

# Kluwer Arbitration Blog

## NZ Renounces ISDS: Deja Vu?

Amokura Kawharu (University of Auckland) and Luke Nottage (University of Sydney & Williams Trade Law) · Wednesday, December 6th, 2017

New Zealand now officially opposes investor-state dispute settlement (ISDS), thanks to the election of a new centre-left Labour-led coalition government that took office in October 2017. In a post-Cabinet press conference on 31 October, Prime Minister Jacinda Adern [announced](#) that: “We remain determined to do our utmost to amend the ISDS provisions of TPP. In addition, Cabinet has today instructed trade negotiation officials to oppose ISDS in any future free trade agreements.” Adern is also [reported](#) to have described ISDS as a “dog”.

This announcement followed the unexpected (and close) electoral victory over the more centre-right National Party, which had governed for three terms. The National Party had actively promoted free trade agreements (FTAs), including ISDS-backed commitments. Earlier Labour Governments had also promoted FTAs, notably with [China](#) (in force from 2008, and also containing ISDS provisions). That FTA has been accompanied by a four-fold increase in goods exports from New Zealand to China, while China has risen to become New Zealand’s ninth largest source of foreign investment. Overall, China now ranks as New Zealand’s second-largest trading partner.

However, bipartisan support over FTAs and foreign investment had begun to fray when the National Government signed the Korea FTA in 2015 and the TPP in February 2016. During inquiries into ratification, Labour parliamentarians raised concerns about whether these agreements allowed sufficient host state regulatory space, for example for New Zealand to introduce new types of restrictions over purchases by foreigners of residential property (the market for which has been booming). Some questions were also raised about ISDS, reflecting broader public concerns (as can be seen in our analysis of New Zealand newspaper reports [here](#)).

As in countries like [Japan](#) and [Korea](#), recent public concerns over ISDS may have reflected New Zealand’s love-hate relationship with the United States. It was then a driving force behind the TPP negotiations, but also a major attraction for New Zealand since an FTA with the US had long been a top trade priority.

In 2015, and shortly after the parliamentary select committee report on the Korea FTA was issued, the populist New Zealand First party (led since 1993 by former National Party politician Winston Peters) tabled the “Fighting Foreign Corporate Control Bill” which would have precluded governments from agreeing to ISDS provisions in future treaties. At the time, the Labour Opposition was prepared to support the Bill through to the select committee stage so as to enable focussed scrutiny of ISDS, although it was unlikely to have backed the legislation any further since

it was contrary to Labour's view of the Executive's prerogative to negotiate treaties. In the event, the Bill was defeated at its first reading.

In this October's general election, Labour took 46 seats in Parliament (out of 120) while National took 56, thus needing New Zealand First to form a coalition government. New Zealand First eventually decided to join with Labour, citing closer alignment with Labour on the role of capitalism in society, and perhaps sensing a mood for change. Policy-wise, there is reasonable alignment between New Zealand First and Labour on controls over foreign investment and immigration.

Against this political backdrop, it is unsurprising that the new Labour-led government declared soon after taking office that it would legislate stricter controls over foreign investment in residential land. Specifically, the new government proposes to add residential housing to New Zealand's [foreign investment screening regime](#). Presumably, it is treating residential housing as a new class of "sensitive land", and will rely on an exemption in its FTAs that allows New Zealand to maintain its screening regime with respect to the current categories of screened investment (including sensitive land). The one exception is its FTA with Singapore, which confines sensitive land to non-urban land. The government accepts it will need to negotiate a solution with Singapore. Australian investors will be excluded from the new measure.

It is also unsurprising that the new government made the announcement regarding ISDS, set out at the outset of this blog post. What is rather more surprising is what the New Zealand government then seems to have done, in reaching agreement in principle for a 'TPP11' agreement at the APEC Leaders' meeting on 11 November in Vietnam, now that the Trump Administration has withdrawn US signature from the TPP. The renamed Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPA, which we sometimes abbreviate as "C3PO"! ) reportedly will commit New Zealand and the remaining 10 other signatories, including Japan (with which it still has no bilateral FTA), to ISDS provisions, but their application to investment agreements and investment authorizations will be suspended. In New Zealand's case however, investment authorizations were already excluded from ISDS by virtue of Annex 9-H of the original TPP text.

To confirm the extent of the changes to the ISDS-related provisions, we will need to await the public release of the final text of C3PO, which is undergoing 'legal scrubbing' by officials based on the 11 countries' agreement in Vietnam. New Zealand may also approach countries other than Australia, with which it had already proposed through an [exchange of letters](#) to exclude ISDS bilaterally (consistently with their other bilateral and regional agreements), to seek similar treatment. Even once such revised agreements are signed off, signatory countries will need to go through national procedures for ratification, which may be complicated or at least take time.

However, at this stage it seems that New Zealand has proven agreeable to quite limited changes to the TPP provisions on ISDS. Those were not renegotiated, for example, to add an appellate review mechanism. This is despite future agreement on such a mechanism being envisaged in TPP Article 9.23(11), and despite an appellate review being increasingly advocated by those unhappy about inconsistencies in rulings from traditionally-structured one-tier ISDS tribunals.

Given these developments with the TPP, what will happen now with the ongoing 'ASEAN+6' negotiations for the Regional Comprehensive Economic Partnership (RCEP, which we sometimes call "R2D2")? The danger for New Zealand is that if it insists on removing ISDS in this proposed regional FTA (it was included in a leaked 2015 draft investment chapter that we analyzed [here](#)),

counterparties insistent on ISDS commitments may force New Zealand to leave the pact. They may hope that National will get back in power so that New Zealand can then sign the treaty, including ISDS commitments.

There are clear parallels with the situation in [Australia](#) from 2011-2013. The centre-left Gillard Labor Government was in coalition with the more leftist Greens, which later proposed an [Anti-ISDS Bill 2015](#) (eventually voted down by both the new Liberal Coalition Government and the by-then Labor Opposition). The Gillard Government adopted a recommendation (by majority) from the Australian Government's Productivity Commission 2010 trade policy review report to eschew ISDS in future FTAs. Consequently, until it lost power in 2013, the Gillard Government was unable to conclude major FTAs with countries like China and Korea that had strongly pressed for ISDS.

The difference now for New Zealand is that major FDI exporting countries negotiating RCEP, which have strong interests in ISDS protections, already have ISDS through existing FTAs (namely with China, Korea, and Singapore via earlier FTAs as well as AANZFTA) or will obtain ISDS if CPTPP comes into force (namely Japan). Australia is the other big FDI exporter into New Zealand, but their particularly closely linked economies, politics and legal systems arguably make this a special case for excluding ISDS protections anyway.

[India](#) may also push for ISDS in RCEP based on its 2016 Model BIT, even though ISDS is heavily circumscribed through a lengthy exhaustion of local remedies requirement. India apparently agreed to omit ISDS altogether in its recent investment facilitation agreement with Brazil (with a longer-standing aversion to ISDS). As for the Southeast Asian countries negotiating RCEP, a recent [JWIT Special Issue](#) shows how most are comfortable with – but not strong proponents of – ISDS (except Singapore), while Indonesia is reconsidering its position in light of some recent high-profile claims.

Overall, given this complex new situation domestically in New Zealand and for RCEP negotiations, we think it is time for New Zealand – and indeed Australia, where the current Coalition Government has just lost its [majority](#) – to rethink its approach more generally towards investment treaties. Specifically, we have [written](#) to leaders in both New Zealand and Australia recommending a shift towards introducing an EU-style two-tier investment court model in lieu of traditional ISDS, as a compromise way forward. Stay tuned for [more](#)!

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