



Expert Paper # 1

THE TPPA: TREATY MAKING, PARLIAMENTARY DEMOCRACY, REGULATORY SOVEREIGNTY & THE RULE OF LAW

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Key points: TPPA Timeline, The TPPA Text, New Zealand's Treaty Making Process, US Congressional Process for TPPA, Status of the TPPA, Regulatory Sovereignty, Enforcement.



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Negotiations for a Trans-Pacific Partnership Agreement (TPPA) were concluded in Atlanta, USA on 5 October 2015, and the text was released on 5 November 2015. There are twelve negotiating countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam. The TPPA has 30 chapters and many annexes, with parties also adopting bilateral side-letters. They are expected to sign the agreement on 4 February 2016 in New Zealand, which is the formal depositary for the TPPA. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPPA will come into force within two years if all original signatories notify that they have completed their domestic processes, or after 2 years and 3 months if at least six of them, including the US and Japan, have done so. This research paper is part of a series of expert peer-reviewed analyses of different aspects of the text.

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CONTENTS

Key points

TPPA Timeline

The TPPA Text

- (i) Content
- (ii) Scope of coverage

New Zealand's Treaty Making Process

- (i) The Executive's treaty-making powers
- (ii) The National Interest Analysis
- (iii) The select committee process
- (iv) Parliamentary debate and vote
- (v) Legislation to implement the TPPA
- (vi) Access to information

US Congressional Process for the TPPA

- (i) Notification of intention to sign
- (ii) US advisory committees
- (iii) International Trade Commission analysis
- (iv) Fast Track
- (v) Congressional vote in implementing legislation
- (vi) The incoming administration
- (vii) US certification of another party's compliance

Status of the TPPA

- (i) Signing
- (ii) Entry into Force
- (iii) Adoption by original signatories
- (iv) Accession by other countries
- (v) The Trans-Pacific Partnership Commission
- (vi) Decisions by consensus
- (vii) Transition periods
- (viii) Amendments
- (ix) Withdrawal from TPPA
- (x) Relationship to other agreements

Regulatory sovereignty

- (i) External influence over domestic decisions
- (ii) Regulatory procedures
- (iii) Chapter-specific committees
- (iv) Inbuilt reviews

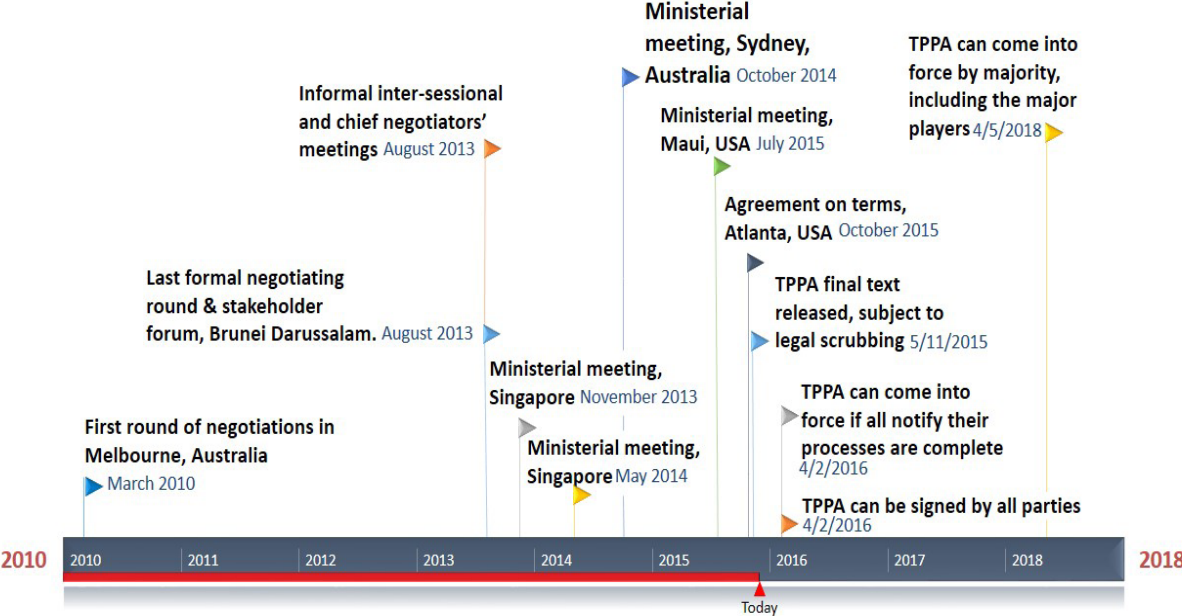
Enforcement

- (i) State-state enforcement
- (ii) State-state dispute process
- (iii) Compliance and enforcement
- (iv) Investor-state dispute settlement

KEY POINTS

- The 30 chapter Trans-Pacific Partnership Agreement (TPPA) constrains domestic law and policy at central government level, and in places by local government and SOEs, in diverse areas beyond traditional aspects of international trade.
- New Zealand's treaty making process is controlled by the Executive, which will decide whether and when to sign and ratify the TPPA.
- Parliament's effective input is limited to any amending legislation, which can be passed, if necessary, in a confidence vote.
- The National Interest Analysis tabled with the TPPA text is prepared by the Ministry of Foreign Affairs and Trade (MFAT) and is not an independent assessment of the costs and benefits of the TPPA.
- The select committee examination of the TPPA by the Foreign Affairs, Defence and Trade Committee will not provide an independent review that can alter the agreement.
- Aside from the final text no other negotiating documents have been, or are proposed to be, released to enable proper analysis, democratic participation and government accountability.
- The US Congressional process is governed by domestic political factors, with a significant chance there will be no vote before a new administration takes office in 2017.
- The US will withhold certification of compliance by New Zealand until the US is satisfied that all changes it requires to New Zealand's domestic laws, policies and practices have been made.
- A new US administration may seek to renegotiate the agreement, add new side-letters or withhold certification until further changes are made.
- The TPPA can only come into force following completion of domestic processes by the US, Japan and several other larger parties.
- Countries that sign the TPPA but do not ratify immediately may be required to make additional concessions, as will other countries seeking to accede to the TPPA.
- A TPP Commission of the parties will govern the agreement, including accessions and amendments.
- Withdrawal is a technical possibility but a political, diplomatic and economic unreality.
- Where there is inconsistency between provisions of the TPPA and existing agreements between some parties, the terms that are more favourable to commercial interests will prevail.
- The TPP provides cumulative opportunities for foreign states and corporations to influence domestic decisions which may be burdensome and intrusive.
- The TPP Commission's powers, chapter-specific committees and inbuilt renegotiations will supervise compliance and could extend the initial TPPA obligations.
- The TPPA will be enforced through extra-territorial tribunals, backed by sanctions that will, in practice, reflect the asymmetries of power between the various parties.
- Provision for investor-state dispute settlement lacks the characteristics of a credible and independent legal process and effectively displaces national judicial processes for a privileged class of foreign investors.

TPPA TIMELINE



THE TPPA TEXT

The TPPA text includes all the annexes, footnotes and appendices. Side-letters are not a formal part of the text, and are not enforceable through the TPPA mechanism unless the letter says so¹. The texts in English, Spanish and French (for the Canadians) are equally authentic² – but not in Vietnamese or Japanese. If there is any divergence, the English text prevails.

