PRECEDENTS FOR NO INVESTMENT RULES OR INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN THE TPPA

As the New Zealand government moves to review the investor-state dispute settlement (ISDS) provisions in the Trans-Pacific Partnership Agreement it is important to recognise there are many precedents for this, and the tide is turning against ISDS internationally.

Comprehensive agreements with no investment chapter

In the ***Trans-Pacific Strategic Economic Partnership Agreement*** (P-4) parties agreed to negotiate within 2 years of entry into force (Article 21). These negotiations triggered the entry of the US and ultimately the broader TPPA negotiations. However, the services and financial services chapters did include national treatment, MFN and other rules on commercial establishment relating to services.

The ***Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA*** or ***CER)*** had no investment annex until February 2011. The services protocol 1989 gave extensive rights to Australian services enterprises to establish and operate in NZ, but it was (and is) not enforceable by the Australian government or investors.

The ***NZ Hong Kong FTA*** 2010 does not include an investment chapter or ISDS. However, there is an existing bilateral investment treaty that dates back to 1995. Negotiations for a successor investment chapter are continuing.

Investment chapter with no enforcement

The investment protocol to the ***Australia NZ CER Agreement,*** adopted in 2011, has no state-state or ISDS enforcement mechanism.

In 2017 the ***South Africa Development Community*** amended their investment treaty to remove ISDS and controversial investor-protection rules.

Domestic law requires disputes to be submitted to domestic courts

South Africa has established a domestic law, the Protection of Investment Act 2015, that provides protection for domestic and foreign investors within the framework of the South African Constitution and for disputes to be resolved in the domestic courts. This followed an extensive review of the options. South Africa has withdrawn, or notified its withdrawal, from its investment agreements that have ISDS and strong investor rights provisions.

Requirement in the agreement to refer the dispute to domestic courts

The ***Australia NZ ASEAN FTA*** provides that investment disputes involving Philippines or Viet Nam are to be referred to their domestic courts, provided they have jurisdiction over the claim (Art 21.1(a))

Mediation and arbitration without ISDS

Brazil adopted a model Cooperation and Investment Facilitation Agreement in 2013. This emphasises dispute prevention and mediation, and does not include ISDS. (Early agreements left open the possibility). Brazil had the advantage that it had no investment agreements in force, as the Congress refused to adopt them. Brazil also restricted the rules to post-establishment (not covering entry of an investment), did not allow expropriation of fair and equitable treatment rules that investors most rely on, and excluded the most-favoured nation rule. Brazil's approach is incorporated in ***Mercosur's*** 2016 investment agreement, and forms the basis for the ***India-Brazil investment agreement*** (not yet public). Mercosur has promoted it in the investment negotiations between Mercosur and the EU.

Option for Parties not to allow ISDS for any dispute under the investment chapter

The US has reportedly tabled a proposal in ***The North American Free Trade Agreement (NAFTA)*** that allows parties can opt whether or not to adopt the ISDS mechanism. Canada and the US would be likely to invoke that; Mexico may retain ISDS to retain US investment.

Option for investor and state not to proceed with ISDS in a particular dispute

Under the ***Singapore NZ FTA*** **(Art 34.2)** an investment dispute can be referred to arbitration. The state being sued can object to it being taken to arbitration, on a case by case basis, but the investor can still proceed. The government being sued would then have to exercise its powers under the ICSID convention to withhold its consent. There is a similar provision in the Taiwan NZ FTA.

Exhaustion of domestic remedies before ISDS

India's new model bilateral investment treaty requires exhaustion of domestic remedies, after which there is a short period in which an investor can lodge an investment dispute. Leaked text shows that India tabled a version of this in the Regional Comprehensive Economic Partnership (RCEP) negotiations.

EU investment court proposal

The EU and G20 have been strongly promoting the idea of a multilateral investment court in an attempt to rescue the discredited investment arbitration regime of ISDS. This proposal was first incorporated into the Canada EU FTA. It provides for original tribunals, similar to now but with some codes of conduct, rosters etc, and an appeal system. However, it remains highly problematic. The arbitrators would still mostly be legal practitioners, there are few legal restrictions on their decision making, and they are enforcing the same pro-investor protections.

Choosing domestic courts or ISDS

Known as **fork in the road,** the investor must opt for either domestic courts or ISDS. However, in agreements like TPPA (Art 9.21) this requirement can be manipulated to enable domestic litigation to be completed, then to initiate an investment dispute; interim injunctive relief from the domestic courts is also available.

Professor Jane Kelsey, Faculty of Law, University of Auckland, 1 November 2017