NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Foreign Affairs, Defence and Trade Committee

on the

Proposed Transpacific Partnership Agreement

P O Box 6645
Wellington
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1. Main points

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1.2. The TPPA is structurally biased towards commercial interests. The needs of commerce come first, and other vital matters that concern our community come second: among them the needs for health, safety, human rights including democratic and labour rights, the environment, cultural values and economic development.

1.3. The TPPA is an agreement of the 1980s and 1990s. If it was truly a “21st Century Agreement” as proponents like to say, it would address or accommodate the big issues of the 21st century. These include reversing growing inequality, combating climate change (and the deteriorating environment more generally), preventing financial crises, stopping the tax avoidance occurring on an enormous scale

internationally by wealthy individuals and corporations, and stemming the erosion of privacy, civil and labour rights. The TPPA either ignores these or takes its member countries in the opposite direction.

1.4. International commerce agreements are too invasive of domestic policy space to be negotiated excluding all bar a select few. Consultation was inadequate by any reasonable standards, and National Interest Analyses should be conducted by independent experts. We urge MFAT and the Government to radically revise their approach to both content and process of treaties such as the TPPA to fit the needs of working people in the 21st century.

1.5. The economic evaluations of the agreement have many weaknesses and the one commissioned by MFAT is unable to answer some of the most important questions such as the effects on employment and income inequality. There is strong evidence that there can be long-lasting negative impacts on employment and increased inequality. The claimed gains are very small and even at that level are not credible. They are counting desirable regulation only as costs to business. The evaluations do not count the costs of the agreement to New Zealand, nor the loss of desirable economic development options.

1.6. The gains from goods trade are disappointingly small. We call for a clear statement as to whether New Zealand could prevent environmental dumping should its climate change countermeasures become effective.

1.7. The Investment and Financial Services chapters expose New Zealand's economy to further risk from financial crises but make it more difficult to use policies that would militate against that risk, such as controls on capital movements which are increasingly in use internationally.

1.8. The Investment chapter further reduces our ability to ensure foreign investment in New Zealand is of good quality through performance requirements or through the Overseas Investment Act. It prevents new regulation outside the current structure of that Act, such as to require approval for strategic assets or residential properties.

1.9. We strongly oppose the Investor State Dispute Settlement (ISDS) provisions which empower large international investors at the expense of working people. One of many aspects that concern us is that ISDS could be used against labour and other human rights. Minor improvements do little to repair the many problems of ISDS, and it is extended to contracts between an investor and the government. There is

increasing international resistance to ISDS and it has no economic justification. It does not belong in a 21st Century agreement.

1.10. Investors from China have their rights extended to the establishment phase of investment by the TPPA through their Most Favoured Nation entitlement. This includes seeking regulatory approvals under the Overseas Investment Act. Arguably they will have the right to use ISDS against decisions under the Overseas Investment Act.

1.11. We have numerous concerns regarding the Cross-border Trade in Services chapter and in the exceptions New Zealand has scheduled for non-conforming measures.

1.12. We have concerns that the chapter on Labour Mobility which allows "Installers and Servicers" unrestricted entry to New Zealand will lead to further incidents like the Chinese maintenance workers brought in from China to work on rail rolling stock in inferior conditions and paid less than minimum New Zealand standards, over which MBIE took no action taking the view that they were not subject to New Zealand labour law. We seek assurance that these provisions will not be misused to avoid hiring local workers, nor to undercut local wages and conditions, nor to deny rights under New Zealand laws including the right to join any applicable collective employment agreement. We also seek assurance that action will be taken by MBIE to test whether local workers could have done the work, and to ensure that the temporary workers are employed under the conditions we describe.

1.13. We are concerned that Chapter 15: Government Procurement restricts the government's ability to use its purchasing to assist the growth of local firms and economic development. We seek clear assurances that the Government Procurement Chapter would not prevent future governments using procurement contract conditions to raise employment standards such as to raise health and safety and employment conditions above the legal minimum (including paying a Living Wage) and require responsible contracting behaviour.

1.14. Chapter 17: State Owned Enterprises and Designated Monopolies further restricts policies on assisting local firms through procurement. It effectively locks covered government operations into the problematic commercial straitjacket in the State Owned Enterprises Act. TVNZ would be covered if its revenue grew 15 percent.

1.15. The extension of monopoly protection under the Intellectual Property chapter has no economic justification and is likely to hinder innovation. It entrenches existing commercial advantage with an outdated model of intellectual property.

1.16. We are particularly concerned at the position of the expensive but increasingly important biologic medicines. We present evidence that there is considerable risk that the TPPA will increase the length of monopoly protection of biologics, holding up excessive prices and reducing their availability. At the least, the TPPA will lock in the current monopoly protection, making it impossible to benefit from greater efficiency, biosimilars entering New Zealand more quickly, or improving the law affecting data protection or patent terms.

1.17. The Labour Chapter is weak and ineffective and US experience shows it will in practice be unenforceable. We show that some New Zealand laws are not compliant with the Chapter, including the Warner Brothers amendment to the Employment Relations Act. The government should provide its own assessment of New Zealand's compliance with this Chapter. If it either asserts that the Warner Brothers Amendment is compliant with the Labour Chapter, or agrees that the amendment is not compliant and fails to repeal it, the weakness of the Chapter will have been amply demonstrated.

1.18. The Environment chapter is also weak and ineffective.

1.19. All the public interest exceptions should apply to the entire agreement, and all should to a much greater extent be self-defined and not subject to challenge by other states or investors.

1.20. New Zealand's standard Treaty of Waitangi exception requires revising and strengthening. In any case, Māori were not adequately consulted about the TPPA before it was signed. We join with many Māori in the strong view that the TPPA is an unwanted imposition on their and New Zealand's sovereignty.

2. Introduction

2.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

2.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi

Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

2.3. At the outset of negotiations for the Transpacific Partnership Agreement (TPPA), the CTU took a stance of critical concern. We wanted to be convinced that it was in the interests of working people in New Zealand. As time has passed, we have become increasingly worried at the form the Agreement has taken, and our position has moved to one of full opposition. During the negotiations we regularly expressed our concern both publicly and to officials, called for change, and finally opposed it. In doing so, we have joined with union movements in other TPPA countries, the peak international union body, the International Trade Union Confederation (ITUC), and other like-minded groups and citizens in New Zealand and internationally. This submission calls on the Foreign Affairs, Defence and Trade Committee to recommend that it does not proceed to ratification, and explains some of the reasons why.

2.4. For our affiliates and their members the closed negotiation process has been a major reason for growing suspicion and opposition. It does the Government no credit for it to continue to deny the validity of these concerns. It is common ground that the TPPA is large, complex and of major impact on New Zealand. Claiming that this was the most consulted agreement ever means very little: it is the quality of the consultation that matters.

2.5. As the public debate over the TPPA shows, there is a powerful groundswell of mistrust and opposition among working people and citizens more generally in New Zealand and internationally in the light of their experience of previous international commerce agreements like the TPPA. Radical redesign is overdue, and MFAT and the Government cannot ignore this if they wish to make international agreements that have the support of the New Zealand public and are sustainable politically.

2.6. In this submission, we enlarge on these matters, including our response to the provisions of the agreement.

3. General

3.1. The CTU policy approach on trade matters is to identify possible risks to the New Zealand economy, local businesses and other interests, while also recognising the advantages that some sectors may accrue from enhanced access to markets. However international commerce agreements such as the TPPA go well beyond

trade. Indeed, as tariff barriers disappear these agreements have become much more about vital and sensitive “behind the border” issues that impact heavily on the ability of governments to govern in the interests of their citizens.

3.2. We believe that New Zealand’s international trade and investment policies should be driven by, and be consistent with, our economic and social development policies. For the CTU, any analysis of the relative merits of a commerce agreement such as the TPPA must be based on empirically sound research, properly conducted net benefit analysis including social, environmental and cultural considerations, and include analysis of:

- the impact on social equity;
- the effects on the quality, security and level of employment New Zealand;
- the contribution any proposed agreement will make to sustainable social and economic development in NZ;
- the impact on public and social services;
- adherence to and advancement of core labour standards in the countries in the agreement;
- the genuine application of the Treaty of Waitangi relationship;
- the environmental impact, including climate change.
- the extent to which the agreement is based on principles which will advance equitable trading relations between countries;
- in general, the maintenance of policy space to respond to unforeseen situations, market and regulatory failure and the right of democratically elected governments to implement their mandate.

3.3. For us, the debate about the TPPA is about designing our economic relationships with the rest of the world in a way that benefits working people in New Zealand. That includes maintaining control of our domestic institutions, statutes and regulations so that we can build a better society and environment. We believe the design represented by the TPPA is fundamentally wrong.

3.4. The TPPA is structurally biased towards commercial interests. These interests are sometimes called ‘trade’ but that is in itself one form of commerce and ‘trade’ describes only a very small part of the agreement.

