

Proactive Release

11/08/2023

The following Cabinet papers and related Cabinet minutes have been proactively released by the Minister for Trade & Export Growth

Title	Reference
CPTPP: Approval and Authorisation to sign an ISDS Side Letter with Chile	
Minute of Decision - CPTPP: Approval and Authorisation to sign an ISDS Side Letter with Chile	ERS-22-MIN-0056
Report of the Cabinet External Relations and Security Committee: Period Ended 25 November 2022 (Part 1)	CAB-22-MIN-0531

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the OIA). Where this is the case, the relevant sections of the OIA that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to OIA redaction codes:

- 6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government;
- 6(b)(i): to avoid prejudicing the entrusting of information to the Government of New Zealand by another country.
- 9(2)(j): to enable without prejudice the carrying out of negotiations

Restricted

Office of the Minister for Trade and Export Growth

Cabinet Economic Development Committee

CPTPP: Approval and Authorisation to sign an ISDS Side Letter with Chile

Proposal

- 1 This paper seeks approval of, and authorisation to sign, a side letter to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) so that the investor-state dispute settlement (ISDS) provisions under the CPTPP would not apply between New Zealand and Chile.
- 2 This paper also seeks approval to initiate the Parliamentary treaty examination process with the ability to take urgent treaty action to have the side letter enter into force before or at the same time as CPTPP enters into force for Chile.

Relation to government priorities

- 3 This paper relates to the implementation of New Zealand's Trade for All Agenda which seeks to deliver inclusive and sustainable trade policy that benefits all New Zealanders. The Trade for All Advisory Board noted in its report that Investor-State Dispute Settlement (ISDS) clauses have damaged public trust and confidence in trade agreements. In response to such concerns, during the conclusion of the CPTPP the Government instructed trade negotiators to oppose the inclusion of ISDS clauses in future trade agreements.

Background

- 4 ISDS is a dispute resolution mechanism that allows foreign investors to pursue remedies directly against a State before an international arbitral tribunal in relation to breaches of a treaty's investment provisions. The ISDS mechanism in CPTPP applies to the Investment chapter, and limited aspects of the Financial Services chapter which relates to investment in financial services. The ISDS mechanism, while providing recourse for aggrieved New Zealand investors in CPTPP economies, has the reciprocal potential consequence of an increased exposure of the New Zealand Government to ISDS claims. New Zealand's negotiating approach since 2017 is to oppose the inclusion of ISDS provisions in future FTA negotiations.
- 5 In concluding the CPTPP, it was not possible to re-open the text to fully exclude ISDS provisions from the agreement, and failing this New Zealand sought to render the ISDS provisions non-operational through side letters with our respective CPTPP partners. At that time, the mandate agreed by Cabinet was that negotiators should "seek to make ISDS voluntary for New Zealand through a series of reciprocal bilateral side agreements where possible" [CAB-17-MIN-0488 refers].
- 6 New Zealand approached all CPTPP members, including Chile, to seek such side letters. New Zealand secured reciprocal CPTPP side letters with Australia, Brunei Darussalam, Malaysia, Peru and Viet Nam as part of the conclusion of the CPTPP

negotiations. Remaining members Canada, Japan, Mexico and Singapore declined to sign side letters to protect domestic investor interests.

- 7 Although it was not then in a position to sign a side letter excluding ISDS from the CPTPP, s6(a), Chile agreed a joint declaration with New Zealand and Canada to use ISDS responsibly at the time that CPTPP was concluded. Since then, New Zealand has continued to seek a side letter with Chile. Chile is now in the process of ratifying the CPTPP. In this context, Chile has now approached New Zealand (and other CPTPP Parties) seeking a side letter to CPTPP which would rule out use of the CPTPP ISDS provisions between Chile and its CPTPP partners, including New Zealand. s6(b)(i)

- 8 Chile is an original signatory to the CPTPP and New Zealand has a strong interest in Chile's ratification of CPTPP. There is strong alignment between New Zealand's progressive approach to trade and Chile's approach s6(a). We already work together on progressive trade initiatives, such as the Digital Economy Partnership Agreement (DEPA), Inclusive Trade Action Group (ITAG) and Global Trade and Gender Arrangement (GTAGA) s6(a).

will be useful as members engage on the CPTPP general review, which will provide opportunities to understand and highlight the value of the inclusive and progressive aspects of the Agreement.