(i) Content

The 30 chapters show how far the TPPA extends beyond a simple ‘trade’ agreement: Preamble

1. Initial Provisions and General Definitions
2. National Treatment and Market Access for Goods
3. Rules of Origin and Procedures
4. Textiles and Apparel
5. Customs Administration and Trade Facilitation
6. Trade Remedies
7. Sanitary and Phytosanitary Measures
8. Technical Barriers to Trade
9. Investment

1 Article 28.3.3

2 Article 30.8

10. Cross-border Trade in Services
11. Financial Services
12. Temporary Entry for Business Persons
13. Telecommunications
14. Electronic Commerce
15. Government Procurement
16. Competition Policy
17. State-Owned Enterprises and Designated Monopolies
18. Intellectual Property
19. Labour
20. Environment
21. Cooperation and Capacity Building
22. Competitiveness and Business Facilitation
23. Development
24. Small and Medium-size Enterprises
25. Regulatory coherence
26. Transparency and Anti-corruption
27. Administrative and Institutional Provisions
28. Dispute Settlement
29. Exceptions and General Provisions
30. Final Provisions

(ii) Scope of coverage

The TPPA rules constrain the actions of states, not private individuals. Some public entities, such as central banks, are excluded when performing specific functions.

One constitutionally problematic question was coverage of sub-central government. Several TPPA countries, including the US, are federations where states, provinces or regions have constitutional powers that cannot be abridged by international agreements without their consent. Other countries, like New Zealand, have unitary systems of government; for them the exclusion of sub-central governments means they would assume more extensive obligations. The text says New Zealand does not have a 'regional' level of government³, presumably because they are considered part of local government, but that is not made clear.

As a compromise, the rules apply to sub-central government, unless a chapter or certain rules explicitly include them (eg. government procurement)⁴ or exclude them (eg. state-owned enterprises (SOEs))⁵. Inbuilt negotiations to extend sub-central government coverage in the SOE⁶

3 Annex 1-A

4 Annex 15-A

5 Annex 17-D

6 Annex 17-C

and government procurement⁷ chapters are meant to extend coverage, but there is no way to force an outcome.

Sometimes coverage of central, regional and local government also applies to SOEs and private bodies exercising delegated functions (investment⁸ and cross-border services⁹), where an annex automatically protects all existing local government measures from some of those rules, but does not allow them to be made more restrictive.

NEW ZEALAND’S TREATY MAKING PROCESS

New Zealand’s domestic process
Cabinet mandates negotiations and periodically updates instructions to negotiators
Minister presents final text and National Interest Analysis to Cabinet to approve before signing
Agreement is signed
Text and National Interest Analysis are tabled in Parliament
Text and National Interest Analysis are referred to Foreign Affairs Defence and Trade Committee
Executive can ratify TPPA after the select committee reports or 15 sitting days elapse, whichever is earlier.
If legislative change is required to comply with TPPA the Executive will not normally ratify until the legislation is passed
Select committee can elect to hear submissions on TPPA
Select committee reports to Parliament
Parliament may decide to debate the select committee report
Parliament may decide to vote on the TPPA
Executive must report its response to any select committee recommendations within 90 days
Any legislative changes required to bring NZ into compliance with TPPA are introduced in a Bill
The Bill follows standard parliamentary process, normally including submissions
Executive ratifies the Agreement at a time of its choosing, normally after the Bill is passed
NZ notifies the TPPA repository (NZ) that its domestic processes are complete
TPPA comes into force when required number of parties notify completion of domestic processes

(i) The Executive’s treaty-making powers

The Cabinet Manual is explicit that: ‘In New Zealand, the power to take treaty action rests with the Executive.’¹⁰ Cabinet must approve any proposal to indicate New Zealand’s intention to be bound (usually signalled by signing a treaty) or to make it binding (through ratification). Except in urgent situations ratification can only be done after the treaty and National Interest Analysis has been

7 Article 15.24.2

8 Article 9.2(e)

9 Article 10.1 (does not explicitly cover SOEs)

10 Cabinet Manual 2014, paragraph 7.112

presented to Parliament and 15 sitting days have elapsed.¹¹ After the 15 sitting days, the Executive can ratify even if the parliamentary processes are still underway. The select committee may ask Cabinet to approve a longer period to consider the treaty.¹²

(ii) The National Interest Analysis

Standing Orders require that a National Interest Analysis (NIA) is tabled along with a treaty.¹³ The NIA must address the following:

- (a) the reasons for New Zealand becoming party to the treaty:
- (b) the advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand:
- (c) the obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty:
- (d) the economic, social, cultural, and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand:
- (e) the costs to New Zealand of compliance with the treaty:
- (f) the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects:
- (g) the measures which could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures, including legislation:
- (h) a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty:
- (i) whether the treaty provides for withdrawal or denunciation.

The NIA is drafted by the department with the main policy interest in the treaty. Even though the TPPA affects a multiplicity of ministries, the Ministry of Foreign Affairs and Trade (MFAT) is the lead ministry for the negotiations and will prepare the NIA.¹⁴ As a consequence, the NIA will not be an independent assessment of the costs and benefits of the TPPA.

Over the years there have been calls for a more independent, comprehensive, balanced and robust cost-benefit analysis during the course of negotiations and NIA once an agreement is complete, but they have been rejected.¹⁵ An International Treaties Bill proposed by Green MP Keith Locke in 2000 would have required information to be provided during the course of negotiations, and expanded the scope of the NIA to include a Treaty of Waitangi assessment.¹⁶

11 Cabinet Manual paragraph 7.120

12 Cabinet Manual paragraph 7.119

13 Standing Orders 287(2) and 398

14 Cabinet Manual paragraph 7.117

15 Keith Locke MP, Green Party, International Treaties Bill 2009; Ken Shirley MP, ACT Party, 2006; Jane Kelsey, Submissions to the Standing Orders Select Committee on the Review of Standing Orders, 2009; open letter by legislators from TPPA countries, 11 February 2014 <http://www.tppmpsfortransparency.org/>

16 <https://home.greens.org.nz/bills/international-treaties-bill>

The lack of independent review has also been an issue in Australia, which has a similar approach of NIAs. The Australian Senate Select Committee on the Free Trade Agreement between Australia and the United States of America observed in 2004:

The government is currently required to table a National Interest Analysis along with each treaty tabled. The NIA includes information about the economic, social and cultural effects of the proposed treaty, and the obligations imposed by it. However, the NIA is a cursory statement of impacts that the Select Committee regards as ‘too little too late’. Information in a more comprehensive form is required at a much earlier stage in the process, and prior to the government committing Australia to be bound by multilateral obligations or by a proposed free trade agreement.¹⁷

In similar vein, the Australian Productivity Commission called for independent scrutiny in its 2010 report on Australia’s free trade agreements, saying the government ‘should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations but before it is signed.’¹⁸

(iii) The select committee process

In New Zealand the Foreign Affairs, Defence and Trade Committee (FADT) examines a treaty and reports to the House.¹⁹ By contrast, Australia established a specialist Joint Standing Committee on Treaties that has built up some expertise and has used its powers to conduct inquiries into treaties under negotiation as well as report to the House on a treaty referred to it.

