

# Kluwer Arbitration Blog

## CPTPP and ISDS: Three Years On

Hiroki Aoki, Weijian Teo (Nagashima Ohno & Tsunematsu Singapore LLP) · Thursday, August 12th, 2021

On 2 June 2021, the British government announced that the existing 11 signatories (the “Parties”) to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) have agreed to the United Kingdom’s bid to begin the accession process.<sup>1)</sup> International Trade Secretary, Liz Truss, [commented](#) that *“CPTTP membership...will help shift our economic centre of gravity away from Europe towards faster-growing parts of the world, and deepen our access to massive consumer markets in the Asia-Pacific...without having to cede control of our borders, money or laws.”* The optimism can hardly be said to be unwarranted when one considers the economic impact, given that the gross population of the CPTPP markets exceeds those of the United States and the EU.

However, the question of the CPTPP’s legal impact remains open, especially with regard to the Investor-State Dispute Settlement (“ISDS”) provisions under Section 9B of [Chapter 9 of the CPTPP’s legal text](#).

This article sets out an overview of the CPTPP and its ISDS provisions and comments on the future of the CPTPP.

### Overview of the CPTPP

The CPTPP, which developed from the Trans-Pacific Partnership’s (“TPP”) failure to enter into force after the United States withdrew in January 2017, is [one of the world’s largest free-trade agreements](#). With a combined GDP of approximately \$13.5 trillion, it has been [projected](#) to raise \$147 billion in annual global income.

The legal text retains two-thirds of the TPP’s provisions, suspending or changing 22 provisions that were primarily favored by the United States. The legal text has to be read together with the relevant side letters, which are bilateral arrangements between specific Parties. Although the use of side letters is not unique to the CPTPP (see, for example, the ASEAN-Australia-New Zealand Free Trade Area (“AANZFTA”) and the United States-Mexico-Canada Agreement (“USMCA”)), the extensiveness of its use is noteworthy: [New Zealand \(25\)](#); [Canada \(40\)](#); [Australia \(21\)](#); and [Vietnam \(35\)](#).

Administratively, [Chapter 27](#) provides for the formation and functions of a TPP Commission composed of government representatives of each Party (the “Commission”). Since the CPTPP’s entry into force on 30 December 2018, the Commission has [met at least once a year](#) to endorse various decisions.

## Overview of the CPTPP’s ISDS Provisions

ISDS is provided under Section 9B of Chapter 9, where a multi-tiered dispute resolution mechanism is set out.

Prior to commencing arbitration, the claimant is required to serve “*a written request for consultations setting out a brief description of facts regarding the measure or measures at issue*” (Article 9.18.2). Disputing Parties are then required to engage in consultations and negotiations for six months from the respondent’s receipt of the claimant’s written request for consultations (Article 9.19.1). The claimant is also required to serve a written notice of intent to submit a claim to arbitration containing specified details on the respondent 90 days before submitting a claim to arbitration (Article 9.19.3). The said written notice must be accompanied by a written waiver “*of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.19*” (Article 9.21.2(b)).

Arbitration may be commenced in accordance with any of the following regimes: ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings; the ICSID Additional Facility Rules; the UNCITRAL Arbitration Rules; or, any other arbitral institution or arbitration rules that the claimant and respondent agree on (Article 9.19.4). The arbitration must be commenced within three years and six months from the date on which the investor first acquired, or should have first acquired, knowledge of the breach (Article 9.21.1).

At the Commission’s first meeting on 19 January 2019 in Tokyo, it [endorsed a decision on ISDS Code of Conduct](#) per Article 9.22.6. Of note is [paragraph 3\(d\) of the Annex](#) that provides as a governing principle that “*Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement.*” The restriction is particularly broad. It covers other disputes that the claimant and respondent are uninvolved in.

Parties are entitled to bring a claim based on the actionable breaches of obligations under Section 9A in respect of a “*covered investment,*” that is given a broad definition under Article 9.1, save for “*judgment entered in a judicial or administrative action.*”

Where the respondent Party is Chile, Mexico, Peru, or Vietnam, the claimant must elect between litigation in the court or administrative tribunal of those parties or arbitration in accordance with Section 9B. The election shall be definitive and exclusive ([Annex 9-J](#)).

In addition, New Zealand has signed side letters with [Australia](#), [Peru](#), [Brunei](#), [Malaysia](#), and [Vietnam](#) to exclude the direct application of ISDS provisions under Section 9B. With regard to New Zealand vis-à-vis Australia and Peru, no Australian and Peruvian investors, in relation to New Zealand, “*shall [not] have recourse to dispute settlement...under Chapter 9, Section B (Investor-State Dispute Settlement) of the Agreement,*” and vice-versa. As regards New Zealand vis-à-vis Brunei, Malaysia, and Vietnam, any dispute between an investor and the respondent State that would otherwise be subject to ISDS under Section 9B of Chapter 9 must comply with a procedure similar to the first tier of Section 9B’s multi-tiered dispute resolution clause for six months. For the second tier (commencement of arbitration) to operate, the respondent State must consent to the application of Chapter 9 to the dispute. In the case of Vietnam, specific consent by the respondent State is required.