3.5. The justification for the structure is usually made in economic terms, but in this agreement the advancement of commercial interests often does not have even an economic rationale. For example, greater intellectual property rights and investor-state dispute resolution have no economic justification, certainly in New Zealand’s case, but they clearly benefit powerful corporations and investors.

3.6. In the TPPA, the needs of commerce come first, and other vital matters that concern our community come second: among them the needs for health, safety, human rights including democratic and labour rights, the environment, cultural values and national economic development. In general, with some exceptions, these vital matters are permitted only to the extent that they are not a restriction on commerce in the form of trade or investment. This turns on its head the values most people hold. We affirm the importance of economic development but the priority given to it must be in the right balance with other needs and rights.

3.7. This form of international agreement extends and embeds the policies ascendant in the 1980s and 1990s and which popularly go under titles like Rogernomics, Reaganism, Thatcherism, trickle-down economics or neoliberalism.

3.8. Yet such policies failed to achieve their promises: New Zealand’s performance since the mid-1980s when Rogernomics began has been characterised more by a large increase in inequality (one of the largest in the OECD) than by increased economic growth, which has fallen steadily behind the rest of the OECD apart from the post-GFC period. The better post-GFC performance is not because New Zealand’s performance improved but that much of the rest of the OECD remain in recession. The deep crisis hit Europe and the US much harder than New Zealand, though our per capita GDP growth rate is still slower than before the crisis.

3.9. The experience of rising inequality and lacklustre growth (lower than in the post-war period) is international. Further, the deep crisis was caused by financial excesses, poor regulation and high inequality (e.g. Kumhof & Rancière, 2010), themselves a result of the deregulatory neoliberal policies. There are many reasons to judge these policies a failure.

3.10. Despite much having been learned since the 1990s about the faults of such policies – the Global Financial Crisis (GFC) being just one of their outcomes – the TPPA continues a long line of such agreements which with each ratification make these policies more difficult to reverse in order to correct their faults. It is an agreement of the 1980s and 1990s rather than for the 21st century.

3.11. If the TPPA was truly a "21st Century Agreement" as proponents like to say, it would address or accommodate the big issues of the 21st century. These include reversing growing inequality, combating climate change (and the deteriorating environment more generally), preventing financial crises, stopping the tax avoidance occurring on an enormous scale internationally by wealthy individuals and corporations, and stemming the erosion of privacy, civil and labour rights. The TPPA either ignores these or takes its member countries in the opposite direction. We present evidence on this in the remainder of the submission.

3.12. We recognise that one agreement cannot fix all of society's problems. But reversal of these damaging trends should be criteria for setting the terms of a truly 21st century agreement. Provisions should be tested as to whether they help or hinder in achieving this. Reining in the excesses of the finance system and joint action to prevent tax avoidance fit squarely on the agenda of an agreement like this.

3.13. Secrecy and poor processes have been major issues for the public, even among those inclined to support agreements like the TPPA. The predominant impact of such agreements is now domestic ('behind the border'), affecting policy and regulatory approaches that are often the result of preferences that have been democratically and collectively determined. Therefore the negotiation of international commerce agreements should be much more like the process of developing and passing legislation, with open circulation and consultation on drafts of the text.

3.14. International commerce agreements are too invasive of domestic policy space to be negotiated excluding all bar a select few. We would never allow domestic legislation to be treated in this way, and international commerce agreements are more significant than most legislation because of their effect of locking in policies against change by future governments: they are almost like a constitution. Ratification should be by Parliament rather than the Executive (essentially Cabinet).

3.15. In the European Union (EU), the EU Ombudsman has recommended that negotiations should be much more open, including public access to draft texts after

they have been tabled in the negotiations[1]. The European Commission has not accepted all of these recommendations, but has been more open with its releases of text in the TransAtlantic Trade and Investment Partnership (TTIP) negotiations. It has been constrained by the still secretive US approach.

3.16. Good process requires independent impact assessments from a variety of angles, reflecting the potential impact of an agreement on different interests, sectors and public policy objectives. Along with an independent economic impact assessment this requires an independent health impact assessment, as many in the health sector have been calling for, as well as environmental, Māori (including Treaty of Waitangi) and social (including gender).

3.17. The present National Interest Analysis is, at best, a justification by MFAT as to why the Government and negotiators agreed to the provisions we see in the final agreement. It is marking one's own exam paper. It is not, and cannot be expected to be, an independent assessment which tests whether the judgements made in settling and signing the agreement were good ones. New Zealanders deserve nothing less than an independent assessment for an agreement that is as important as the TPPA. The US has a special body, the United States International Trade Commission ("an independent, quasijudicial Federal agency with broad investigative responsibilities on matters of trade"[2]) that carries out such assessments; in New Zealand it may be more practicable to use ad hoc panels of experts, chosen on the advice of all parties in Parliament, who are funded to commission analyses of the agreement.

3.18. The closest we have to an independent assessment from a New Zealand perspective is the series of expert papers (yet to be completed) which were funded by the New Zealand Law Foundation and the NZ Public Service Association[3]. We will refer to these.

3.19. Finally it is important to respond to claims that the consultation over the TPPA has been the most for any agreement. Quantitatively that may be correct (no data has been produced to prove it) but the number of meetings between officials and other parties does not measure the quality of consultation. We and affiliates attended numerous meetings with MFAT and other officials, mostly at our request. With a few honourable exceptions we learned almost nothing we did not already know from the

[1] See http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark
[2] https://www.usitc.gov/press_room/about_usitc.htm, accessed 10 March 2016.
[3] Available at https://tpplegal.wordpress.com/.

exchange. We consistently learned much more from our national and international contacts, the international specialist media and leaks. The MFAT web site pages on the negotiations were often woefully out of date with perfunctory entries giving little more than a summary of the official line. More, and more up to date information could be gleaned from the web sites of MFAT'S Australian counterpart, DFAT, and the US Trade Representative, though even these provided meagre insights into what was going on.

3.20. It is possible that officials reflected our views in their advice and that that flowed through into official positions, but we had and have no way of knowing that.

3.21. At the heart of the weakness is that consultation without sufficient information is a charade. This is a well-tested principle of real consultation, recognised by our courts. In *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671, 675 the Court of Appeal set out the minimum legal basis for consultation as follows:

> 'Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade. The concept is grasped most clearly by an approach in principle. To 'consult' is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter, not uncommonly, can follow, as the tendency in consultation is to at least seek consensus...
>
> ... Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.
>
> Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep an open mind and be ready to change and even start afresh. Beyond that there are no universal requirements as to form. Any manner of oral or written interchange that allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might take years of formal meetings.

3.22. The 'consultation' we experienced failed on most of these criteria. Most importantly, it failed to ensure we were "adequately informed so as to be able to make intelligent

and useful responses". We were then lambasted by the Minister for being uninformed.

3.23. It is vital that New Zealand revises its attitude to release of draft text and to its consultation processes.

3.24. We urge MFAT and the Government to radically revise their approach to both content and process of treaties such as the TPPA to fit the needs of working people in the 21st century.

4. Economic evaluations

4.1. The economic gains from the TPPA are (at best) tiny and the modelling used to justify government claims has many weaknesses in estimating both economic gains and impacts such as employment and distribution of any benefits.

4.2. The government appears to be relying on the economic evaluation commissioned by MFAT (Strutt, Minor, & Rae, 2015) to claim that there will be a $2.7 billion benefit to New Zealand's economy. The assumptions underlying this evaluation are highly problematic, as will be seen in three studies discussed below. Even the $2.7 billion claim is based on only a 0.9 percent one-step increase in the size of the economy over approximately 15 years which is barely measurable in reality.

4.3. The government and MFAT (e.g. Key & McClay, 2016; Ministry of Foreign Affairs and Trade, 2016, pp. 244, 250) show their lack of belief in the study by claiming that the TPPA will increase employment (by how much is never quantified). This is inconsistent with the study which is premised on the assumption that there will be no net effect on employment (p.4) and that all displaced workers will quickly find new jobs. Either the government accepts the findings of its economic modelling or it doesn't. As will be seen below, it by no means follows from an increase in economic output from trade (even if it occurs) that increased employment will follow.

4.4. At least four economic evaluations have been published since agreement was reached on the final text of the TPPA. One was commissioned by MFAT (Strutt et al., 2015), one published by the World Bank (Lakatos, Maliszewska, Ohnsorge, Petri, & Plummer, 2016), a further one by the last two authors of this study (Petri & Plummer, 2016) and one by the Global Development and Environment Institute at Tufts University in the US (Capaldo & Izurieta, 2016). An earlier series of economic evaluations by two of the authors of the World Bank study, Peter Petri and Michael

Plummer of the Peterson Institute for International Economics, a strong advocate of increased globalisation, was thoroughly critiqued by economist Geoff Bertram and environmental analyst Simon Terry in 2014 (Bertram & Terry, 2014) and the World Bank modelling appears to have been modified reflecting some but not all of their criticisms.