The Australian Senate’s Foreign Affairs, Defence and Trade References Committee also recently conducted an inquiry into the treaty-making process.²⁰ By contrast, the New Zealand FADT committee did not even hear a petition from 16 representative organisations presented in 2011 until 2015; its report merely ‘noted’ the content and encouraged MFAT to expand its public consultation programme.²¹ The Australia Senate committee also heard submissions and produced an in-depth report on investor-state dispute settlement,²² based on a bill similar to a member’s bill in the New Zealand Parliament in July 2015 that was stopped from advancing to select committee by a one-vote majority.²³

17 Report of the Australian Senate Standing Committee on Foreign Affairs, Defence and Trade on the Free Trade Agreement between Australia and the United States of America 2004, para 28

18 Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements*, Nov 2010, xxxviii

19 Standing Orders 397(3), 399(1) and 400(1)

20 Report of the Australian Senate Standing Committee on Foreign Affairs, Defence and Trade, *Blind agreement: reforming Australia’s treaty-making process*, 25 June 2015

21 Foreign Affairs, Defence and Trade Committee, *Petition 2008-129 of Helen Kelly on behalf of the NZ Council of Trade Unions (and others)*, July 2015

22 Report of the Australian Senate Standing Committee on Foreign Affairs, Defence and Trade, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, 27 August 2014

23 *Fighting Foreign Corporate Control Bill 2015*, Fletcher Tabuteau (NZ First): Labour, Green, NZ First and Maori

The reporting role of the FADT committee is vaguely worded: when the committee examines the treaty and NIA it ‘*considers whether the treaty ought to be drawn to the attention of the House*’, on the basis of anything in the NIA or otherwise.²⁴ The Cabinet Manual says the committee *may* seek public submissions.²⁵ While it declined to do so over New Zealand’s accession to the WTO’s government procurement agreement, it is inconceivable it would not conduct public hearings on the TPPA. Where there is a high volume of submissions the committee may also conduct hearings in different cities.

MFAT services the committee, which means the advice comes from those who negotiated the text. The committee can ask MFAT officials questions and seek responses to points raised in submissions, but the members rarely have enough knowledge to assess the answers. The report is usually drafted by MFAT and almost always echoes the NIA.

Former Green MP Keith Locke, who has sat on the FADT Committee, observes that ‘critics of free trade and investment treaties are disadvantaged in committee hearings, in several ways:

1. They will have had little time to see and analyse the text of the treaty.
2. The Ministry of Foreign Affairs and Trade officials presenting the treaty to the Select Committee will be totally committed to its passage and will push it very strongly.
3. The officials will emphasise any trade advantages (however small) for New Zealand’s agricultural sector, and largely ignore the treaty’s oppressive investment provisions.
4. Both Labour and National parties, whatever the differences between them, have a long history of combining to support ratification of such treaties. Labour and National MPs have often criticised opponents of such treaties as being “anti-trade”.
5. The Ministry officials usually have a strong input into the drafting of the final report from the Select Committee to the House. The final report rarely takes much account of the public submissions criticising the particular treaty, although there is usually some room at the end of the report for dissenting opinions from parties like the Greens and New Zealand First.²⁶

If the committee or a majority makes recommendations, the government’s response must be presented to Parliament within 90 days of the report.²⁷

(iv) Parliamentary debate and vote

The Standing Orders are silent on any role for Parliament in examining the treaty aside from the select committee. There is no requirement that the House even debates the committee’s report. The Cabinet Manual says ‘*the House may sometimes wish to give further consideration to the*

parties voted for; National, Act and United Future against. *NZPD* 22 July 2015, vol:707, p:5252

24 Standing Order 400(2)

25 Cabinet Manual paragraph 7.120

26 Comments provided by Keith Locke for this report.

27 Cabinet Manual paragraph 7.108

proposed treaty action; for example, by a debate in the House.²⁸ Put another way, Parliament must take positive steps to debate the TPPA.

Debates on treaties are rare. When organising parliamentary time the government almost always puts legislation ahead of reports from select committees.

Several members' bills have sought a more robust process. ACT MP Ken Shirley²⁹ and Green MP Keith Locke proposed similar bills that would have required parliamentary debate and a vote on proposed treaties. Keith Locke's International Treaties Bill in 2000 would have prevented the government taking binding action on a treaty without the approval of the House of Representatives. It would have also required the provision 'from time to time the text of draft treaties that are under negotiation involving New Zealand, sufficient to keep the House informed of significant developments in treaty making'. The Bill was voted down at the Second Reading in 2003 by 101 votes to 16, with both the Labour and National parties voting against. The Green and Act parties voted for it.³⁰

A draft text was therefore unavailable to New Zealand MPs prior to the New Zealand government concluding the TPPA deal, although members of the US Congress were eventually allowed confidential access to the draft text. However, over 600 cleared US advisors, almost all from the corporate sector, were given access to parts of the text.³¹

New Zealand governments have been prepared to allow debates, and even votes, on FTAs when they were confident of bipartisan support. That makes the position of the Labour Opposition extremely important. Were Labour to indicate a no-vote for the TPPA the government could still make it a confidence vote, but a one vote majority would undermine claims of a parliamentary mandate.

It seems more likely the government will conflate a parliamentary vote on the TPPA with a vote on the much narrower implementing legislation. That was done recently with the New Zealand Korea FTA, when Parliament did not debate the select committee report, so the concerns of many submitters and several political parties, especially on investment-state dispute settlement, had to be raised in the debate on a bill to amend the tariff schedule.³²

(v) Legislation to implement the TPPA

According to the Cabinet Manual, legislation needed to bring New Zealand's domestic law into compliance with the TPPA should not be introduced until after the treaty has been presented and

28 Cabinet Manual, paragraph 7.120

29 The ACT bill was not drawn from the ballot. For ACT's position see Ken Shirley's contribution to the debate on Keith Locke's bill: <http://www.vdig.net/hansard/archive.jsp?y=2000&m=11&d=08&o=56&p=64>

30 NZPD, vol 606, p. 3589, February 2003

31 'The Insider List', <https://sojo.net/articles/insider-list>

32 Tariff (Free Trade Agreement between New Zealand and the Republic of Korea) Bill 2015

the select committee has had time to report.³³ It is general practice that the treaty is not ratified until that legislation has been passed.

Most of the controversial parts of the TPPA will not actually require changes to legislation. Many of the rules lock in the status quo, such as a competitive market model for services, light-handed pro-business regulation, and commercially focused SOEs. Others may pre-empt future government actions, for example requiring data to be held on servers within New Zealand, climate change policies that impact negatively on foreign investments, or precautionary re-regulation of financial and capital markets. Where changes are required, they can often be made by regulation, new policy or administrative directives, for example to government procurement practices or Pharmac's procedures.

Only four areas legislative amendments are likely for the TPPA: tariffs, trade remedies, copyright (and possibly patents), and the threshold for vetting overseas investment. Even though this covers areas that are the responsibility of other select committees, notably commerce and health, the amendments are likely to be moved as an omnibus bill that is dealt with by the FADT committee. The bill will follow the standard parliamentary process. Submissions will be sought but the time may be truncated on the grounds there have already been submissions on the TPPA itself.

The House will vote on the bill. But the government could make it a confidence vote to ensure it is passed. If the bill was voted down, or an amendment succeeded, that would not change the content of the TPPA; it would just mean New Zealand would be in breach of its TPPA obligations if the agreement came into force. The government would be unlikely to proceed to ratify under those circumstances, especially knowing the US would almost certainly not certify New Zealand's compliance, as discussed below.

(vi) Access to information

Following the announcement on 5 October 2015 that negotiations were concluded, MFAT released a series of Fact Sheets setting out the government's account of the agreement and its implications.³⁴ The text itself was released one month later, subject to legal verification, along with various side letters. Legal verification (scrubbing) had not been completed by the end of November. However, no other formal documentation from the negotiations has been made public. In March 2010 at the start of the TPPA negotiations the parties agreed to an unprecedented pact to keep an extraordinary range of information secret:

First, all participants agree that the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release. This means that the documents may be provided only to (1) government officials or (2) persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents. Anyone given access to the documents

³³ Cabinet Manual, paragraph 7.122

³⁴ <https://www.tpp.mfat.govt.nz/>

will be alerted that they cannot share the documents with people not authorized to see them. *All participants plan to hold these documents in confidence for four years after entry into force of the Trans Pacific Partnership Agreement*, or if no agreement enters into force, for four years after the last round of negotiations. ...