Analysis

- 9 The Chilean approach is a welcome development. It aligns with New Zealand's position to oppose ISDS and responds to our earlier overtures to Chile to conclude such a side letter.
- 10 Entering into the side letter with Chile will further limit New Zealand's ISDS exposure under CPTPP beyond the 80 percent of investment under the agreement which is already carved out. It also means we will not have any exposure to ISDS from Chilean investors as we have no other ISDS provisions with Chile. s9(2)(j)
- 11 Consistent with Cabinet's earlier mandate, officials have negotiated with Chile on the text of an ISDS side letter to rule out use of the CPTPP ISDS provisions between New Zealand and Chile. The negotiated text reflects the approach taken in the side letter New Zealand agreed with Peru under CPTPP and is a complete exclusion. This is New Zealand's preferred model. It is the most direct and straightforward approach to carving out the ISDS provisions, so these do not apply for investors and investment between New Zealand and Chile. Alternatives, such as voluntary application of ISDS, have only been agreed to where complete exclusion has not been possible - as was the case with Viet Nam, Malaysia and Brunei in CPTPP. (We have gone further with Australia and carved out not only ISDS but also State-State dispute settlement more generally, befitting the uniquely close and integrated relationship under CER, s6(a))

- 12 The inclusion of ISDS provisions in the original Trans-Pacific Partnership (TPP) Agreement was the subject of strong public concern and protest. Officials consider that there remains widespread public support for efforts to limit the Government's risk of ISDS exposure.
- 13 There are around 15 New Zealand companies with established entities in Chile. If this side letter is approved, these companies will not be able to sue the Chilean Government directly using the ISDS mechanism, but will still be able to pursue domestic remedies before Chilean courts, and to petition the New Zealand Government to take a State-State dispute on their behalf – something that the Government has done on only rare occasions.
- 14 I propose that Cabinet approve, and grant authorisation to sign, the attached ISDS side letter to CPTPP between New Zealand and Chile.

Entry into Force of the side letter

- 15 The side letter is a treaty level agreement that will enter into force on the date of entry into force of the CPTPP for Chile. CPTPP is already in force for New Zealand, but Chile is still in the process of ratification, so the side letter would become operational on the date of entry into force of the CPTPP Agreement for Chile.

Parliamentary Treaty Examination Process

- 16 This side letter and the associated National Interest Analysis (NIA) will undergo Parliamentary treaty examination (PTE).
- 17 The NIA undertaken in 2018 for the ratification of CPTPP addresses in some detail the question of ISDS in CPTPP and the approach to seeking ISDS side letters adopted at that time. This additional side letter would be consistent with that policy, and have the effect of extending the number of CPTPP partners to whom the CPTPP ISDS provisions would no longer apply in respect of New Zealand.

Urgency

- 18 I seek approval to take this treaty action (definitive signature) under urgency if needed to prevent ISDS entering into force between New Zealand and Chile. This means the side letter may be signed before PTE is completed as set out in Standing Order 406(3) and Cabinet Manual 7.127.
- 19 There is a risk that the CPTPP ISDS provisions will apply between New Zealand and Chile if the side letter is not concluded before CPTPP enters into force for Chile.
s6(b)(i)

This would expose New Zealand to ISDS from Chile. This would also be inconsistent with New Zealand's policy on ISDS.

Financial Implications

20 There are no financial implications arising from this paper.

Legislative Implications

21 There are no legislative implications arising from this paper.

Impact Analysis

Regulatory Impact Statement

22 Regulatory impact analysis is not required. No legislative or regulatory changes are required in order for New Zealand to implement this agreement.

