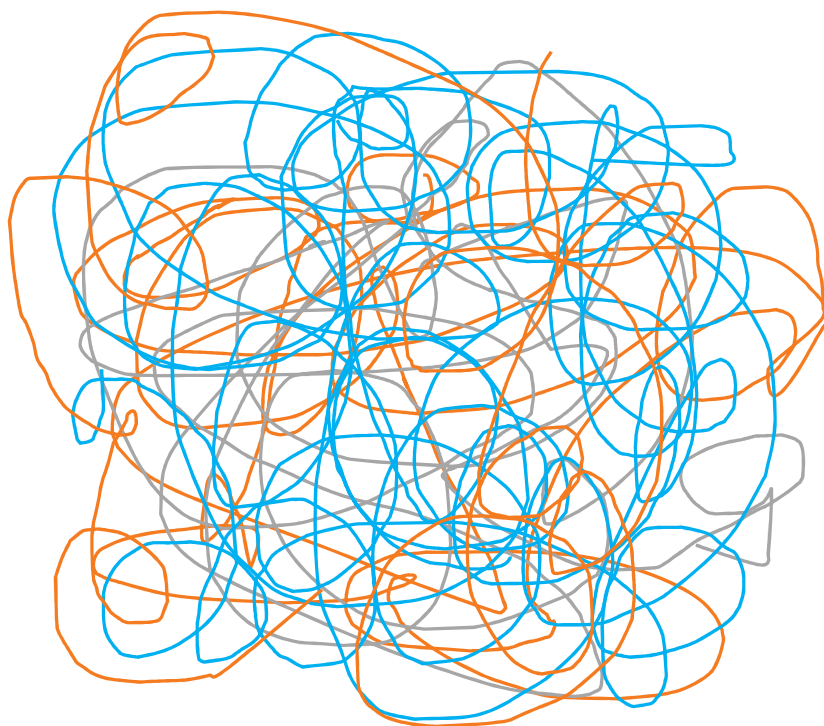
- International adjudication of investment disputes has been around for over a century
- Early history:
 - Development of international legal standards for the treatment of foreign investors
 - Political resolution of disputes (gun-boat diplomacy)
 - Diplomatic protection (state/state)
- Post-WWII: decolonisation lead to an increase in international investment disputes
- A mechanism was needed...

Rise of IIAs

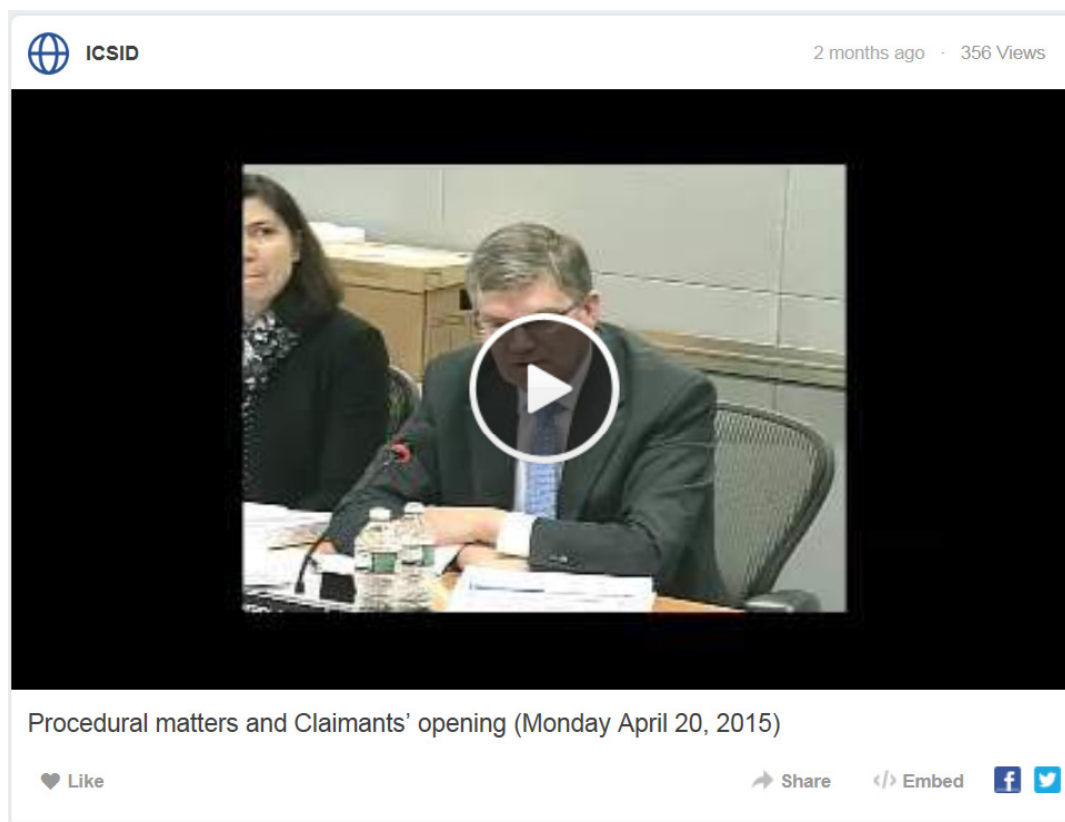
- MAI 1998 failed...
- ...but now over 3,200 international investment agreements (*IIAs*), and 600 cases
 - standalone bilateral investment treaties (*BITs*)
 - embedded FTA investment chapters
- ICJ *Diallo* (2007):