4.5. All these evaluations are based on complex mathematical models of the world economy. None would pretend to be perfect: the nature of economies is that they are so complex that simplifying assumptions must always be made. The assumptions made in setting up these models are crucial to understanding the significance of their predictions. The first three use "dynamic computable general equilibrium" (DCGE) models with similar sets of assumptions. The third uses a model developed in the United Nations: the United Nations Global Policy Model (GPM) which has very different assumptions.

4.6. A critique of MFAT's study and of the economic impact of the TPPA has been published as one of a series of expert publications funded by the Law Foundation and the Public Service Association noted above. Authored by Barry Coates, former head of Oxfam New Zealand, well-known business journalist Rod Oram, retired Victoria University economist Geoff Bertram and Auckland Professor of Economics Tim Hazledine, it gives a wide-ranging, authoritative assessment (Coates, Oram, Bertram, & Hazledine, 2016).

4.7. The MFAT study has also been analysed by a former Reserve Bank economist (Harrison, 2016).

4.8. The official MFAT study estimated that New Zealand's production (Gross Domestic Product or GDP) would by 2030 increase by up to 1.4 percent above "business as usual" growth. MFAT reduced that estimate to 0.9 percent by halving the GDP gains estimated from its modelling of "non-tariff barriers" (NTBs) on goods, recognising "limitations" in the modelling. No reason is given for halving the goods NTB estimates rather than, say, cutting them by 25 percent or 75 percent or discarding them entirely as unreliable. No reason is given for *not* similarly cutting the estimated gains from NTBs on services, even though their modelling is if anything more doubtful. In contrast, the World Bank study halves these (Lakatos et al., 2016, p. 226).

4.9. The modellers themselves warn that “appropriate caution” should be taken when considering the results for NTBs (Strutt et al., 2015, pp. 3, xvi). Sources for estimating these gains are acknowledged as being primitive (“first generation”). Even more importantly from a policy perspective, they do not distinguish between genuine barriers (e.g. labelling requirements that unnecessarily increase the cost of packaging) and legitimate measures required for health, safety and other valid public policy purposes (e.g. plain packaging of cigarettes; financial regulations). So-called barriers to international trade can be things we value: food safety regulations, information requirements on labelling, country of original or genetically modified content labelling, training and qualification requirements, government provision of services, state-owned enterprises, restrictions that ensure services are provided by local not for profit organisations, financial regulations, controls on foreign investment, standards of service and many more. Getting rid of these so-called barriers is familiar to us as deregulation – think leaky homes, building products, our terrible record of workplace injury and death, the finance company collapses. Many “barriers” vary between countries for valid reasons and they change with experience. Modelled “GDP gains” from removal of these “barriers” may in fact be losses in public welfare. ‘Benefits’ in these models are from a commercial perspective but not from a public welfare one: not from the point of view of people who face detriment to our health, society and environment. This is an example of the privileging of commercial interests.

4.10. Both Coates et al and Harrison dismiss these NTB calculations. Coates et al do so in similar terms to the above, documenting the weakness of both the data and the modelling, and question the credibility of the size of the estimates: “it is difficult to understand how removal of undefined NTBs could create $1.7 billion per year for New Zealand exporters, almost as large as exports of meat products to the TPPA countries” (Coates et al., 2016, p. 9).

4.11. Harrison goes into more detail. He points out that the degree of protection of New Zealand’s goods trade implied by the NTB levels used for the modelling is not credible. They would make New Zealand the fourth most protected in the TPPA in agriculture and food, almost as high as Japan and much higher than the US. He observes that those countries which rank low on this measure of protection include some of the least developed countries such as Gabon and Trinidad and Tobago, again illustrating that these measures count important and entirely legitimate regulatory measures as “barriers”.

4.12. On services NTBs, Harrison quotes the source of Strutt et al's estimates for tariff-equivalents (Fontagné, Guillin, & Mitaritonna, 2011, p. 39, Table 10) to point out that New Zealand's finance sector is estimated to have a 70.5 percent tariff-equivalent level of protection, similar to Russia. This is absurd given that New Zealand's financial sector is overwhelmingly overseas owned and lightly regulated. Harrison also points out that the modelling includes the removal of "barriers" on provision of government services, which are supposed to be excluded from the TPPA (though we question this below). He also questions the credibility of the estimates on gains from trade facilitation, as do Coates et al.

4.13. Without these questionable additions, the estimated gain is just 0.2 percent of GDP from reduction of tariffs on goods. That it is so small should not be a surprise: Easton (1997, p. 172) found that even at the high levels of protection prior to 1980 the maximum gain from removal of the protection was 0.7 percent of GDP.

4.14. It is what Nobel Prize winning economist and international trade expert Paul Krugman has called the "dirty little secret" of international trade analysis (Krugman, 1995). Earlier this year, he went further (Krugman, 2016):

> But it's also true that much of the elite defense of globalization is basically dishonest: false claims of inevitability, scare tactics (protectionism causes depressions!), vastly exaggerated claims for the benefits of trade liberalization and the costs of protection, hand-waving away the large distributional effects that are what standard models actually predict. …
>
> Furthermore, as Mark Kleiman sagely observes, the conventional case for trade liberalization relies on the assertion that the government could redistribute income to ensure that everyone wins — but we now have an ideology utterly opposed to such redistribution in full control of one party, and with blocking power against anything but a minor move in that direction by the other.
>
> So the elite case for ever-freer trade is largely a scam, which voters probably sense even if they don't know exactly what form it's taking.
>
> Ripping up the trade agreements we already have would, again, be a mess, and I would say that Sanders is engaged in a bit of a scam himself in even hinting that he could do such a thing. Trump might actually do it, but only as part of a reign of destruction on many fronts.

> But it is fair to say that the case for more trade agreements — including TPP, which hasn't happened yet — is very, very weak. And if a progressive makes it to the White House, she should devote no political capital whatsoever to such things.

4.15. Both Harrison and Coates et al argue that even 0.2 percent this is too high. Coates et al point out that the tariff "savings" of $259 million per year by 2030 quoted by government spokespeople assumes that all the benefit of the reductions go to the exporter rather than to consumers or intermediaries in the supply chain. Who benefits depends on competitive conditions. In general (and in MFAT's modelling) perfect competition is assumed, in which case tariffs cuts lead to reduced prices for consumers, and the producers (New Zealand exporters) will see no benefit.

4.16. If in fact producers receive the benefit then MFAT should revise its view that New Zealand "consumers may benefit directly from cheaper imported products" ((e.g. Ministry of Foreign Affairs and Trade, 2016, p. 43). It cannot have it both ways.

4.17. It is worth being clear what even the questionable 0.2 percent means. It is as if your employer came to you and said "I'll give you a 0.2 percent pay rise in 15 years time on condition I have a lot more control over your life from now on." Note that this is 0.2 percent once off, accumulating gradually to that value over 15 years. It's not a 0.2 percent rise each year, year on top of year.

4.18. The World Bank evaluation estimated additional growth of approximately 3 percent by 2030 and Petri and Plummer estimate 2.2 percent. Both have the same failings regarding estimates of goods and services NTBs.

4.19. But even that is not the whole story. Whatever the estimated growth in the economy (whether 0.2 percent or 0.9 percent or 1.4 percent), we cannot presume that each of us will share equally in that growth. The DCGE models used for the MFAT, World Bank and Petri and Plummer estimates are not designed to assess how that growth is shared, nor the effect on employment. It is asserted by MFAT and others that these are the best models for assessing trade effects. That may be so, if taken literally: they assess how patterns of trade may change. But they are not the best for assessing the wider economic, social and environmental impacts because that is not what they are designed to do. It is wrong to use them for that purpose.

4.20. This means they do not estimate answers to some of the most important and controversial questions about the TPPA. Some of the trade impacts that are ignored may reduce the economic benefits.

4.21. For example, the DCGE models assume no transition costs, such as people losing a job and being unable to find another for several years, or only finding a lower paying one.

4.22. In reality, transition costs can be large and long lasting. A recent study by respected US researchers, Autor, Dorn and Hanson (2016) looks at the impact on US employment and wages of the large and rapid increase in imports from China. They review numerous other studies as well as making further estimates. They find, contrary to the standard assumptions on which the DCGE models are based, that the imports created substantial and long lasting unemployment and loss in wages:

> Adjustment in local labor markets is remarkably slow, with wages and labor-force participation rates remaining depressed and unemployment rates remaining elevated for at least a full decade after the China trade shock commences. Exposed workers experience greater job churning and reduced lifetime income. At the national level, employment has fallen in U.S. industries more exposed to import competition, as expected, but offsetting employment gains in other industries have yet to materialize.