This effectively shields a comprehensive pool of information from public scrutiny until at least one election cycle after the agreement comes into force (which is likely to be at least two years after signing).³⁵

Trade Minister Groser initially insisted that negotiations are always conducted that way. However, previous New Zealand governments had released a range of documents, as demonstrated in a successful High Court challenge to the Minister's refusal to release information under the Official Information Act.³⁶ The Minister changed his argument, telling the court that every negotiation is different.³⁷ Despite an order from the High Court to reconsider his blanket refusal to release any of the information requested, without having viewed any documents, the Minister advised that he could not respond to one category until 5 February 2015, which is the day after the expected signing of the TPPA, and set no date for other aspects of the request.³⁸

In addition to concerns about democracy and accountability, the availability of a negotiating record (or travaux préparatoires) is crucial for interpreting the text. As the official Depositary New Zealand presumably holds the authentic negotiating record, although there is no reference to one in the Agreement.³⁹ If there is not a single authentic record, each country will rely on its own version, creating more uncertainty and contention. That is problematic for countries with limited capacity or that joined part way through the negotiation, and for non-negotiating countries that accede to an agreement they had no role in negotiating. It also means people outside government who have a concern about proper interpretation will not have access to the negotiating and background documents for around six years, if it all.

35 Subsequently, a similar pact has been agreed for the negotiations for a Trade in Services Agreement (TISA), with confidentiality applying for five years after the agreement comes into force.

36 *Kelsey v Minister of Trade* [2015] NZHC 2497. Submissions, affidavits and the judgement can be accessed on <https://tpplegal.wordpress.com/legal-challenge-to-secrecy/>

37 New Zealand will have to agree to release of more information in the proposed negotiations for a free trade agreement with the European Union, following pressure from the European Ombudsman and the European Parliament on the European Commission to publish more information on such negotiations.

38 On 25 November 2015 the High Court declined to direct the Minister to release the information earlier but left it open to applicants to return to the court to seek a further order.

39 Article 30.7

US CONGRESSIONAL PROCESS FOR THE TPPA⁴⁰

Key dates for the US (39)	
Date	Description
05/11/2015	US President gave Congress 90-days' notice of intention to sign
03/02/2016	Earliest the US President can sign the TPPA
04/02/2016	Earliest the US President can submit implementing legislation to US Congress if he chooses to dispense with normal procedures and various reports required in the Fast Track legislation, but for which there is no penalty for failure to submit. This is an unlikely scenario but possible. Submission of the implementing bill would start the Fast Track/TPA clock. The House would then be required to vote within 60 legislative session days, followed by a Senate vote within 30 legislative session days. Either chamber could use the full amount of time or hold a vote on the first available day.
Signing + 105 days	The International Trade Commission must deliver its report within 105 days of signing, but it can deliver the report earlier. If signing is on 3 Feb 2016, the latest for ITC report is 18 May 2016.
February – June 2016	Primary elections and Caucuses to select presidential and congressional candidates in each party are scheduled in each state during this period. The main set of primaries is March 1 – Super Tuesday. A US TPP vote is unlikely before this time.
Late July 2016	Political conventions for Democrats and Republicans where final Presidential candidates are selected.
15 July-6 September 2016 & 1 October - 14 November 2016	Target recess dates for Congress to be out on extended recess.
08/11/2016	Election day for President, all 435 member of the House of Representatives and 1/3 of members of Senate
14/11/2016 – End of 2016	Lame duck period of Congress
03/01/2017	New Congressional session begins
20/01/2017	New president and administration take office

(i) Notification of intention to sign

The Bipartisan Congressional Trade Priorities and Accountability Bill (otherwise known as the Fast Track or Trade Promotion Authority legislation) required the President to give 90 days' notice of intention to sign the TPPA. That notice was given on 5 November 2015, the same day the text was released.

⁴⁰ See generally, Public Citizen, 'TPP Vote Calendar', <https://www.citizen.org/documents/TPP-vote-calendar.pdf>

(ii) US advisory committees

The notification of intention to sign also triggered a 30-day period for reports on the TPPA from 28 trade advisory committees, including 16 industry trade advisory committees, whose 600 members are overwhelmingly drawn from the corporate sector.⁴¹

(iii) International Trade Commission analysis

The International Trade Commission (ITC) is a US government body, one of whose tasks is to prepare economic analyses of international trade agreements to be provided to Congress alongside the implementing legislation. The assessment includes the estimated impact on US GDP, exports and imports, employment, and the production, employment and competitive position of industries likely to be significantly affected by the agreement. Section 105(c) of the Fast Track law says the ITC must deliver its report to the President and Congress 105 days after the President signs the TPPA, although it could do so before.

The ITC issued a notice of investigation on 17 November 2015 indicating its anticipated date for transmitting the report is 18 May 2016. However, that might just reflect the final date on which the Commission can report, assuming the agreement is signed on 3 February [US time] when the 90 days' notice period expires. The US Trade Representative (USTR) has urged the ITC to complete the work as soon as possible, although there were earlier reports that it will need the full period available to analyse such a complex text.⁴² The ITC has announced a public hearing on the economic impacts of TPPA on 13 January 2016 to 'assess the likely impact [of TPPA] on the US economy as a whole and on specific sectors and the interests of US consumers'.⁴³

(iv) Fast Track

Fast Track or Trade Promotion Authority was signed into law in June 2015. The Bill delegates to the US President the right to sign and enter into a trade agreement before the Congress approves the contents of the pact. It then guarantees the House and Senate will vote on the legislation to implement the agreement within 90 days of submission of the implementing legislation. Under Fast Track that legislation circumvents normal congressional committee review/amendment processes and is also not subject to any floor amendments. Both houses of Congress are restricted to a yes or no vote. Debate in each chamber is limited to 20 hours and Congress must complete the process within 90 legislative days.

In return for surrendering some of its control over trade, which constitutionally belongs to the House of Representatives, the Fast Track bill contained a long list of substantive and procedural requirements for the TPPA. Most of the procedural requirements are binding; the substantive content may become a matter of contest. There are already signs of discontent on both sides of Congress.

41 'The Insider List', <https://sojo.net/articles/insider-list>

42 Former ITC Chairman Irving A. Williamson reported in 'ITC Says Analyzing TPP Economic Impact Will Take At Least Five Months', Inside U.S. Trade, 22 November 2013

43 'ITC predicts TPP Economic Assessment Will not be ready until May', Inside US Trade, 17 November 2015

The Obama administration needs a majority in each chamber. In 2014 the first attempt to move the Fast Track legislation in the Senate failed, as it needed a super-majority in the initial vote. After legislative manoeuvring and deal-making, the second vote succeeded by a single vote. The Fast Track legislation itself was then blocked on a first attempt in the House of Representatives. After further deal-making and legislative manoeuvring, it passed narrowly by a 218-208 majority in the House and 60-38 vote in the Senate. The Democratic Party President relied on Republican votes.

Only 28 Democrats supported the bill in the House. If 5 House votes shift, TPPA will not pass, and there are warnings that could well happen.⁴⁴

(v) Congressional vote on implementing legislation

Once the TPPA is signed there is no specified date on which the implementing legislation must be tabled in Congress.

Technically, the final legal text and a draft statement of administrative action must be submitted to Congress 30 days before the legislation and statement of administrative action is submitted to Congress. Normally the administration would wait until the ITC report is completed to present the Bill, but that is not strictly required.

The timing will be tactical - the administration will not want to present the legislation unless they know it will pass. It could be extremely fast if the votes are there, or if the deal does not enjoy majority support it could be more than 4 years, as with the US Korea FTA.