“... in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements...”

A disaggregated regime



What does an ISDS hearing look like?



<http://livestream.com/ICSID/events/3954046>

How do you find the decisions?

- <http://www.italaw.com/>
- <https://icsid.worldbank.org>
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

The Trans-Pacific Partnership

- 12-nation trade and investment pact
 - Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United State, and Vietnam
- Leaked chapters on:
 - Investment (including ISDS)
 - The environment
 - Intellectual property
 - Healthcare / pharmaceuticals
 - Regulatory coherence
- Negotiations could conclude this week



Why would NZ include ISDS in the TPP?

- Probably not to assist outbound foreign investors
- But FTAs are negotiations – without the give, there is no get
- We don't, actually, have much to trade – remember stalled Korea-NZ FTA?
- So, ISDS is part of the price

Best practice drafting techniques

Traditional BIT standards	Problems	Potential solutions
Fair and equitable treatment (<i>FET</i>)	Vague, open-textured and hence unpredictable	Tie to CIL minimum standard of treatment (<i>MST</i>)
Expropriation	Regulatory or creeping expropriation notoriously hard to define	Rely on CIL police powers exception Include indirect expropriation annex
Most favoured Nation (<i>MFN</i>)	Extension to rights accorded under other BITS	Draft MFN clause to exclude procedural rights Limit to post-establishment
Umbrella Clauses	Risk of parallel proceedings; undermines contractual mechanisms	Omit or draft to reflect governmental/commercial distinction
National Treatment (<i>NT</i>)	Restricts policy flexibility	Limit to post-establishment / restrict through NT annex

Best practice drafting techniques

- Tools to balance regulatory autonomy
 - eg, narrowly-defined obligations, excluded domestic measures, expropriation annex, general exceptions
- Tools to improve legitimacy
 - eg, greater transparency, joint interpretations of the parties, excluding frivolous claims, interested party participation, multilateral appeals process

Case study: can the Government stop foreigners buying houses?

- Compare:
 - China-NZ FTA: Article 138
 - Korea-NZ FTA: Article 10.5
- Art 10.15: Non-Conforming Measures

New Zealand reserves the right to “*adopt or maintain*” any measure that requires certain specified investment activities to receive prior approval, including the “*acquisition or control, regardless of dollar value, of certain categories of land that **are** regarded as sensitive or require specific approval according to New Zealand Overseas Investment legislation*”

Striking a balance...

- International treaties necessarily constrain national sovereignty
- Problem is not restricting domestic action, but doing so without sufficient *forethought, balance, and political and institutional legitimacy*

...or striking a pose?

- No conspiracy – but a precocious mechanism growing up fast
- The TPP is a huge opportunity – the WTO Doha round has been ongoing since 2001
- Need perspective: significant counterfactual risk in not being part of TPP
- Care is needed with ISDS; so, we should proceed *carefully*
- But let's not overreact