And

> recent evidence further suggests that the short and medium-run adjustment costs demanded by large trade shocks are sizable entries in the accounting of gains from trade… trade not only has benefits but also significant costs. These include distributional costs, which theory has long recognized, and adjustment costs which the literature has tended to downplay. (p.3-4)

4.23. This is not simply, as is frequently asserted, a matter of low skilled workers losing jobs at the expense of high skilled workers: unemployment rose for workers at all education levels (p.26), and workers with some college education, as well as high-school dropouts experienced reduced wage growth (p.27) though it impacted the bottom four wage deciles most strongly (p.31). There have also been findings of employment loss for Norway, Spain and Germany (p.26). Autor et al. estimate the net total employment reduction at 2.4 million workers after taking into account direct and indirect effects and offsetting job creation, which they find to be small (p.29-30). For workers affected, the “costs may amount to several months or even several years of a worker’s earnings” (p.34). The effects are driven by lack of mobility between regional economies, leading to strong regional impacts.

4.24. We are not suggesting that the import impact will be nearly as great as that from China, but it demonstrates unequivocally that it is badly mistaken to assume as the

DCGE models do that there will be no transition costs. The US and China are of course different to New Zealand and the other TPPA countries but MFAT's model estimates that real imports will increase more than real exports (Strutt et al., 2015, p. 17, Table 3.3). It is not made clear whether this represents an increase in the trade deficit or solely a terms of trade effect. If it represents an increased trade deficit there could be transition costs which increase the economic and human costs of the agreement. The government has not provided clear information as to where the expected increase in imports, or change in industry structure, will fall and so it is impossible to assess what the impact will be. It is reasonable however to expect that there will be winners, mainly in the agricultural sector where jobs are frequently poor quality (whether judged by pay, conditions or security), and losers elsewhere, possibly in manufacturing if greater agriculture exports and financial inflows raise the exchange rate. The scale will of course be much less than a large increase in imports from China, but if the pattern is similar to that which Autor et al describe, the losers will lose more than the winners will win.

4.25. While advocates like to point to the increase in exports the TPPA is estimated to generate, it will also increase imports. As noted above, MFAT's study estimates that real exports will increase just 0.4 percent as a result of tariff reductions – but real imports will increase over twice as much: 0.9 percent.

4.26. DCGE models either ignore the financial system or assume it has no impact on the rest of the economy, despite international financial flows (for example) having a significant effect on the exchange rate and its volatility, and potentially being destabilising for the economy, as they were during the GFC. The TPPA will encourage greater financial flows through its Finance Services chapter. It would not take a large recession triggered by a financial crisis exacerbated by the financial flows to negate the minimal gains. By way of comparison, if New Zealand's previous GDP growth rates had continued from the end of 2008, roughly when the GFC-induced recession began in New Zealand, GDP would have been 7.6 percent higher by the end of 2010[4].

4.27. The objective of the Financial Services chapter is presumably for finance to grow further in New Zealand. If the current research in the Bank of International Settlements and the International Monetary Fund which suggests there can be "too much finance", is correct, this could reduce economic and productivity growth

[4] Taking the average GDP growth rate from December 1998 (when the last recession ended) to December 2007 when a local recession driven by drought and a fall in commodity prices began.

(Arcand, Berkes, & Panizza, 2012; Cecchetti & Kharroubi, 2012, 2015; Sahay et al., 2015). These researchers came to the conclusion that after a certain point, the size of the financial sector relative to the size of the economy is a drag on economic growth. The BIS report estimated that for New Zealand, the growth in the size of the financial sector since the early 1990s "created a drag of nearly one half of 1 percentage point on trend productivity growth". This is a huge drag given annual productivity growth, as they measured it (GDP per worker), averaged just 1.1 per cent over the period. The IMF researchers affirmed that there could be "too much finance" and hence a need for regulation for both financial development and financial stability.

4.28. If the TPPA's impact increases income inequality, that may slow growth and reduce social cohesion as researchers from both the International Monetary Fund (IMF) and OECD have found (e.g. Berg & Ostry, 2011; Cingano, 2014). One mechanism that could increase inequality is increased international financial integration which international research has identified as increasing income inequality (see for example Furceri & Loungani, 2015; Jaumotte, Lall, & Papageorgiou, 2013; Lazonick, 2015; Stockhammer, 2009); another is the trade channel described by Autor et al.

4.29. If it increases environmental degradation, that also is a cost, even if often unquantifiable. That could happen if it encourages more intensive agriculture or the threat of investor suits through ISDS discourages governments from instituting improved environmental controls.

4.30. The Tufts University study uses a "Global Policy Model" designed to address some of these questions. It estimates transition costs and does not assume zero effect on inequality, nor does it assume zero effect on employment. The study assumes the same effects on trade as Petri and Plummer's earlier study in 2012, and uses them to estimate the effect of the TPPA on inequality, employment and government spending. It estimates that New Zealand's GDP will grow by only 0.8 percent by 2025 above business-as-usual (and actually shrink in the US and Japan).

4.31. It estimates that the share of the income from our economy received by working people (the labour share of income) will reduce by 1.45 percent of GDP by 2025. In other words it estimates that inequality will increase because in net terms, all the benefits of the higher production of the economy – plus some – will go to investors. Corporations will benefit at the expense of working people. The study also estimates that employment will *fall* by 2025 compared to its expected growth without TPPA

due to transition costs, whose existence Autor et al have confirmed. The estimated fall for New Zealand is 6,000 jobs (448,000 jobs in the US). Other people will lose their jobs – but eventually find new ones.

4.32. This emphasises the importance of government assistance for people during these traumatic processes, and industry strategies to ensure new jobs are created which are at least as good as the old ones. But the model estimates that government expenditure will fall because in response to the downward pressures on wages and job loss, governments will try to increase investment by reducing company costs, including company taxes. The government would therefore have *less* capacity to respond to adjustment needs.

4.33. None of these models count the costs. We have already mentioned the adjustment costs of increased globalisation. In addition there are economic and social costs of higher-priced medicines, books and music; the higher risk of financial crises which could more than reverse any small economic gains; the cost of corporations suing the government through ISDS – both legal costs and the impact on our future choices; the cost of remaining in a low value economy; the increased difficulties in putting public health measures into place to combat excess alcohol use and obesity.

4.34. One of the most important costs could be cutting off possibilities for New Zealand's future economic development towards a higher-value model, providing higher wages and less dependence on volatile commodity prices. Defenders of the TPPA and similar agreements will say that increased international competition improves the productivity of New Zealand firms and leads to better economic performance. Our history since tariff reductions began in a big way in the 1980s and 1990s does not provide support for this argument: it led to an increased dependence on low-value commodity exports and a harsh environment for new firms.

4.35. The opposite view, which we share, is that the TPPA will hinder development. In Coates et al, Rod Oram makes a strong argument for this, concluding that "while the TPPA and other trade agreements will facilitate two-way trade and investment, the benefits might be asymmetric. Large-scale overseas companies with close connections to their consumers will likely find it easier to tap into New Zealand resources than small New Zealand companies will find it to develop relationships with overseas consumers... While at face value some of its measures might help New Zealand companies progress in global value chains, this analysis shows there

are powerful counter-arguments that TPPA will keep them at the bottom of value chains, making them and the country poorer for it."

4.36. As soon as we get into this territory, those on both sides of the argument can make cases regarding longer term 'dynamic' effects for which the economic models provide little help. We're back to looking at evidence and experience.

4.37. Business advocates have frequently described one of the purposes of the TPPA as making it easier to do business in international supply chains. In these, a multinational corporation controls an international design, production and distribution process spread across a number of countries. One estimate from the OECD (Lanz & Miroudot, 2011) is that around one third of world trade is between related companies including almost half (48 percent) of US imports. This trade is not "free" in the usual sense, because its price is set by the company controlling the supply chain. It may exploit tax advantages by raising or lowering prices between associated companies in different countries, leading to economic losses in some countries and downward pressure on tax revenue. The *New Zealand Herald's* recent documentation of the tax avoidance by multinationals shows that this is a reality for New Zealand (Nippert, 2016). Advice to the government has been that pharmaceutical companies "game" the entry of biosimilar products using their international supply chains to control the market after the protection of their biologic pharmaceuticals has ended (Ministry of Health, 2014).

4.38. Then Executive Director of the NZ US Council, Stephen Jacobi described the needs of supply chains as follows (Jacobi, 2011): "TPP will also need a strong market integration agenda focused especially on services, investment, behind the border issues and regulatory coherence and co-operation." He said "making it easier to do business … requires attention to the laws, regulations and institutional arrangements that shape daily economic activity." In other words, businesses are advocating for changes to the domestic rules and institutions of New Zealand (and other countries) using the TPPA rather than through our Parliamentary system.

4.39. The UN trade and development agency UNCTAD has repeatedly warned about the risks of supply chains, because benefits depend on where the country is in the supply chain and its degree of control. Countries at the bottom may find themselves locked in to low value, low wage production, taking prices controlled at the top of the chain (UNCTAD, 2014). That is why Rod Oram says they are a game in which the big players win. From the point of view of working people, they intensify international

competition to lower wages through the constant reality or threat of offshoring of jobs, one of the likely reasons for globalisation to be associated with growing inequality in OECD countries (Ebenstein, Harrison, & McMillan, 2015; Elsby, Hobijn, & Şahin, 2013; Jaumotte et al., 2013; Loungani, Wang, Feiveson, & Jalles, 2011; Organisation for Economic Co-operation and Development, 2011).