If all corners were cut, it could be submitted shortly after the President signs the TPPA in early February 2016. But that would be during the election campaign when all members of the House are up for re-election and can be held accountable by the electorate.

Any moves to satisfy what the Republicans demand is likely to lose Democrat votes and vice versa.

As soon as the text became available, Democrats on key Congressional began consulting with constituents to assess it against core policies, including the May 10, 2007 bipartisan deal they brokered with US President Bush for the FTAs with Peru, Colombia, Panama and South Korea.⁴⁵ This focuses on labour, environment and medicines.

Republican support is likely to become more difficult in an election year. Influential members of Congress, including the Republican chair of the Senate Finance Committee,⁴⁶ say the agreement does not live up to the requirements of the Fast Track law and have called for renegotiation of provisions, especially on biologics medicines and the exception for tobacco from investor-state dispute settlement (ISDS).⁴⁷

44 Ian Swanson and Bob Cusack, 'Obama's trade deal is in trouble', The Hill, 17 November 2015

45 'House Democrats to Scrutinize TPP for Compliance with May 10 Deal', Inside US Trade, 12 November 2015

46 'Utah Senator, Crucial Ally for the Pacific Rim Trade Deal, is Now Its Main Hurdle', New York Times, 12 November 2015

47 Steven Dennis, 'Obama Faces a Tough Road with TPP Trade Deal', Fortune, 12 November 2015

Alternatively, the implementing bill could be tabled during the ‘lame duck’ period between the outgoing Obama administration and the incoming new president and members of Congress. Doing so would be politically difficult, especially if the incoming president opposed the deal, which is the current position of the entire Democratic slate of candidates and several prominent Republican candidates. If a candidate who opposes the TPPA is elected, there will be much pressure not to hold a vote on TPPA to preserve the opportunity to seek more concessions through renegotiation in the next Administration.

(vi) The incoming administration

If the implementing legislation has not been passed, it is possible that a new president might decide, or be prevailed upon, to seek to reopen aspects of the text. The FTAs with Panama, Colombia and South Korea that were negotiated and signed by President Bush were not voted on during the Bush administration. They then languished for several years while the Obama administration negotiated an additional ‘Labour Action Plan’ with the Colombian government and required the Korean government to make a series of further concessions on automobiles and agriculture. It was only after those additional concessions were secured that Congress voted to approve those agreements.

A change in the political balance across both houses of Congress in either political direction could also affect the outcome of the vote.

In addition, the new administration could use the certification process to secure changes to other parties’ commitments and domestic laws that are favourable to the US.

(vii) US Certification of another party’s compliance

Under the TPPA the US President must provide formal written notification that the US has satisfied its domestic approval processes before the Agreement can come into force.⁴⁸ That will not occur until the US certifies that the other parties have altered their domestic laws and policies to satisfy US expectations of what is needed to comply with the TPPA. This is distinct from the US’s domestic process of passing the implementing legislation.

The formula adopted in the agreement means the US must be an original party to the Agreement. Until the US certifies another party’s compliance, the US process will not have been completed for that party. It is unclear from the TPPA text whether the US could deliver partial notification in relation to only some parties, but the US is expected to argue so.

Certification is a legally binding obligation on the US President, set out in Section 4(a) §1 and §2 of the Fast Track legislation:

Prior to exchanging notes providing for the entry into force of a trade agreement, the United States Trade Representative shall consult closely and on a timely basis with Members of Congress and [relevant committees] ... , and keep them fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement that are to take effect on the date that the agreement enters into force.

48 Article 30.5

US government officials will transmit a list of the changes to the other country's domestic laws and policies that the US government requires before it will allow the TPPA to go into force. They will then monitor compliance, and pressure the government of the trading partner country to alter its laws and policies until they satisfy the US view of the changes required.

The US use of certification in the past has been controversial as it involves foreign interference in sovereign lawmaking processes. Examples of US certification practices are available on www.tppnocertification.org. In many instances the US has focused on intellectual property laws, especially affecting medicines. In Australia's case the US insisted that further amendments to copyright laws were passed before it would certify compliance under the Australia US FTA. In May 2015 current and former legislators from TPPA countries sent an open letter to their political leaders calling on them to resist such pressures.⁴⁹

Members of Congress have already indicated they will call for side-letters or proof that the other country has complied with US demands in areas of medicines, especially biologics, the tobacco exception from ISDS, dairy, and currency controls.⁵⁰ A Japanese official has suggested side-letters as a creative way to address objections from US lawmakers without renegotiating the formal text.⁵¹

The other parties cannot effectively constrain certification, as it is a unilateral US process. However, the formula for bringing the agreement into force raises some uncertainties about how certification may work in practice, as discussed below.

49 <http://tppnocertification.org/wp-content/uploads/2015/05/Legislators-letter-rev.pdf>

50 Steven Dennis, 'Obama Faces a Tough Road with TPP Trade Deal', *Fortune*, 12 November 2015

51 'Japanese official holds door open to TPP fixed without renegotiation', *Inside US Trade*, 24 November 2015

STATUS OF THE TPPA

(i) Signing

In signing the TPPA, a government is indicating its intention for the state to be bound by the terms of the treaty. But it does not become binding on that state until it has completed its necessary domestic processes and the provisions set down in Article 30.5 for entry into force of the agreement have been satisfied.

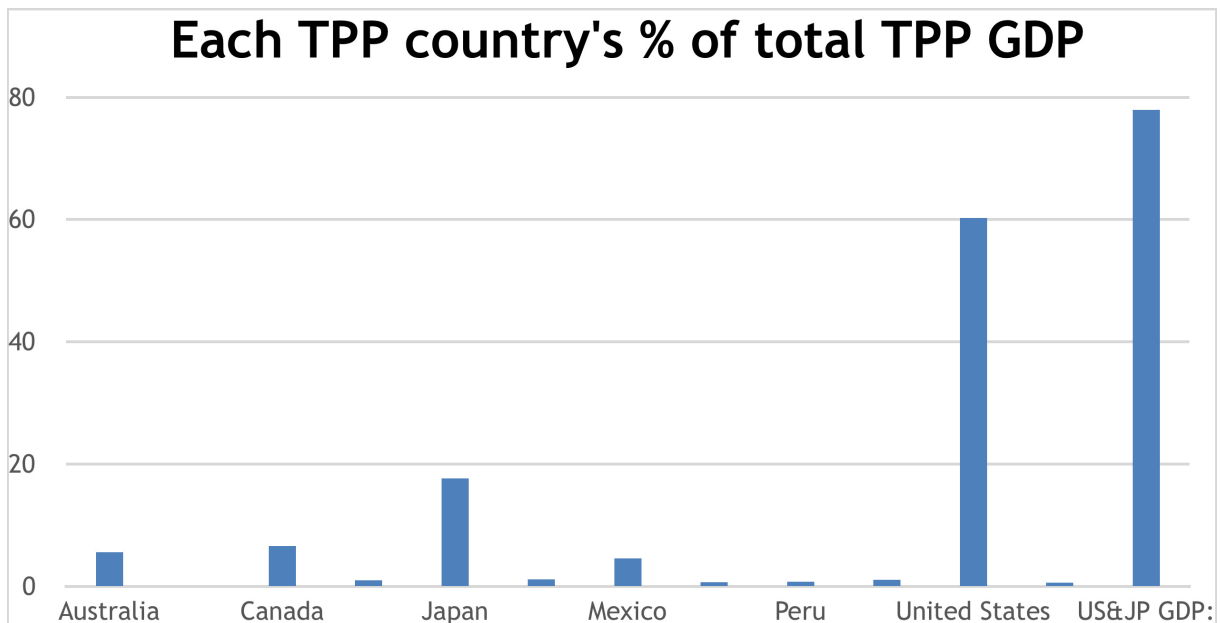
(ii) Entry into force

There are three different ways the TPPA could come into force and bind some or all of the signatories.⁵²

1. If all original signatories complete their domestic processes to approve the agreement coming into force and notify the Depositary in writing within two years of signing, the TPPA comes into force 60 days after the last country notifies.
2. If not all original signatories have notified completion of their processes after two years, but at least 6 have done so, and they account for at least 85% of the combined GDP of the original signatories (as of 2013), the TPPA would come into force after 60 days (that means 2 years plus 60 days after signing).
3. If 2 years passes without the second option being met, the agreement comes into force 60 days after the date when 6 or more parties comprising 85% of GDP have notified.