Population Implications

23 There are no population implications arising from this paper.

Human Rights

24 There are no human rights implications arising from this paper.

Consultation

25 The Treasury has been consulted on this paper and concurs with the contents of this paper.

Communications

26 Once signed, the text of the side letter and this paper (with any appropriate redactions) will be available on the website of the Ministry of Foreign Affairs and Trade.

27 Officials are in discussion with Chile regarding publicity that may be appropriate at the time of signature^{s6(a)}

Recommendations

The Minister for Trade and Export Growth recommends that the Committee:

- 1 **Note** that in concluding the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Cabinet agreed a mandate that negotiators should “seek to make Investor-State Dispute Settlement (ISDS) voluntary for New Zealand through a series of reciprocal bilateral side agreements where possible” [CAB-17-MIN-0488 refers];
- 2 **Note** that, consistent with the above mandate, officials have negotiated on the text of a side letter with Chile which carves out CPTPP’s ISDS provisions between New Zealand and Chile;

- 3 **Note** that no amendment to New Zealand primary legislation or regulations is required in order to ratify or implement the side letter.
- 4 **Approve** the attached *Side Letter to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to exclude Investor-State Dispute Settlement (ISDS) between New Zealand and Chile* (Side Letter) in Appendix 1;
- 5 **Authorise** the Minister for Trade and Export Growth to approve any necessary minor or technical amendments to the side letter;
- 6 **Agree** that the legally verified text of the side letter, along with this Cabinet paper and the Cabinet minute, be made public after signature;
- 7 s6(a)
- 8 **Note** that the side letter will enter into force on the date of entry into force of the CPTPP for Chile;
- 9 **Agree** New Zealand sign and exchange this legally binding side letter;
- 10 **Approve** the content of the National Interest Analysis (NIA), which is attached to the paper as Appendix 2;
- 11 **Agree** to present the side letter and the NIA to the House of Representatives for the purposes of the parliamentary treaty examination process, under Standing Order 405;
- 12 **Agree** that the side letter be signed and exchanged on an urgent basis in the national interest, under Standing Order 406(3) and in accordance with Cabinet Manual 7.127.

Authorised for lodgement

Hon Damien O'Connor

Minister for Trade and Export Growth

Appendix 1

Letter from Chile to New Zealand

[Date]

Hon [authority] – New Zealand

Dear [insert name]

I refer to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018 ("CPTPP"). Particularly, I have the honour to confirm the following agreement reached by the Republic of Chile and New Zealand:

1. No investor of Chile shall have recourse to dispute settlement against New Zealand under Section B (Investor-State Dispute Settlement) of Chapter 9 (Investment) of the CPTPP.
2. No investor of New Zealand shall have recourse to dispute settlement against Chile under Section B (Investor-State Dispute Settlement) of Chapter 9 (Investment) of the CPTPP.

I have the honour to propose that this letter and your letter of confirmation in reply shall constitute an agreement between the Republic of Chile and New Zealand which shall enter into force on the date of entry into force of the CPTPP for both Chile and New Zealand.

Yours sincerely

[Authority] – Chile

Letter from New Zealand to Chile

[Date]

Hon [authority] – Republic of Chile

Dear [insert name]

I have the honour of acknowledging receipt of your letter of today's date, which states as follows:

"I refer to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018 ("CPTPP"). Particularly, I have the honour to confirm the following agreement reached by the Republic of Chile and New Zealand:

1. No investor of Chile shall have recourse to dispute settlement against New Zealand under Section B (Investor-State Dispute Settlement) of Chapter 9 (Investment) of the CPTPP.
2. No investor of New Zealand shall have recourse to dispute settlement against Chile under Section B (Investor-State Dispute Settlement) of Chapter 9 (Investment) of the CPTPP.