4.40. So while supply chains may bring efficiencies in production, the benefits may not be seen in all participating countries and they are high risk to working people in a country like New Zealand which is unlikely to be at the top of the chain in a controlling position. Working ourselves up the chain becomes an issue of industry policies to move New Zealand's economy into higher value, higher wage production. But the TPPA makes that more difficult in a number of ways including significantly reducing our ability to use government purchasing to assist local firms to grow by giving them more favourable treatment[5], banning a broad swathe of conditions we might want to put on overseas investors such as those in supply chains to ensure benefits flow to New Zealand from their activities here[6], and weakening the public interest and developmental role of public entities like SOEs which compete with overseas suppliers and investors[7]. As we have seen, they can provide a mechanism for tax avoidance.

4.41. Finally, we need to remember that these numbers provide only estimates. Estimates for the Australia-US free trade agreement before it came into force in 2005 proved to have greatly over-sold it (e.g. Armstrong, 2015a, 2015b). Given the dynamics and membership of the TPPA, this is a useful guide. The New Zealand government claims that its agreements have always turned out better than predicted – yet most of them haven't been properly evaluated taking all effects on trade into account, and they cannot be judged from a few years of experience. But in any case in saying this they are acknowledging this modelling is only as good as the assumptions the modellers make – and that is all-important as we have seen.

5. Goods trade

5.1. The gains from tariff removals from goods trade are disappointingly small. Some of the increases in quotas, such as in Japan, Canada and Mexico, are small and still subject to competition between TPPA countries. The experience of Australian

[5] TPPA Chapter 15: Government Procurement.
[6] TPPA Chapter 9: Investment, Article 9.10.
[7] TPPA Chapter 17: State-Owned Enterprises and Designated Monopolies

agricultural exporters to the US under the Australia-US FTA has been disappointment, because US resistance to imports will not stop with the implementation of the agreement. With US dairy exporters become increasingly competitive, the share of these quotas that New Zealand actually gains may be hard fought.

5.2. As already noted, MFAT's modelling estimates that real imports will increase faster than real exports, though both increases are small. We need much better information on which industries and regions will feel the impact of increased imports and changes in industry structure to be able to judge their impact on the New Zealand economy, employment and wages. This is not necessarily limited to areas where tariffs are being reduced, which the National Interest Analysis lists (p.44) as some items in clothing, textiles, plastics, machinery, electrical machinery, wood products, wooden furniture, steel, iron and aluminium products. The Government should describe what actions it is preparing to take to assist people through changes in their industries to minimise the income losses and dislocation that are possible.

5.3. It is important that the government makes use of the trade remedies against dumping, subsidies and import surges. We previously made submissions on proposals that would weaken the actions taken, expressing our concern.

5.4. We also call for a clear statement as to whether New Zealand could prevent environmental dumping should its climate change countermeasures become effective. New Zealand industry could be damaged if it had to compete against imports that did not have to lower their carbon impact. This may require the use of trade remedies. Concerned at the weakness of internationally binding responses to climate change a number of economists (for a summary, see Bertram (2015)) are now advocating policies that set up effective carbon control measures in individual countries or regions which must be backed by anti-dumping measures with respect to other countries to be effective. The anti-dumping measures in turn act as incentives on exporters from those other countries to reduce carbon impacts regardless of their own government's position.

6. Sanitary and Phytosanitary measures (SPS)

6.1. It is vital that New Zealand's border protections against unwanted pests and diseases be maintained. We are concerned that a risk-based approach encouraged by the SPS chapter lowers standards when risks are judged to be low. Even though

the appropriate level of protection may be set, great care must be taken that narrow commercial interests do not have a disproportionate influence in making judgements on those risks.

6.2. Protection should not be compromised by excessive pressure on border control processing times for narrow commercial reasons.

6.3. We are also concerned that the precautionary principle, particularly with regard to newly identified or discovered human and animal diseases and threats to the environment must be adhered to. Absence of evidence should allow New Zealand to proceed with caution rather than have a bias towards continuing commercial transactions. The precautionary principle (as described by the WTO) states[8]:

> Member countries are encouraged to use international standards, guidelines and recommendations where they exist. When they do, they are unlikely to be challenged legally in a WTO dispute. However, members may use measures which result in higher standards if there is scientific justification. They can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, not arbitrary. And they can to some extent apply the "precautionary principle", a kind of "safety first" approach to deal with scientific uncertainty. Article 5.7 of the SPS Agreement allows temporary "precautionary" measures.

6.4. Commercial interests should not have any ability to influence the lowering of our high border control standards.

7. Technical Barriers to Trade (TBT)

7.1. We would be concerned if this added to barriers to identifying country of origin.

7.2. We would also be concerned if it was a barrier to regulations on labelling for health purposes, as with tobacco packaging.

8. Investment – General

8.1. Investment is important for any economy. High quality investment which raises productivity, creates well paid jobs, introduces and uses new knowledge, technology and skills – in short adds to social welfare and equity – may be welcomed. Unfortunately there are many problems in an international context which agreements like this must recognise.

[8] https://www.wto.org/english/thewto_e/glossary_e/precautionary_principle_e.htm

8.2. Investment is in two forms: Foreign Direct Investment, where control of a firm is intended, and other forms which are essentially financial, either minority (portfolio) shareholdings in companies or financial instruments such as bonds and derivatives. These are covered specifically in two chapters: Chapter 9 (Investment) and Chapter 11 (Financial Services), but other chapters also have an impact. It will take some time for experts to analyse these complex provisions and their interplay before we fully understand their implications. These comments must therefore be preliminary ones.

Financial investment

8.3. The definition of "investment" includes (art 9.1) "(b) shares, stocks or other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments and loans; (d) futures, options and other derivatives". Financial investors such as banks, insurance companies, hedge funds, investment banks, currency traders and investment funds can claim rights under this agreement. Chapter 11 Financial Services introduces further rights.

8.4. Financial forms of investment bring the potential problems of large flows of capital determining the exchange rate, harming export and import-competing industries, and exacerbating rather than helping resolve a crisis in times of financial turmoil. This was amply demonstrated during the Global Financial Crisis requiring in some cases massive government intervention leading to enormous increases in public debt. In New Zealand's case, it required Reserve Bank support for commercial bank liquidity which was imperilled by their previous heavy overseas short-term borrowing, and the government felt compelled to provide retail and wholesale deposit guarantees. Both put our public finances at risk. A number of countries including South Korea and Brazil who were not then encumbered by treaty commitments preventing controls on capital flows used them as an important measure in protecting their economies.

8.5. As a result of this experience and of earlier experience such as Malaysia's effective use of capital controls in response to the Asian financial crisis in the late 1990s, the International Monetary Fund (IMF) has dramatically changed its position on the use of capital flow management. Having previously strongly opposed such policies, it now advocates retaining their use as part of a "toolkit" of policies to deal with the problems of international capital flows (e.g. Blanchard, Dell'Ariccia, & Mauro, 2013). However the acceptance is now increasingly widespread, with many experts (e.g.

Stiglitz & Ocampo, 2008; Gallagher, 2010; UNCTAD, 2014) advocating considerably broader use than does the IMF. For Iceland, capital controls were crucial in preventing an enormously damaging economic crisis brought about by irresponsible banking practices. Many economists favour international financial transaction taxes, which are being brought into use by the European Union and have been used by Brazil for many years. Capital flow management has an important place in preventing crises as well as reacting to one, and in exchange rate management. At the very least it would be extremely unwise to commit to forgo their use forever.

8.6. This is imperilled by art 9.9 (Transfers) in this agreement which prevents such controls on international transactions of capital or profits, dividends, interest etc. While the general exception for Temporary Safeguard Measures (art 29.3: Measures to Safeguard the Balance of Payments) provides a degree of relief (which is more than in some previous agreements), it only allows temporary measures. Their use is limited to emergencies whereas such measures may be useful in maintaining economic and financial stability to prevent crises. Article 29.3 also subjects such actions to challenge by other countries who are party to the TPPA, and by investors under ISDS. Grounds for challenge include the actions exceeding what is "necessary" to deal with the circumstances in the specified emergency situations (art 29.3(3)(c) and (d)) , and that they are being "used to avoid necessary macroeconomic adjustment" (art 29.3(3)(h)). The latter allows other Parties and investors to challenge fundamental economic decisions made by a New Zealand Government.