That formula means the US and Japan must be originating parties. Table 1 shows just two additional larger countries (Canada, Australia, Mexico) would be enough to meet the threshold of 85% of shared GDP. Poor and small countries are virtually irrelevant.

52 Article 30.5



Data from <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>

The formula raises a conundrum in relation to US certification. The agreement cannot come into force for any country until the US notifies the TPP Commission that its domestic processes have been completed. Article 30.5 assumes a single notification by each signatory. However, US practice has been to certify compliance by other parties to a plurilateral agreement bilaterally and differentially. Presumably this was discussed during negotiations, but there is nothing in the text to indicate whether that would be permitted. If the US cannot notify the Commission until it has completed certification for all signatories, and the agreement cannot come into force until it provides that notification, the process could take a long time and the pressure on other countries from US certification would be even more intense. Requiring single and full certification would also contradict the intention of the provision that the agreement can come into force for only some parties.

(iii) Entry by original signatories

There are incentives for being in the first tranche of parties, and potential penalties for not being one. Any original signatory who is not in that first group must give notice that it intends to become a party to those who are. However, its acceptance is not automatic. The TPP Commission (made up of all the existing parties) needs to agree. The text is not explicit that the Commission or any one of its members may require further concessions, probably by side letters, but that is implicit. The US has particular leverage because the President will need to go back to Congress for approval. Assuming the country is accepted, the agreement comes into force for it after 30 days, unless all agree to a different date.

A signatory country's later entry also raises questions about phase-in periods, especially for tariff cuts that are implemented over time. There is a presumption that an original signatory who joins later must immediately implement all the tariff cuts it would have made to that date if it was in the first tranche, unless another country wants to delay its own reciprocal cuts to the new party.⁵³

(iv) Accession of other countries

Any other member of APEC is automatically allowed to seek to join the TPPA; but there needs to be consensus for any non-APEC country to even begin the process. Any country wanting to join must be prepared to accept not only the terms of an agreement they had not role in negotiating, but also any additional terms that existing parties require of them.⁵⁴ This accession process is presumably confidential and could take a very long time.

The process will be similar to countries joining the WTO and when Japan, Mexico and Canada joined the TPPA negotiations.⁵⁵ The country will have to negotiate bilaterally with each of the existing members and get that approval – which means they can be required to make more extensive commitments than existing members, which may include rules that are not in the TPPA. A working group of all TPPA parties who want to participate must then agree on the accession. Just one existing party can block the establishment of a working group for a non-APEC country.⁵⁶ The working group reports to the TPP Commission in writing, setting out any terms and conditions. The group decides by positive consensus or the lack of a written objection by a group member within 7 days. The Commission still needs to adopt the working group recommendations.

Most of the terms agreed bilaterally will end up being shared across all the parties, but the TPPA already sets the precedent for different market access between parties and side-letters setting out special bilateral arrangements.

(v) Trans-Pacific Partnership Commission

There is no formal institution created to oversee the agreement. Instead, a TPP Commission is established, comprising all the parties to the Agreement at the level of ministers or senior officials along the lines of NAFTA (US-Mexico-Canada). The Commission is the vehicle through which the TPPA members meet yearly. Chairing of meetings rotates among the parties, although New Zealand, which has been the official Depositary of the Agreement during the negotiations, will presumably continue to be so.⁵⁷

The Commission facilitates the TPPA become a ‘living agreement’, with functions to:

- consider any matter relating to implementation or operation of the agreement;
- review within 3 years and at least every 5 years after that the ‘economic relationship and partnership’ among the Parties;
- consider any proposal for amendment or modification;
- supervise the committees and working groups;
- establish model procedural rules for arbitral tribunals;
- consider how to enhance trade and investment between the parties;

⁵⁴ Article 30.4.1

⁵⁵ ‘TPP Partners Officially Invite Canada To Join Talks, Ending Years Of Effort’, *Inside US Trade Daily News*, 19 June 2012

⁵⁶ Article 30.4.3bis

⁵⁷ Article 30.7

- review the roster of panel chairs for state-state disputes;
- decide whether an original signatory can join the agreement;
- change institutional arrangements;
- consider changes to schedules on tariffs, rules or origin or government procurement;
- consult with non-government actors (including corporate interests) on a matter within its responsibility; and
- seek to resolve disputes over interpretation and application of the agreement and issue interpretations of provisions.

(vi) Decisions by consensus

All decisions of bodies established under the TPPA are by consensus unless the text or the parties say otherwise.⁵⁸ This takes the form of ‘negative consensus’, requiring no objection from any party present at a meeting. If one country is absent and would have objected, it is bound by the decision of the others. There is no provision for proxies. In situations where the Commission’s functions require an actual consensus, that is deemed to exist if a party that dissents during the discussion does not table an objection in writing within 5 days.⁵⁹

(vii) Transition periods

Countries that have transition periods must report their plans and progress towards implementation at each meeting.⁶⁰ Where a transition period is less than three years, a written report must be tabled six months before it expires; for more than three years (such as New Zealand’s 8 years for copyright), reports must be annual after the first 3 years, and six months before the period expires. Any other party can ask for more information about progress and must be provided with it promptly. At the end of the transition period, the country must report on what it has done. If a country fails to meet these requirements that automatically goes on the agenda for the next Commission meeting, or a special meeting can be called to discuss it.

(viii) Amendments

Any changes to the text (including general or country-specific annexes, such as rules on foreign investment, appendices and footnotes) must have consent of all the other parties, which will involve their domestic processes.⁶¹ Again, the US Congress would need to approve. If an amendment is approved, it comes into force 60 days after all parties have notified their approval, or otherwise if agreed.

58 Art 27.3

59 Article 27.3

60 Art 27.7

61 Art 30.2

(ix) Withdrawal from TPPA

As with most treaties, any party can withdraw from the whole agreement by giving written notice to the Depositary and other parties.⁶² Withdrawal takes effect after 6 months unless the parties agree otherwise.

Recently, some countries have begun withdrawing from stand alone bilateral investment treaties,⁶³ which are the equivalent of the investment chapter of the TPPA. Doing so in the TPPA would mean terminating participation in the entire agreement. It is not possible to withdraw from just one chapter or rule, such as intellectual property on medicines, investor-state dispute settlement or SOEs. That would be an amendment that requires consent of the other parties.

Complete withdrawal from the TPPA would be unprecedented and bring with it reputational and diplomatic ramifications, with threatened or actual investor flight and strike and credit ratings downgrades. Other states in the TPPA and beyond would be likely to express a lack of confidence to enter into future treaties with New Zealand.

(x) Relationship to other agreements

There is a complex web of bilateral and regional agreements among the negotiating parties to the TPPA, and all are members of the WTO. Some of those agreements have different, and conflicting, terms and obligations from the TPPA, and frequent vague wording makes their compatibility more uncertain.