I have the honour to propose that this letter and your letter of confirmation in reply shall constitute an agreement between the Republic of Chile and New Zealand which shall enter into force on the date of entry into force of the CPTPP for both Chile and New Zealand."

I have the further honour to confirm that your letter and this letter in reply shall constitute an agreement between the Republic of Chile and New Zealand which shall enter into force on the date of entry into force of the CPTPP for both Chile and New Zealand.

Yours sincerely

[Authority] – New Zealand

Appendix 2

Side Letter to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to exclude Investor-State Dispute Settlement (ISDS) between New Zealand and Chile

National Interest Analysis, 20 October 2022

Executive Summary

It is proposed that New Zealand seek to sign side letters of treaty status between New Zealand and Chile that would exclude Investor-State Dispute Settlement (ISDS) provisions from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This is consistent with New Zealand policy to seek to exclude ISDS from its future free trade agreements. It will not create any new obligations.

Entering into this treaty has the advantage of reducing New Zealand's risk of international litigation before international arbitral tribunals. Without these side letters, New Zealand will be exposed to claims from Chilean investors once CPTPP enters into force for Chile.

During public consultation relating to CPTPP at the time of New Zealand's ratification of CPTPP, concerns were expressed on the impact of ISDS provisions. The same general concerns are relevant to this treaty action. This treaty action seeks to address these concerns by reducing New Zealand's exposure to ISDS in CPTPP.

Nature and timing of proposed treaty action

The Side Letter to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to exclude Investor-State Dispute Settlement (ISDS) between New Zealand and Chile (Side Letter) is a legally binding instrument of treaty status between Chile and New Zealand. The Side Letter excludes the application of ISDS between both countries under the CPTPP.

The side letter will enter into force for both parties on the date of entry into force of the CPTPP for Chile. CPTPP is already in force for New Zealand, but Chile is still in the process of ratification, so the side letter would become operational on the date of entry into force of the CPTPP Agreement for Chile.

New Zealand's ratification of the CPTPP did not extend to Tokelau therefore this side letter does not apply to Tokelau.

Reasons for New Zealand to Become Party to the Treaty

Since 2017 New Zealand has had a policy of seeking to exclude ISDS from future trade agreements. This side letter between Chile and New Zealand will give effect to that policy by excluding the right for Chilean investors to take a claim directly against New Zealand, and New Zealand investors from taking a claim directly against Chile.

Section B of the CPTPP Investment Chapter provides a mechanism for the settlement of disputes between foreign investors and the government of the country in which the investment is made. If a dispute cannot be settled within six months through consultation and negotiation, the investor may submit the issue to arbitration. The investor may do so either on their own behalf, or on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.

Without this side letter, a CPTPP claimant, such as an investor from Chile, may make the submission to arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) or arbitration under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceeding (or, if only one of the respondent and the Party of the claimant is a Party to the ICSID Convention, then under the ICSID Additional Facility Rules), the UNCITRAL Arbitration Rules, or any other arbitration institution or rules to which the claimant and the respondent agree.

New Zealand sought to exclude ISDS for New Zealand from the CPTPP. This position was not shared by all 11 CPTPP members. As a result, and as with many of New Zealand's existing free trade agreements (FTAs) (including with China, ASEAN, Malaysia and Korea), the provisions of the CPTPP Investment Chapter are supported by recourse to ISDS. However, the application of the ISDS provisions in CPTPP to New Zealand is reduced by a series of reciprocal, legally-binding side letters with a number of CPTPP members.

In the National Interest Analysis submitted at the time of New Zealand's own ratification of CPTPP, it was noted that New Zealand had agreed a treaty-status legally binding side letter with Australia and Peru that would mean that no investor of New Zealand could have recourse to ISDS against those two CPTPP Parties under Section B, and that no investor of those countries could have recourse to ISDS against New Zealand. New Zealand has agreed additional side letters with Brunei, Malaysia and Viet Nam which require the respective Governments to give explicit consent for an ISDS claim to go ahead. These were identified as one of the key mechanisms to manage public concerns with entering into CPTPP. It was also stated in the same National Interest Analysis that New Zealand "continue[s] to seek similar agreements with the other countries that share our wider concerns about ISDS".

Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand

Entering into this treaty-level side letter has the advantage of reducing New Zealand's risk of international litigation before international arbitral tribunals.

With Chile in the final stages of its ratification to the CPTPP, without the side letter, New Zealand will be exposed to claims from Chilean investors which can be made directly against New Zealand before international investment arbitral tribunals.

While there are a number of procedural elements designed to protect the State in an ISDS claim (for example, by limiting the scope of available claims under the CPTPP versus its predecessor TPP agreement, exclusion of ISDS claims relating to tobacco, protections for our Overseas Investment screening regime, provisions designed to avoid frivolous claims

and limitations on the quantum of monetary awards)¹, the most effective means to limit the Crown's risk of ISDS under the Agreement is to fully exclude an investor's right to make a claim under Section B of Chapter 9 (Investment) of CPTPP.

While New Zealand sought to exclude its application entirely during the final stages of the negotiation, this was not possible, and so officials have instead been pursuing side letters to limit its effect as the next best option.

This will not however leave Chilean investors without remedies. Chilean investors in New Zealand will still have access to domestic judicial processes to pursue any grievances, and in serious cases, can ask the Chilean Government to consider using diplomatic channels or taking a dispute on their behalf under the CPTPP's State-State dispute settlement mechanism.

Conversely, a potential disadvantage is that by entering into the side letter, New Zealand investors in Chile will also not have the right to take action directly against the Chilean State. There are at least 15 known New Zealand companies active in Chile. However, the New Zealand Government policy on ISDS is now well established, and has been the Government's publicly stated position since 2017. New Zealand investors in Chile have never had this right as Chile has not formally ratified CPTPP, and completing this treaty action in a timely manner will prevent a situation where the CPTPP enters into force for Chile and bestows a right to use ISDS only to remove it some time later.

Legal obligations which would be imposed on New Zealand by the Treaty action, the position for reservations to the Treaty, and an outline of any dispute settlement mechanisms

The effect of this legally binding side letter of treaty status between Chile and New Zealand would be to exclude the application of ISDS between both countries under CPTPP. The side letter creates no new binding legal obligations, instead they prevent Chilean and New Zealand investors from utilising the ISDS mechanisms available under the CPTPP against the relevant State. The side letter does not affect the application of State-State dispute settlement between the New Zealand and Chilean governments.

Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation

This side letter does not create any new binding obligations and no implementing legislation is required.

Economic, social, cultural and environmental costs and effects of the treaty action

We do not expect there to be any significant economic, social, cultural or environmental costs or effects of signing this side letter.

Completed or proposed consultation with the community and parties interested in the treaty action

During public consultation with Māori, the public, businesses and interest groups about their interests and concerns relating to CPTPP at the time of New Zealand's ratification, ISDS

¹ A more complete list of protections can be found on the Ministry of Foreign Affairs and Trade website - [Investment and ISDS | New Zealand Ministry of Foreign Affairs and Trade \(mfat.govt.nz\)](https://www.mfat.govt.nz/en/about-mfat/investment-and-trade/investment-and-isds/).

was specifically identified amongst the main issues raised in broader public and stakeholder consultations as follows²:

- “Many participants raised concerns around the ISDS provisions in CPTPP and how this might impact on New Zealand’s ability to regulate in its own best interests and potential to negatively affect Māori interests”; and
- “Some individuals and groups were concerned about the potential impact that CPTPP, particularly ISDS and intellectual property provisions, might have on public health”.

