

# “An amendment to stop the spread of ISDS”



A submission to the Foreign Affairs, Defence and Trade Committee on the Trans-Pacific Partnership Agreement (CPTPP) Amendment Bill 2018 (70-1), endorsed formally by *It's Our Future* and the following organisations:



**Doctors for  
Healthy Trade**



**Contact details** We would like to make an oral submission before the select committee. Please contact *It's Our Future* spokesperson Oliver Hailes by email: [oliverhailes@hotmail.com](mailto:oliverhailes@hotmail.com)

**Background** This submission calls for a clause to be inserted into the Amendment Bill that would prevent the Minister of Trade from extending investor-state dispute settlement (ISDS) protection to future signatories of the TPPA, thereby giving effect to existing Government policy:

- “*This Government will make sure New Zealand always retains the right to make laws in the public interest. This includes seeking to renegotiate the Trans-Pacific Partnership to exclude investor-state dispute mechanisms and avoid their inclusion in all future agreements.*” – Speech from the Throne, 8 November 2017.
- “*New Zealand must not enter into an agreement with one or more foreign countries that includes provision for investor-state dispute settlement.*” – Fighting Foreign Corporate Control Bill 2015 (Member’s Bill introduced by Fletcher Tabuteau MP for New Zealand First; supported by Labour and the Green Party but defeated at first reading by National, ACT and United Future).

**Where are we now?** Despite massive popular protests in 2016, the Labour Government signed the reboot of the TPPA in Santiago, Chile on 8 March 2018. Thousands of concerned Kiwis submitted their overwhelming opposition and petitioned for an overhaul of the treaty-making process, but the Government is pushing legislation through Parliament to change our laws to comply with impending international obligations regarding matters such as overseas investment, trade tariffs and intellectual property.

The Government plans to ratify the TPPA-11 this year, which will come into effect once six countries have done so – Japan, Mexico and Singapore have completed their processes already.

The TPPA-11 contains the rules that will govern the global economy in the 21st century; since the signing in March, several countries have reportedly expressed interest in joining, including the United States, United Kingdom, South Korea, Thailand, Taiwan, Philippines, Indonesia and Colombia.

Article 5 provides for any country to join the TPPA-11, subject to such terms and conditions as may be agreed between existing parties and that country. Minister of Trade David Parker has said this means there must be consensus before a country can join the original 11 members. In theory, we have a veto.

**The end of ISDS?** The Minister of Trade told the public our concerns about ISDS have been resolved and it is highly unlikely that New Zealand can be sued successfully for implementing laws that put the public interest before the private profits of foreign investors.

Yet the TPPA-11 contains the very same investor rights that are notorious for chilling regulatory measures that advance objectives such as public health, workers’ rights and environmental protection. Access to ISDS is limited only by side instruments signed with Australia, Brunei Darussalam, Malaysia, Peru, Viet Nam and Singapore, which do not affect the application of ISDS between those parties under other agreements, and a joint declaration with Canada and Chile merely affirms the right to regulate – but subject to ISDS!

Nonetheless, global developments spell the end of ISDS. New Zealand’s trade negotiations with the European Union exclude ISDS because the latter considers it unnecessary. The 28 EU members join a host of countries, including Bolivia, Brazil, Ecuador, Indonesia, South Africa and Venezuela, which have accepted the argument that ISDS unduly favours the wealthy at significant cost to people and the planet. Indeed, in its examination of the TPPA-11 in May 2018, our select committee unanimously noted “*the Government will not include ISDS in future agreements*” and was “*interested in what alternative arrangements are being considered by other countries*”.

The protection of capital mobility and strong investor rights under ISDS has allowed multinationals to shop around the globe to exploit labour and natural resources, resist laws that harm their bottom line, and sue for lost profits or devalued assets from regulatory changes – yet they do not have to pay for the social and environmental costs and may withdraw their investments on a whim. Our Parliament must prevent New Zealand from backsliding deeper into the discredited ISDS system by transforming the policy of the present Government into a binding commitment under domestic law.

**What is to be done?** The Foreign Affairs, Defence and Trade Committee – the select committee examining the Amendment Bill – should recommend that Parliament inserts a clause into the draft legislation to prevent the expansion of ISDS under TPPA. The new clause must at least provide that:

*The responsible Minister must not agree to any additional country joining the CPTPP or TPP unless and until—*

- (a) New Zealand negotiates and signs a binding instrument with that country in which that country agrees that its investors shall not have recourse to investor-state dispute settlement against New Zealand under the CPTPP or TPP or under any existing or future agreements between the two countries that provide for investor-state dispute settlement; and*
- (b) the completion of the full process for parliamentary examination of international treaties as if for a new and unratified international treaty – or any more robust form of public scrutiny or parliamentary approval that is subsequently adopted.*

This amendment would future-proof our law and stop the spread of ISDS.