Normally at international law the later agreement between the same parties that involves the same subject matter supersedes the prior agreement, to the extent that they are not compatible.⁶⁴ The TPPA says they are meant to co-exist and both continue to apply.⁶⁵ Significantly, it is terms that are more favourable to commercial interests – not to the right to regulate, or social and environmental objectives – that prevail.⁶⁶ The relevant parties are meant to consult where there is a perceived inconsistency.

Where a dispute could arise equally under the TPPA and another agreement involving the disputing parties (including the WTO), the complainant can choose which dispute forum to use, but that decision is final.⁶⁷

62 Art 30.6

63 K. Gordon and J. Pohl, Investment treaties over time: treaty practice and interpretation in a changing world, OECD working papers on international investment, 2015/02.

64 Article 30(3) Vienna Convention on the Law of Treaties 1969

65 Article 1.2

66 Article 1.2fn1

67 Article 28.4

REGULATORY SOVEREIGNTY

The ‘right to regulate’ appears as rhetoric in the preamble and in several places throughout the text of the agreement.⁶⁸ But the TPPA is the antithesis of that right, because its very purpose is to constrain governments’ future actions. In addition to requiring that a government’s laws, policies and practices comply with substantive rules in the TPPA, the agreement imposes many procedural obligations. A feature of the ‘behind the border’ reach of the TPPA is its focus on the processes and commercial orientation of domestic decision-making in the name of ‘transparency’ and ‘regulatory coherence’. Cumulatively these can be both intrusive and burdensome, and provide the means for states and investors from other TPPA countries to build an evidence portfolio to use, if necessary, in an eventual dispute.

(i) External influence over domestic decisions

The generic rules on transparency (chapter 26) cover public disclosure of existing and proposed measures and prior consultation with other parties and interested persons, but are largely exhortatory. There is a stronger obligation to maintain independent tribunals or procedures for prompt review and if necessary correction of administrative action covered by the Agreement.⁶⁹

Individual chapters impose more specific and onerous transparency requirements that give foreign states and commercial interests more opportunities to influence government decisions. These apply to export licensing procedures,⁷⁰ Sanitary and Phytosanitary measures,⁷¹ Technical Barriers to Trade,⁷² Cross-border services,⁷³ Financial services and investment,⁷⁴ Telecommunications;⁷⁵ Competition Policy,⁷⁶ and Intellectual Property.⁷⁷ The SOE chapter has particularly onerous requirements to respond to requests for information that can do not require the party making the request to meet any objective and challengeable test.⁷⁸

68 eg. Articles 10.8.2 and 25.2.2

69 Article 26.4

70 Article 2.14

71 Article 7.13

72 Article 8.7

73 Article 10.11

74 Article 11.13

75 Article 13.22

76 Article 16.7

77 Article 18.19

78 Article 17.10

(ii) Regulatory procedures

Domestic decision making processes and priorities are also targeted in Chapter 25 on Regulatory Coherence. Each government can decide the scope of regulatory measures covered by the chapter, but they must be ‘significant’, and be published within a year.⁷⁹ Governments promise to use ‘good regulatory practices’ in relation to those measures to promote trade and investment, economic growth and employment.⁸⁰

The Regulatory Coherence chapter is much less directive than the version leaked in 2011, which would have realigned governments’ institutional arrangements and imposed presumptions of light-handed and least-burdensome regulation. After a backlash from developing country governments the final chapter affirms the sovereign right of governments to set their regulatory priorities, and ‘encourages’ them to use regulatory impact assessments,⁸¹ and facilitate inter-agency coordination when creating and reviewing regulation.⁸² The chapter is not enforceable *per se*, although investors could cite the expectations it creates when challenging a government measure.

(iii) Chapter-specific committees

In addition to the TPP Commission and the dispute processes, virtually every chapter creates a specific committee to consider matters arising under the chapter and in some cases to review implementation and compliance.

(iv) Inbuilt reviews

In addition to the potential for the Commission to revisit aspects of the TPPA, several specific rules and matters of coverage are flagged for further negotiations. Significantly, the controversy over the rules on new generation biologics medicines, which was resolved by providing two options, will be renegotiated after 10 years. The regulatory coherence chapter is to be reviewed every 5 years in light of developments in ‘good regulatory practices’.⁸³ There are inbuilt negotiations for sub-central government coverage in the SOE⁸⁴ and government procurement chapters.⁸⁵ Some chapter-specific committees may decide on future negotiations (as with government procurement⁸⁶).

79 Article 25.3

80 Article 25.2.1

81 Article 25.5

82 Article 25.4

83 Article 25.6.7

84 Annex 17-C

85 Article 15.24

86 Article 15.24(1)

ENFORCEMENT

(i) State-state enforcement

A party to the TPPA can dispute an interpretation or application of the agreement by another party or enforce the rules where it considers they have been breached, unless the chapter or rule is specifically excluded from enforcement.⁸⁷

In addition to enforcing the rules, a party can bring a dispute if it believes that benefits it expected from the TPPA have been ‘nullified or impaired’ by the actions of another party, even if the rules were not broken.⁸⁸ This possibility creates uncertainty where the text is vague, as often occurs with compromise solutions to a contested issue, and opens the door to pressure and the ‘chilling effect’ where a government is threatened with a dispute if it proceeds with a proposed action. Lack of public access to the negotiating history, or travaux préparatoires, will make it difficult for policy advocates outside government to anticipate or advise on interpretations. This applies only to certain chapters, and significantly not those on investment and intellectual property.

Notable exclusions from state-state enforcement are the Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices (which applies to Pharmacs’ processes),⁸⁹ and the Competition Policy⁹⁰ and the Regulatory Coherence chapters.⁹¹ Governments are still required to comply with those rules and will be held to account by the TPP Commission and any subject specific committees. Non-compliance could still form the basis for a nullification and impairment complaint.⁹²

(ii) State-state dispute process

The framework for state-state disputes is standard for FTA: it begins with consultations,⁹³ and availability of ‘good offices’, followed by requests to establish an arbitral panel. Each step has a time limit (although similar timelines are increasingly deviated from in the WTO).

Each party to a dispute chooses an arbitrator from a list of experts in law, international trade, or matters covered by the Agreement that has been submitted by the various TPPA parties. The disputing parties, and failing that their panellists, are meant to agree on a chair. The arbitrators must have appropriate expertise where a dispute involves the labour, environment or anti-

87 Article 28.3(a) and (b)

88 Article 28.3(c)

89 Paragraph 26-A.6

90 Article 16.9

91 Article 25.11

92 Article 28.3(c)

93 Article 28.5

corruption chapters,⁹⁴ but there is no similar requirement for a health-related dispute. Special arrangements apply for some financial services and investment disputes.⁹⁵

Where the same matter could be enforced through the WTO or another FTA involving the parties the complainant can choose the forum, but that choice is final.⁹⁶ The panels are only required to refer to WTO jurisprudence where the rule has been imported from the WTO,⁹⁷ such as the general exceptions.⁹⁸ Changes to the wording of WTO provisions and other agreements means there is no clear jurisprudence, adding to legal uncertainty. Where a panel reaches a minority decision the identity of the dissenting panelist is not disclosed.⁹⁹

Other parties that claim a ‘substantial interest’ can seek to join the dispute as an interested party.¹⁰⁰ Non-state actors with an interest, whether a corporation or non-government organisation, can ask the panel to consider accepting written submissions to help evaluate the submissions and arguments – by implication limited to the issues being pleaded.¹⁰¹ Panels can also call on experts where the parties agree.¹⁰²

Hearings will be in public,¹⁰³ and will be held in the country of the party,¹⁰⁴ unless the parties to the dispute agree otherwise. This is a major advance as it will make it easier for locals to monitor. Parties must also make ‘best efforts’ to publish submissions as soon as possible,¹⁰⁵ but no later than the final panel report (ie. when it is over). The right to protect confidential information could undermine this new openness.¹⁰⁶

The rules of procedure are required to include a code of conduct for arbitrators,¹⁰⁷ but that does not have to be ready until the TPPA comes into force, meaning it is not part of the text that is

94 Article 28.9.3-6

95 Article 11.21

96 Article 28.4

97 Article 28.11.3

98 Article 29.1 and 29.2

99 Article 28.17.2

100 Article 28.13

101 Article 18.12.1(e)

102 Article 28.14

103 Article 28.12.1(b)

104 Article 28.12.1(h)

105 Article 28.12.1(d)

106 Article 28.12.1(f)

107 Article 28.10.1(d)

subject to domestic approval. A panellist who breaches the code can only be removed if both parties agree.¹⁰⁸

There is no appeal.