Although there is no official explanation on the requirements of specific consent, it is worth noting that the side letters between New Zealand and Vietnam also contain a provision stating that “*nothing in this side letter shall derogate from the rights and obligations of the Parties under any existing international agreements to which Parties are party*”—these agreements include the AANZFTA Agreement, under which both parties have recourse to ISDS per [Article 20](#) of Chapter 11. Hence, it is plausible that specific consent was intended to circumscribe arbitrations under the CPTPP’s ISDS regime in light of other international agreements.

### **The Future of ISDS under the CPTPP**

As illustrated by New Zealand’s side letters, the ISDS provision is not written in stone. Parties are free to augment its applicability.

Already we see a recent trend of States moving away from ISDS. In the USMCA that succeeds the North American Free Trade Agreement, Canada is notably absent from Chapter 14 on ISDS. (See definition of “Annex Party” in Annex 14-D of [Chapter 14](#)). The EU is looking to [reform](#) existing ISDS mechanisms through the creation of a multilateral investment court to preside over disputes arising from future bilateral EU investment agreements. The Regional Comprehensive Economic Partnership (“RCEP”) that is currently the [world’s largest FTA](#) excludes any ISDS dispute settlement mechanism under [Chapter 10](#) that deals with investments. In addition, the Biden administration has [made clear](#) that the United States would not be returning to the CPTPP anytime soon.

In light of this, it appears that the weight of preserving support for ISDS has fallen chiefly on the shoulders of Japan, given the [strong support](#) by its business community for ISDS. However, in the face of [New Zealand](#) and [Australia](#)’s notable opposition to ISDS, Japan’s influence alone may not be sufficient in promoting and sustaining the current regime for ISDS. The fact remains that to date, there has been no reported case of a claim commenced under the CPTPP’s ISDS regime could reflect its lack of popularity.

Consequently, the most immediate indicator of continued support for ISDS in the

CPTPP may be revealed in the outcome of United Kingdom's accession process. According to the Commission's [endorsed decision](#) regarding Accession Process of the CPTPP on 9 January 2019, an Accession Working Group will be [established](#) *"to negotiate the accession of the aspirant economy"* (para. 2.3, [Annex](#) to CPTPP). At the first meeting with the Accession Working Group, the United Kingdom will have to *"identify any additional changes it will need to make to its domestic laws and regulations, in order to comply with the obligations of the CPTPP"* (*id.* para. 3.3). It is likely that the subject of ISDS will be one of the important issues given that ISDS featured significantly with mixed views in the United Kingdom's Department for International Trade's [public consultation](#) on potential United Kingdom's accession to the CPTPP.

The outcome of the United Kingdom's negotiations on ISDS is difficult to forecast. On the one hand, the United Kingdom has shown signs that it is willing to exclude ISDS as seen in its in-principle agreement with Australia that the investment chapter in the [United Kingdom-Australia FTA](#) will not include an ISDS mechanism. On the other hand, when Minister of State for Trade Policy, Greg Hands was asked in [the House of Commons in late May](#), on whether the government could rule out the inclusion of ISDS in the CPTPP, he stated that *"It is a live negotiation, and there will be a chapter on investment...We are huge investors in each other's markets, and...that the UK has never lost an ISDS case."*

One of the main [pushbacks](#) against ISDS has been its use by private companies to sue States for the impacts of public policies that result in limiting profit margins. In this regard, the recent release of the new Canadian Foreign Investment Promotion and Protection Agreement Model on 13 May 2021 reflects a [shift](#) from older investment and trade treaties that focused primarily on achieving economic prosperity, to a "new" generation of treaties that tend to provide comprehensive frameworks that reflect national (and international) agendas for promoting sustainable development, corporate social responsibility, and human rights, while also expressly addressing how this may interact with the interests of private businesses.

The CPTPP's ISDS regime has not fallen behind in this regard. In respect of claims under the CPTPP's ISDS regime, Article 9.16 provides a safeguard for States *"to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."* Article 9.17 contains an affirmation by States to encourage enterprises operating in their territories *"to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility"* that the respective State endorses or supports. These provisions may soften the negative image of ISDS in the sphere of public opinion over the course of accession negotiations.

If the United Kingdom follows in New Zealand's footsteps and negotiates side letters to waive investors' recourse to ISDS, this might pave the way for other potential applicants like the [Philippines](#) and [Taiwan](#) to follow suit in future negotiations, although one should be cautious in being too quick to pronounce the end of ISDS. As mentioned in the previous section, States obligations under the CPTPP are part of a wider network of international trade agreements. The lack of uptake of ISDS under

the CPTPP could simply reflect an aversion of States against opening themselves up to claims on multiple fronts as opposed to a definitive end to ISDS.

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### References

- <sup>↑1</sup> The signatories consist of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

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