More recently, public consultations in the context of the New Zealand-United Kingdom FTA have reiterated these concerns regarding ISDS. While in the context of another treaty, the same general concerns are relevant and the National Interest Analysis for that agreement notes “there were also clear concerns raised about possible inclusion of an ISDS clause. Civil society groups raised fears that an ability for international investors to sue the New Zealand Government risked giving unwarranted power to corporate interests and encroaching on New Zealand’s sovereignty”.³

Subsequent protocols or amendments to the treaty and their likely effects

Not applicable.

Withdrawal or denunciation provision in the treaty

There are no express provisions relating to withdrawal or denunciation in the side letters. Therefore, Article 54 of the Vienna Convention the Law of Treaties will apply and the parties may withdraw with the consent of both parties.

² See Section 9.6 of the National Interest Analysis to the CPTPP, available at [CPTPP Final National Interest Analysis for 8 March \(mfat.govt.nz\)](#)

³ See Section 10.5.2 of the National Interest Analysis for the UKFTA, available at [Resources | New Zealand Ministry of Foreign Affairs and Trade \(mfat.govt.nz\)](#).



Cabinet External Relations and Security Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

CPTPP: Approval and Authorisation to Sign an ISDS Side Letter with Chile

Portfolio Trade and Export Growth

On 22 November 2022, the Cabinet External Relations and Security Committee:

- 1 **noted** that in concluding the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), Cabinet agreed a mandate that negotiators should 'seek to make Investor-State Dispute Settlement (ISDS) voluntary for New Zealand through a series of reciprocal bilateral side agreements where possible' [CAB-17-MIN-0488];
- 2 **noted** that, consistent with the above mandate, officials have negotiated the text of a side letter with Chile, which carves out CPTPP's ISDS provisions between New Zealand and Chile;
- 3 **noted** that no amendment to New Zealand primary legislation or regulations is required in order to ratify or implement the side letter;
- 4 **approved** the *Side Letter to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to Exclude Investor-State Dispute Settlement (ISDS) Between New Zealand and Chile* (the Side Letter), attached as Appendix 1 to the paper under ERS-22-SUB-0056;
- 5 **authorised** the Minister for Trade and Export Growth to approve any necessary minor or technical amendments to the Side Letter;
- 6 **agreed** that the legally verified text of the Side Letter be made public after signature;
- 7 s6(a)
- 8 **noted** that the Side Letter will enter into force on the date of entry into force of the CPTPP for Chile;
- 9 **agreed** that New Zealand sign and exchange the legally binding Side Letter;
- 10 **approved** the content of the National Interest Analysis (NIA), attached as Appendix 2 to the paper under ERS-22-SUB-0056;
- 11 **agreed** that the Side Letter and the NIA be presented to the House of Representatives for the purposes of the parliamentary treaty examination process, under Standing Order 405;

- 12 **agreed** that the Side Letter be signed and exchanged on an urgent basis in the national interest, under Standing Order 406(3) and paragraph 7.125 of the Cabinet Manual.

Janine Harvey
Committee Secretary

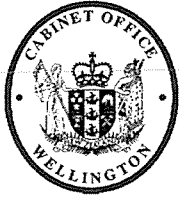
Present:

Rt Hon Jacinda Ardern (Chair)
Hon Kelvin Davis
Hon Chris Hipkins
Hon Andrew Little
Hon Nanaia Mahuta
Hon Damien O'Connor
Hon Michael Wood
Hon Dr David Clark
Hon Kieran McAnulty

Officials present from:

Office of the Prime Minister
Officials Committee for ERS

Proactively Released by the Minister for Trade and Export Growth



Cabinet

Minute of Decision

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Report of the Cabinet External Relations and Security Committee: Period Ended 25 November 2022 (Part 1)

On 28 November 2022, Cabinet made the following decisions on the work of the Cabinet External Relations and Security Committee for the period ended 25 November 2022:

Out of scope

ERS-22-MIN-0056 **CPTPP: Approval and Authorisation to Sign an ISDS Side Letter with Chile** CONFIRMED
Portfolio: Trade and Export Growth

Out of scope

Rachel Hayward
Secretary of the Cabinet