(iii) Compliance and Enforcement

The objective of enforcement is that a party found in breach of its obligations will revoke the impugned law, policy, decision or action.¹⁰⁹

There is a drawn out process for resolving a stand-off if a losing respondent fails to implement the panel's decision.¹¹⁰ Ultimately, there are two options: (i) paying temporary monetary compensation so long as the breach continues; and (ii) sanctions by the withdrawal of benefits equivalent to the loss the other party faces from the breach. These sanctions should be in same subject matter as the breach (eg agriculture), and only where that is not practicable resort to a different subject matter (eg. Internet services or investment). There are limits on using withdrawal of intellectual property and financial services concessions for a breach involving goods. This retaliation can have serious consequences, so the aggrieved country has to consider the breach is serious and is meant to consider the economic consequences.¹¹¹

However, enforcement will reflect the vastly unequal economic power of the TPPA parties, as both complainants and respondents. Some novel moves are presumably meant to mitigate the impact of sanctions on poor countries. If a party plans to suspend benefits against another party they can agree to a short-term (12 month) compromise where the country in breach pays half the assessed economic loss, in instalments, into a fund that can be used for 'initiatives to facilitate trade between the parties' including further reducing 'unreasonable trade barriers'.¹¹² This will do little to address the power asymmetries, especially when a rich country is in breach.

(iv) Investor-State Dispute Settlement (ISDS)

Investors from a TPPA country have new, more extensive rights in the investment and financial services chapters, and the controversial power to enforce their special entitlements through international arbitration using ad hoc tribunals from which there is no appeal. The ISDS process is also made available for a dispute on an investment contract involving natural resources, various public services and infrastructure, and for a dispute over an authorisation to invest.¹¹³

¹⁰⁸ Article 28.9.9

¹⁰⁹ Article 28.19.3

¹¹⁰ Article 28.19

¹¹¹ Article 28.19.4

¹¹² Article 28.19.7-12

¹¹³ Article 9.18.1-2

The investment chapter is examined in a separate research paper;¹¹⁴ this section only assesses ISDS procedures in terms of regulatory sovereignty and national judicial systems .

Section B of the investment chapter, which provides for ISDS, attempts to address some deficiencies in the practices of investors and arbitral tribunals. There is a 3.5-year time limit on bringing a claim from when the action complained of should have been known.¹¹⁵ Challenges that a dispute manifestly lacks merit are to be heard expeditiously.¹¹⁶ Investors must waive the right to pursue a legal dispute on the same measure in another legal forum,¹¹⁷ or invoke more favourable procedural rules in other investment treaties using the most-favoured-nation rule.¹¹⁸ The burden of proof is explicitly placed on investors for alleged breaches of the minimum standard of treatment.¹¹⁹ The TPP Commission can issue a binding interpretation of a provision,¹²⁰ or a non-conforming measure listed in a Party's investment annex;¹²¹ however, the parties may not agree, and even though this is said to bind investment tribunals¹²² they have disregarded parties' interpretations in the past.¹²³ Special rules apply to interpreting exceptions relied on as defences to a dispute on financial investments.¹²⁴

None of this addresses the fundamental objection that ISDS lacks the characteristics of a credible and independent legal process and effectively subordinates national judicial processes as the appropriate legal forum for a privileged class of foreign investors.¹²⁵ Investment tribunals are still ad hoc with the 'judges' selected by the parties.¹²⁶ Consideration of the proposed code of conduct

114 Amokura Kahwaru, 'TPPA: Chapter 9 on Investment', www.tppllegal.wordpress.com

115 Article 9.20

116 Article 9.22.4

117 Article 9.20.2(b)

118 Article 9.5.3

119 Article 9.22.7

120 Article 27.2.2.f

121 Article 9.25.1

122 Article 9.24.3 and 9.25.2

123 For example, in *Railways Development Corporation v Republic of Guatemala* (ICSID Case no ARB/07/23, award 29 June 2012), a dispute under the Central American Free Trade Agreement (CAFTA), the tribunal suggested in paras 216-18 the interpretation argued by the state parties reflected a wrong understanding of the law, and it chose an alternative interpretation.

124 Article 11.22

125 Chief Justice RS French, 'Investor-State Dispute Settlement – a Cut Above the Courts?', speech to Federal Court Judges, Darwin, 9 July 2014 referred to with approval by Chief Justice Sian Elias in 'Barbarians at the Gate: Challenges of Globalization to the Rule of Law', speech to the World Bar Association Conference, Queenstown, New Zealand, 4 September 2014, p.3; An Open Letter from more than 100 Jurists to the Negotiators of the Trans-Pacific Partnership Agreement Urging the Rejection of Investor-State Dispute Settlement, 8 May 2012

126 Article 9.21

for arbitrators is not required until the agreement comes into force,¹²⁷ so it is impossible to assess whether it will even attempt to address the conflicts of interest that arise when practicing investment lawyers also act as arbitrators. Decisions of domestic courts can be challenged under ISDS,¹²⁸ and domestic appeal processes by-passed.¹²⁹ There is no system of precedent and no appeal.¹³⁰

Other countries are recognising the need to address these concerns at a more fundamental level. The European Union has proposed replacing ISDS with an investment court, including in the Transatlantic Trade and Investment Partnership with the US and the proposed free trade agreement with New Zealand.¹³¹ South Africa has proposed domestic legislation that would substitute for ISDS commitments from which it is withdrawing.¹³² India is developing new, more balanced model investment treaty.¹³³ The TPPA is not only a missed opportunity, but one that places regulatory sovereignty and the integrity of the rule of law at greater risk.

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127 Article 9.21.6

128 eg. *Eli Lilly v The Government of Canada*, ICSID Case no. UNCT/14/12

129 eg. *Bilcon of Delaware v The Government of Canada*, Permanent Court of Arbitration, 17 March 2015 (<http://www.pcacases.com/web/view/50>), especially the dissenting opinion of Prof Donald Macrae, discussed by the Canadian government on 14 May 2015, at para 13 (<http://www.italaw.com/sites/default/files/case-documents/italaw4357.pdf>)

130 In Article 9.22.11 the parties will merely consider whether any appellate mechanism developed in other institutional arrangements should apply to disputes under the TPPA.

131 European Union, 'Commission proposes new investment court system for TTIP and other trade and investment negotiations', 16 September 2015, http://europa.eu/rapid/press-release_IP-15-5651_en.htm

132 Promotion and Protection of Investment Bill, following a Cabinet decision of the South African government in July 2010 to withdraw from South Africa's bilateral investment treaties.

133 Luke Eric Peterson, 'India invites comments on draft model investment treaty; text offers radical departure, and calls to mind Norway's past efforts at revision', *International Arbitration Reporter*, 24 March 2015