8.7. Further, the present agreement apparently includes government issued bonds as investments. If there is any doubt as to that, owners of government bonds get that protection by Most Favoured Nation (MFN) treatment, given that South Korean investors in government bonds are explicitly protected under the Free Trade Agreement between New Zealand and South Korea, in art 10.2, part (c) of the definition of Investment. In times of financial crisis either on a national or local government level, debt restructuring is necessary in order to allow a government to recover from a position in which debt has reached unmanageable levels. As with private bankruptcies and similar situations, the process often requires a "haircut" on holders of government debt – that is, agreement is reached with creditors that they will be repaid only a portion of what is owed, usually over a longer term than originally contracted. This allows orderly repayment of debt at a level that will not

cause the extremes of poverty, unemployment, social and economic dislocation and often consequent social upheaval that total debt default can lead to.

8.8. Such orderly arrangements are being undermined by “vulture funds” purchasing at rock-bottom prices the debt instruments of governments after haircuts have been agreed with the great majority of creditors. The vulture funds then use the disputes processes in agreements such as this to demand full payment rather than the reduced payment accepted by other creditors. Not only is this punitive for the people of the country concerned, but it threatens the viability of future debt restructuring processes because creditors are unlikely to agree to forego a portion of their repayments if they believe others may be paid in full. The problem has been highlighted this month by Argentina capitulating to vulture fund demands for US$4.6 billion[9]. (For details regarding the Argentinian situation and its implications for investment agreements see Lavopa, 2015.)

8.9. The present agreement does not prevent this occurring, except for government-to-government loans under art 9.1, footnote 3.

8.10. Global financial risks have not gone away. Many observers consider that they are increasing again, and indeed are higher in some ways than before the Global Financial Crisis. We need to preserve our ability to take a variety of policy measures to prevent and deal with crises rather than find ourselves locked into a deregulatory regime which has proved deeply flawed in recent years.

Foreign Direct Investment

8.11. Foreign direct investment (FDI), where control of a firm is intended, can be desirable if it brings new capital, expertise unavailable in New Zealand, technology, knowledge spillovers to other firms and workers, and linkages into the local economy that multiply its developmental effects. While the international literature refers to these as benefits of foreign direct investment, the question as to whether they are actually present in New Zealand should be evaluated as an empirical matter. In fact they often seem to be weak in New Zealand.

8.12. For example Fabling and Sanderson (2011) find that “foreign firms tend to target high-performing New Zealand companies" but that “positive effects do not extend to productivity growth” unless the acquired company was originally capital-shallow.

[9] See http://www.eurodad.org/stopfeedingvulturefunds

"Overall, the New Zealand research echoes the theoretical ambiguity … – while foreign acquisitions generate potential for positive effects on domestic firms, these positive outcomes are not guaranteed and depend heavily on the motivation of the new foreign parent." They show a fall in capital/labour ratios after acquisition of high capital-intensity firms (Table 6, p.18) which is consistent with asset-stripping and leveraged buyouts which have been common in the last two decades.

8.13. More recently, Maré, Sanderson and Fabling (2014) found that in contrast to international experience, the wage premium for working in a foreign-owned firm is only 2.7 percent to 3.5 percent after taking into account factors such as firm size, location, industry, and the tendency of such firms to hire more highly skilled workers. They comment: "These findings give little support to the argument that foreign firms provide substantial indirect or spillover benefits to domestic firms through human capital accumulation and labour mobility."

8.14. In research published by the Ministry of Business, Innovation and Employment, Doan, Iyer and Maré (2014) looked for increased productivity through three types of potential "spillovers" in the form of local firms learning from their interactions with overseas firms. They concluded: "We find little evidence of substantial positive spillover effects from FDI to local firms' productivity".

8.15. An Inland Revenue Department (IRD) analysis of Management's top-200 non-bank firms (Benge, 2010) shows much higher returns on equity (26% compared to 12%) and assets (16% compared to 10%) to foreign firms, but that was not matched by the firms' export performance. This led IRD to suggest that these firms were concentrated in areas of the economy with location-specific rents – that is, areas not exposed to international competition and with dominant market positions.

8.16. The evidence is therefore that while bringing substantial financial gains to their owners, overseas owned firms do little to improve New Zealand's productivity, technology, knowledge spillovers, linkages and capability, but are likely to lead to an increase in our international liabilities.

8.17. The cost of foreign equity capital is high compared to debt. Balance of Payments data shows the average after-tax return on New Zealand's international equity liabilities between 2001 and 2015 was 10.4 percent, three times the average return on debt of 3.3 percent. FDI received over twice the return of portfolio investment – 7.8 per cent compared to 3.8 per cent, and there was an average return to FDI

equity of 11.9 per cent[10]. In all, the outflow of income on foreign investment in New Zealand exceeds New Zealand's current account deficit, leading to high and growing international liabilities. In addition there are issues of tax avoidance, including thin capitalisation and transfer pricing, which reduce the return to New Zealand. Their realities have been highlighted by recent features on Radio New Zealand and in the *New Zealand Herald* (Campbell, 2015; Nippert, 2016).

8.18. There are also widespread sensitivities around the overseas ownership of New Zealand's land and fishing quota, which should be respected for both economic reasons (including external control of supply chains) and cultural reasons.

8.19. There is therefore good reason to be selective of foreign direct investment.

8.20. This is prevented in the TPPA by art 9.4 (National Treatment) and art 9.10 (Performance Requirements). Article 9.4 (National Treatment) prevents differential conditions being put on overseas firms, ruling out conditions being placed on their activities in New Zealand other than those placed on all firms.

8.21. Article 9.10 (Performance Requirements) explicitly rules out a list of potential conditions such as requirements to export, use local content, or introduce new technology or processes. This ban applies in connection to the "establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment". Similar requirements are already present in other agreements such as the Trade-Related Investment Measures (TRIMS) agreement in the WTO but the constraints were taken to a new level in the Protocol on Investment to the New Zealand-Australia Closer Economic Relations Trade Agreement (art 7) and the 2015 New Zealand-South Korea FTA (art 10.11) which extended the list of banned requirements. The TPPA now extends these even further adding bans on requirements to use local technology or to place certain conditions on licensing of technology. For example, TRIMS applies only to trade in goods, whereas art 9.9 applies to goods and services which are not necessarily traded ones. Art 9.9 outright prevents any requirement to export a given level or percentage of goods or services, whereas the TRIMS ban is only on requiring a relationship between exports and the firm's imports ("trade balancing"). Art 9.9 bans requirements for transfer of a particular technology, production process or other proprietary knowledge to a firm in New Zealand, so promises of introduction of technology cannot be enforced. Even

[10] Calculated from Statistics New Zealand, Balance of Payments 2001-2015, Infoshare series IIP088AA and BOP058AA, www.stats.govt.nz.

on receipt of an advantage such as a subsidy, overseas firms cannot be required to use a given level of domestic content or give preference to locally produced goods (unless it is the subject of government procurement). These restrictions apply to all investors, not only those who are signatory to these agreements.

8.22. An exception has been filed to the requirements of TPPA's articles 9.4, 10.3 (which is National Treatment of Cross-Border Services), 9.10 and 9.11 (which limits conditions placed on Senior Management and Boards of Directors) in Annexes I and II. This allows the government to have approval requirements for takeovers or new investment by overseas investors in similar terms to the current Overseas Investment Act and Fisheries Act. It can maintain existing requirements or adopt new ones. However the exception is limited to current categories of investment: acquisition of 25 percent or more shares or voting power; commencement or acquisition of businesses worth over $200 million (double the current threshold of $100 million which is maintained for government-owned foreign investment in New Zealand), acquisition or control of sensitive land defined in the current legislation, and acquisition of 25 percent or more of a company owning fishing quota or direct acquisition of quota.

8.23. The exception is less useful than it may appear. It applies only at time of acquisition or establishment of a business, not to the ongoing operation. It is within the current limited framework so doesn't include for example the ability to define new classes of overseas investment for regulation such as strategic investment. Classes of land are limited to be those defined in the current legislation so for example purchase of urban residential property is excluded from control, other than by taxation measures.

8.24. The exception also applies only to acquisition of 25 percent or more of "entities" by an investor whereas the Overseas Investment Act applies to the investor and any associated investors. Further, the exception does not prevent investors taking advantage of the Expropriation nor the Fair and Equitable Treatment provisions which are one of the most common bases for claims.

8.25. These weakened conditions are available to investors from South Korea and China under their FTAs' Most Favoured Nation provisions. In particular, the TPPA applies National Treatment to the *establishment* of investments whereas the China-New Zealand FTA excluded establishment from National Treatment (art 138).

8.26. Investors from China therefore have their rights extended to the establishment phase, such as seeking regulatory approvals including under the Overseas Investment Act. New Zealand has obtained an exception in the TPPA (Annex 9-H) which means that Overseas Investment Act approvals or declines cannot be subject to the dispute provisions of the TPPA, which is welcome. However it is arguable by Chinese investors that this exception does not apply in their case because the right to equal treatment on establishment is made available to them in the context of the China-New Zealand FTA, and both agreements exclude dispute resolution procedures from MFN (art 129 of the China-New Zealand FTA, art 9.5 of the TPPA).

