



NEW ZEALAND  
FOREIGN AFFAIRS & TRADE



# TRANS-PACIFIC partnership INVESTMENT AND ISDS

## FACT SHEET

### ➔ Overview

The Trans-Pacific Partnership (TPP) will improve access and protection for New Zealand investors and investments in the TPP region.

Inward foreign direct investment (FDI) from TPP countries to New Zealand amounts to 75% of all FDI in New Zealand. Because New Zealand has not previously had free trade agreements with all of the current TPP countries, the Investment chapter will open the door for FDI to grow even further. New Zealand's outward foreign direct investment (ODI) in TPP countries (including Australia) represents about 73% of total investment abroad. TPP will support these investors by ensuring that the investment environment is certain, stable and transparent, particularly where there is no existing free trade or investment agreement.

TPP will also promote increased investment in New Zealand by investors from TPP countries and reinforce New Zealand's attractiveness as a stable investment destination.

The TPP Investment chapter has a high quality yet balanced framework of investment obligations that can be enforced directly by investors through an additional mechanism called investor state dispute settlement (ISDS). Numerous safeguards are also included throughout the Investment chapter that protect the Government's right to regulate for legitimate public policy reasons.

This factsheet should be read together with the *Market Access for Services and Investment factsheet*.

## → TPP will open doors for New Zealand investors

### Investment conditions

The TPP investment chapter will provide certainty for New Zealand investors by protecting their investments from actions of other governments that are grossly unfair or unjust, including expropriation of assets without compensation, or that involve discrimination based on nationality (except where exceptions apply). Investors will also benefit from an obligation that requires TPP Parties to provide New Zealanders with the same treatment afforded to other foreign investors (except where exceptions apply). Once an investment is underway, the Investment chapter will also help ensure that investors retain the ability to exercise control over their investments and to obtain the benefits of their investments.



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### Investment market access opportunities

TPP is the first time New Zealand has entered into these types of investment commitments with Canada, Japan, Mexico, Peru and the United States.

New Zealand will also benefit from enhanced market access commitments in Brunei, Chile, Malaysia, Singapore, and Viet Nam. The full region will provide increased investment opportunities for many sectors, including our agricultural, manufacturing and natural resource industries.

Four TPP Parties (including New Zealand) operate investment screening regimes for significant or sensitive acquisitions. All have agreed to offer preferential screening thresholds to TPP Parties above existing policy. Under TPP, the threshold above which an investor must get approval to invest in New Zealand will increase from \$100 million to \$200 million for investors from TPP Parties. No changes will be made to the way New Zealand approves investments relating to 'sensitive land' or fisheries quotas. New Zealand also retains the flexibility to make the approval criteria under the Overseas Investment Act more or less restrictive.

The non-discrimination provisions in TPP would prevent the Government banning TPP nationals from buying property in New Zealand. New Zealand retains the ability, however, to impose some types of new, discriminatory taxes on property.

Where other TPP Parties operate investment screening regimes for significant or sensitive acquisitions, New Zealand investors will also gain access to a preferential screening threshold.

## Investor state dispute settlement (ISDS)

The TPP Investment chapter contains an ISDS mechanism. ISDS is a dispute resolution mechanism that allows foreign investors to pursue remedies directly against a TPP Party in relation to breaches of TPP's investment provisions. Investment provisions to which the ISDS mechanism applies comprise:

- The Investment chapter subject to certain exceptions, see safeguards below;
- Limited aspects of the Financial services chapter subject to certain exceptions, see safeguards below;
- Investment agreements which are defined in TPP as a narrow set of agreements entered into by New Zealand's government departments and ministries. Agreements relating to matters such as land, water or the delivery of correctional, healthcare or other social services are not investment agreements and are not subject to ISDS under the investment agreements provision;
- Investment authorisations, though New Zealand has secured a country-specific exception which mean Government decisions under the Overseas Investment Act to grant or decline consent for foreign investment are not subject to ISDS. This protects the Government's ability to control the approval of foreign investment in significant business assets, sensitive land and fishing quota.

The ISDS provisions of TPP do not apply to any other areas of the agreement.

In past trade agreements, such as the New Zealand-China FTA, New Zealand has included ISDS provisions, carefully balancing the objective of protecting New Zealand investors abroad while safeguarding the New Zealand Government's right to regulate. New Zealand has achieved this through approaches which carefully scope investment obligations, create high thresholds for investors to prove breaches of investment commitments, create exceptions for important areas of policy, provide procedures that discourage frivolous claims and prevent punitive damages being awarded, and being clear that no ISDS tribunal can overturn New Zealand law.

TPP adopts this approach, along with additional safeguards to further protect the New Zealand Government's right to regulate.

Consistent with CER and the Australia-ASEAN-New Zealand FTA, TPP's ISDS provisions will not apply between New Zealand and Australia. Australia is responsible for three-quarters of the total foreign direct investment from TPP countries into New Zealand.

## Safeguards

The safeguards in TPP, which protect the New Zealand Government's right to regulate and which seek to prevent unwarranted ISDS claims, include:

- Exceptions to the Investment chapter's rules to limit the scope of the chapter and therefore limit the scope of ISDS. For New Zealand, these exceptions cover important policy areas such as health and other public services, and the ongoing screening of foreign investment.
- A provision that allows the Government to rule out ISDS challenges over tobacco control measures.
- Additional provisions that confirm Government action to implement legitimate public welfare measures, such as public health, safety and the environment, is very unlikely to constitute indirect expropriation.
- Imposing a high burden of proof on investors to establish a breach of investment obligations such as 'expropriation' or 'minimum standard of treatment'. The investor has the burden of proving all elements of its claims under TPP.
- Government action (or where the Government does not take an action) that is inconsistent with an investor's expectations will not in and of itself constitute a breach of the Investment chapter leading to potential ISDS, even if there is loss or damage to the covered investment.
- Government decisions not to issue, renew or maintain or decisions to modify or reduce subsidies or grants will not in and of itself constitute a breach of expropriation or the minimum standard of treatment obligations leading to potential ISDS.

- Limiting the types of monetary awards and damages that can be made against the Government. The New Zealand Government cannot face claims for punitive damages and costs can also be awarded against an investor if their claim is ultimately unsuccessful.
- The Government is expressly permitted to make a counterclaim and obtain damages when the investor is in the wrong under a covered investment agreement.
- Procedures that allow TPP Parties to issue interpretations of TPP provisions that are binding on ISDS tribunals.
- Provisions that mean hearings will be open to the public, and which allow tribunals to accept submissions from experts and the public.
- Procedures and rules that limit the possibility of an ISDS claim being made in the first place. Claims must be submitted before three and a half years have passed, and the investor must initially enter into consultation and negotiations to attempt to resolve the claim with the New Zealand Government. Any preliminary objections from the Government, like that the claim goes beyond a tribunal's jurisdiction or is manifestly without legal merit, must be resolved before the full arbitration commences.

TPP Parties want to ensure that ISDS decisions are made by robust and independent panels. The Parties will continue to work on an appropriate code of conduct for ISDS arbitrators. TPP's transparency requirements, such as the requirement for hearings to be open to the public and for ISDS decisions to be publicly available, will ensure integrity of the ISDS process.

Neither the TPP Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices (which relates to PHARMAC), nor the interpretation of the Treaty of Waitangi, are subject to the dispute settlement mechanisms under TPP.