8.27. The exemption of the Overseas Investment Act from TPPA dispute provisions does not extend to subsequent decisions under the Act such as to monitor and police conditions placed on investors. These are currently weakly enforced. Nor does the exemption extend to other (pre-)establishment disputes over matters such as obtaining permits or licences from central or local government.

8.28. Conditions may be placed on investors in approval processes under the Overseas Investment Act. Some, such as the good character of those in control of an investment and complying with representations made in the application, are standard (even if weak). There is also power under the Act to revoke approvals in case of fraud, and to force the sale of property in the case of contravention of the Act. The enforcement of these conditions or other actions after the investment has been approved are subject to ISDS. An investor who acquires an investment without approval when approval should have been sought presumably also gains coverage of ISDS, firstly because the Investment chapter does not exclude investments that were made unlawfully, and secondly because the Overseas Investment Act 2005 in s.29(1) states that an investment without consent is not an illegal contract and is not void only because of the lack of consent. These are major concerns.

8.29. The Investment chapter for the first time is extended to “Investment Agreements”, which are contracts between an investor and a central government Ministry or Department or similar level organisation. We note that investment agreements with regard to exploration, extraction, refining, transportation, distribution or sale of land and water or the provision of “correctional services, healthcare services, education services, childcare services, welfare services or other similar social services” are not subject to these provisions. This means that disputes such as Novapay (if it were not with an Australian investor) or where a casino, convention centre, water supply, roading or similar project goes wrong, the investor has the choice of using ISDS

rather than the court system, unlike local contractors. There is no apparent necessity for this. Especially given the unreliability of ISDS processes, it increases the risk faced by governments in letting such contracts, and is a vote of no-confidence in our court system.

Inadequate National Interest Analysis

8.30. The National Interest Analysis justifies liberalisation of investment and greater protection of investors in terms of the interests of New Zealand based investors wanting to invest in other TPPA countries. There is no attempt to quantify the national benefits of this: it is apparently assumed that what is good for the investors is good for New Zealand. Some outward investment may be desirable such as if it allows exports of goods or services that would not otherwise occur, or enables agriculture product suppliers to supply the market year round. However some may be purely for financial reasons, and some may be to send production offshore at the expense of New Zealand jobs. The benefits then go disproportionately to the investors themselves (who may not even be New Zealand residents in the case of a subsidiary of an overseas owned New Zealand based firm) with little benefit to New Zealand workers, or indeed loss of good jobs.

8.31. A case has not been made as to why the State has a role in reducing the risks of any of these investors. Risk is an innate part of any investment.

8.32. There is international evidence that the benefits of outward investment are very unequally distributed. An important international OECD study, “Divided We Stand: Why inequality keeps rising” (Organisation for Economic Co-operation and Development, 2011) finds that outward foreign direct investment increases income inequality, while IMF researchers (Jaumotte et al., 2013) find that in both developed and developing countries, financial globalization including foreign direct investment is associated with increases in income inequality. In both groups of countries, inward FDI is associated with rising inequality, while in developed countries outward FDI also has an additional negative impact.

8.33. Given that the protection given to outward investment is at the expense of many options for future New Zealand governments to pursue policies in the interests of New Zealanders, it is in effect a subsidy of unknown size to what can be presumed to be a relatively small number of outward investors. It is at the expense of many New Zealanders who cannot afford it, and at the expense of New Zealand’s future

economic development. No justification has been given for this other than the benefit to the investors.

8.34. In practice ISDS is available only to large investors because of the cost of ISDS cases. This subsidy therefore privileges a very few large New Zealand based firms, which are not necessarily New Zealand owned.

Definitions of investor and investment too broad

8.35. We are concerned at the very broad definition of investment (art 9.1) which extends to contracts and rights under contracts (such as private-public partnerships or PPPs, construction contracts, and information technology providers such as Novopay), intellectual property rights (such as trade marks on cigarette packs giving them protection under investment dispute procedures as well as disputes under Chapter 18 on Intellectual Property), and licenses, permits and concessions (so that licenses, permits etc issued by local government as well as central government could in their own right be the subject of investment suits if the issuer needed to change their conditions or revoke them). A wide range of local and central government activities and decisions can therefore be challenged under the cover of being an "investment".

8.36. Further, an investor includes persons "attempting to make" an investment (art 9.1), so that for example investors applying for approval to invest under the Overseas Investment Act would have standing to challenge the decisions of Ministers, the Overseas Investment Office, and other local or central government authorities issuing permits etc required for the "attempted" investment, if they are unhappy with the outcome. This is confirmed in the key articles 9.4 (National Treatment) and 9.5 (Most-Favoured-Nation Treatment) which apply to "establishment" of investments as well as established ones. We have discussed the exception for the Overseas Investment Act, its weaknesses, and the additional rights given to investors from China above.

8.37. There are also risks in the lack of definition of "attempting": how substantial must the "attempt" be to gain standing?

Non-Conforming Measures (Annexes I and II)

8.38. The lists of Non-Conforming Measures in Annexes I and II contain some exceptions to the applicability of some articles of the Investment chapter (chosen from National Treatment, Most Favoured Nation, Performance Requirements, and Senior

Management and Boards of Directors). They do not apply to accusations of expropriation or breach of "fair and equitable treatment" which are the basis for most investor claims. We discuss these further under Cross-border Services.

9. Investment – Investor-State Dispute Settlement (ISDS)

9.1. Section B of Chapter 9 provides for Investor-State Dispute Settlement, allowing individual investors to challenge laws, regulations and actions of local and central government where they threaten their interests such as by reducing investors' profits or asset values. The threat of awards of substantial sums against governments stands as a strong disincentive to act in the interests of New Zealand's people when it is contrary to the interests of TPPA investors.

9.2. The threat is even greater because it includes investors from the notoriously litigious USA.

9.3. To be clear at the outset: We call for the deletion of ISDS in this and all other agreements New Zealand enters into.

9.4. ISDS provisions are hugely contentious internationally, and are a focus of international opposition to the TPPA and similar agreements. We detail some of the reasons and expert opinion below.

9.5. A 21st Century agreement should convincingly responding to these concerns by excluding ISDS rather than making minor improvements and significant additions such as increasing its scope to investment contracts.

Increasing international resistance

9.6. Increasing numbers of countries are now resisting or withdrawing from such provisions. Some countries including India, Indonesia and South Africa are withdrawing from such obligations. Brazil has never allowed any and has recently signed bilateral agreements on its own model. Germany and France have opposed its inclusion in the TPPA counterpart between the European Union and the US, the TTIP (Transatlantic Trade and Investment Partnership). As we detail below, the EU is proposing a somewhat improved replacement (an Investment Court System or ICS) that is still widely opposed including by European judiciary. New Zealand and Australia do not have ISDS under CER. Australia refused to have ISDS provisions in its agreements until the current government changed its policy to "a case by case

basis" and the conservative Howard government insisted on no ISDS in the Australia-US Free Trade Agreement. Opposition is therefore a mainstream concern which cannot be dismissed.

9.7. As mentioned, the EU is developing its own alternatives to the arbitration procedures in the TPPA. The EU's proposals (the so-called Investment Court System or ICS) are a significant procedural improvement on the standard procedures including a standing court system with controls over conflicts of interest, precedent and appeal. However even these are rejected by large sections of EU society in the context of the TTIP negotiations including much of their judiciary. In November, the European Association of Judges (EAJ) published a statement on the proposal which rejected the need for ISDS even with these refinements, stating (European Association of Judges, 2015):

> The EAJ does not see the necessity for such a court system. The judicial system of the European Union and its member states is well established and able to cope with claims of an investor in an effective, independent and fair way. The European Commission should promote the national systems for investor's claims instead of trying to impose on the Union and the member states a jurisdiction not bound outside the decisions both of the ECJ and the supreme courts of the member states.

Growing expert critique of ISDS

9.8. There is a growing body of expert opinion questioning both ISDS provision and the rationale for investment agreements. The Australian Productivity Commission commissioned a research report on "Bilateral and Regional Trade Agreements" which was published in November 2010 and included an analysis of ISDS (Australian Productivity Commission, 2010, pp. 265–277). It found that ISDS was ineffective in encouraging investment, quoting a WTO staff research paper (Berger, Busse, Nunnenkamp, & Roy, 2010) that concluded that being party to an agreement with ISDS provisions "had no statistically significant impact on foreign investment into a country". The Commission found that "There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows." Further, "Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions." It concluded: "the Commission considers that Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional

substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system."

9.9. More recently the Australian Productivity Commission has summarised its position regarding ISDS in Australia's agreements including the TPPA (Australian Productivity Commission, 2015, p. 61):

- The inclusion of investor-state dispute settlement (ISDS) provisions in Australia's preferential trade agreements and bilateral investment treaties has become contentious.

  – The provisions depart from national treatment principles by affording substantive appeal rights to foreigners not available to domestic firms, risk impeding domestic regulatory reform (regulatory chill), include safeguards and carve-outs of uncertain effect, lack transparency and have inadequate parliamentary scrutiny.

  – ISDS provisions also expose the Australian Government to potentially large unfunded contingent liabilities dependent on decisions by international arbitration tribunals.

  – Concerns are heightened by increases in the number of ISDS cases internationally.

- Against these concerns, it is not clear ISDS provisions respond to a demonstrable market failure or have been associated with the fostering of foreign investment flows, particularly between advanced economies with transparent and well-functioning legal systems.

9.10. Further (p.80):

> Australia is not the only country to be considering the appropriateness of ISDS provisions with France and Germany both opposed to the inclusion of such provisions in the European Union-United States trade agreement known as the Trans-Atlantic Trade and Investment Partnership which is currently being negotiated. Germany has also indicated it will not ratify the recently signed European Union-Canada agreement (known as the Comprehensive Economic and Trade Agreement) which contains ISDS clauses reportedly on the grounds that:
>
> > It must not be that international investors have rights and influence before arbitration tribunals, which national enterprises don't have in their own country. (ICTSD 2014)
>
> The possible inclusion of an ISDS mechanism in the TPP could similarly allow investors to bring claims for private arbitration directly against governments and potentially undermine the role of domestic courts and freedom of governments to regulate in the public interest. The greater the stringency of specific provisions, the greater the risk of ISDS actions against government as firms have more at stake in relation to government

> decisions that directly or indirectly affect their commercial interests. Similarly, where interpretation of the negotiated text may be subject to dispute, understandings or expectations between TPP members over how these provisions will be interpreted may not necessarily be taken into account by an international tribunal hearing a claim bought by a private company.

9.11. The main United Nations advisory body for developing countries, UNCTAD, also considers ISDS a failure and a risk to countries. In its 2014 Trade and Development Report, it concluded:

> If the reason for establishing ISDS is to respond to failures in national judicial systems that do not provide independent justice or enforce the protection of private property, the appropriate response should be to fix those shortcomings, rather than allowing foreign investors to seek justice elsewhere. The legal framework for international investment based on IIAs [International Investment Arbitrations] and on ad hoc arbitration tribunals has failed so far to provide a legitimate alternative to national courts. As investment disputes often involve matters of public policy and public law, the dispute settlement mechanism can no longer follow a model that was developed for the resolution of disputes between private commercial actors. Instead, it should take into consideration the public interests that may be affected in investment treaty arbitration. (UNCTAD, 2014, p. 146)

9.12. A report produced for the U.K. Department for Business, Innovation and Skills on "Costs and Benefits of an EU-USA Investment Protection Treaty", considering among other things the Canadian experience, concluded: "In sum, an EU-US investment chapter is likely to provide the UK with few or no benefits. On the other hand, with more than a quarter of a trillion dollars in US FDI stock, the UK exposes itself to a significant measure of costs." It proposed either excluding investment protection provisions from the agreement or at least excluding ISDS (Poulsen, Bonnitcha, & Yackee, 2013, pp. 45–46).

9.13. Legal scholars and law makers have expressed grave concerns at the nature of ISDS processes and the challenge that they present to the domestic legal system. In 2012, over 100 jurists from New Zealand and other countries negotiating the TPPA called for ISDS to be excluded from the TPPA[11]. Led by eminent jurists who have held high public office they included retired judges, Sir Edmund Thomas, Retired Judge of the Court of Appeal of New Zealand and Justice Elizabeth Evatt, former Chief Justice of the Family Court of Australia and former President of the Australian

[11] See https://tpplegal.wordpress.com/open-letter/

Law Reform Commission, Professor Margaret Wilson, former Speaker of Parliament, Bruce Fein, the Associate Deputy Attorney General under the Reagan Administration, and leading investment law scholar Professor Sornarajah from Singapore. Lawyer-parliamentarians included Winston Peters, Metiria Turei and Andrew Little. Professor Jagdish Bhagwati, an expert in international trade and former advisor to the World Trade Organisation, also signed.

9.14. Similarly, over 100 US law professors wrote to the US Congress and Administration opposing ISDS saying "ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement. It weakens the rule of law by removing the procedural protections of the justice system and using an unaccountable, unreviewable system of adjudication."[12]

9.15. The Chief Justices of both New Zealand and Australia (French, 2014) have expressed concern, particularly at the implications of ISDS for our respective legal systems. As New Zealand's Chief Justice, Sian Elias observed to colleagues at a World Bar Association Conference (Elias, 2014, p. 3):

> Some of the more intrusive impacts of international law on domestic legal systems are now arising in the context of Investor-State Dispute Settlement processes. The Chief Justice of Australia has recently asked whether such processes are set up as "a cut above the courts?". It has clearly been disconcerting for Australia's highest court that it may be argued that one of its decisions is a breach of a bilateral investment treaty. Given the proliferation of bilateral and multilateral investment treaties and free trade agreements containing Investor-State Dispute Settlement processes, we can expect that experience to become not uncommon.
>
> It is feared that Investor State Dispute Settlement processes will undermine capacity to regulate the banking and finance sector or control environmental impacts. It is conceivable that human rights based determinations of domestic courts may similarly give rise to claims. Quite apart from impact on domestic sovereignty and constitutional issues, these disputes impact potentially upon the rule of law within domestic legal systems.

[12] http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congress-administration-to-protect-democracy-and-sovereignty-in-u-s-trade-deals

“Seriously flawed” arbitration process

9.16. ISDS involves arbitration based on commercial arbitration models, with each party nominating one member of a three-person tribunal and then agreeing on a chair, with various methods to choose the chair if agreement cannot be reached. The tribunals are typically international corporate lawyers or academics who rotate between representing clients at such cases and adjudicating as members of tribunals. Assertions and concerns about conflicts of interest are rife and real. Despite these concerns there is no appeal process nor are tribunals required to respect the precedents of findings in other cases. Indeed, hearings are often closed to all but the tribunal members and the representatives of the claimant investor and respondent government. The present agreement takes a few steps to open the hearings.

9.17. A prominent and experienced international corporate lawyer who has represented many clients in these and other arbitrations, George Kahale, made an extraordinary speech to an international conference on Investment Treaty Arbitration in March 2014 (Kahale, 2014). He said that “the system that we're celebrating here today is seriously flawed, and in my view it needs a complete overhaul… I'm not going to catalogue today for you all of the troubling aspects of investor-State arbitration. I've just selected my Top Ten for your consideration.” He asked “what can we expect from a system where tribunals are not appointed for their training in international law, where many are part-time with other interests not necessarily consistent with their functions as arbitrators, and where arbitrators are dependent upon the interested parties or the appointing authorities for additional appointments?”

9.18. Number 3 on his list was “the predominance of substantive concepts that are susceptible to abuse. The two most glaring examples are MFN [Most Favoured Nation] and FET [Fair and Equitable Treatment]”. “With respect to FET,” he said, “I think most of us intuitively sense that the drafters of these 3,000 [Investment] treaties had little or no idea that FET meant anything other than the minimum standard of treatment under customary international law. Even the United States, Canada, and Mexico were taken aback by the expansive interpretations of some tribunals, which is why they entered into the NAFTA interpretation of FET. As for MFN, I'm less interested in the technical argument regarding the scope of MFN clauses than I am in the entire concept. Quite simply, MFN, in all of its forms, is a dangerous provision to be avoided by treaty drafters whenever possible. As a corporate lawyer, I always try to avoid MFN-type clauses in contracts because of the

difficulty in applying them. The same is true with BITs [Bilateral Investment Treaties]. Should an investor from one country benefit from more favorable treaty provisions granted to investors from another when the latter were granted in exchange for benefits conferred outside of the treaty, such as foreign aid, military or diplomatic support, or guaranteed investment levels that the first treaty partner did not confer? The entire concept is unworkable, and States would be well advised to eliminate it from their treaties."

9.19. He also spoke of the apparent "need for speed" leading to legal errors, the fact that "conduct wholly unacceptable for a federal judge in the United States is commonplace in investor-State arbitration" in terms of ethics, pre-judgement of issues, lack of impartiality and conflict of interest – despite these cases having much higher impact than federal judges would normally hear, and lack of appeals process.

9.20. He condemned the inappropriateness of these processes for the "mega cases" that are now arising: "In my view, it's unacceptable to take a cavalier approach to the application of legal principles with claims that exceed the GDP of many nations. You simply cannot approach such a case with the same rules, the same attitudes, the same system used to deal with a small demurrage claim under a charter party." He gave the example of Occidental Petroleum Corporation v. Ecuador. "There, the tribunal awarded $1.8 billion plus interest, not an insignificant sum for a country like Ecuador. What is interesting about that case is not only that it involved a strong dissent arguing that the majority's reasoning could not be followed from Point A to Point B, but also that the tribunal found it appropriate to reduce compensation by 25 percent. Now, I'm not against the reduction, but I'm scratching my head as to how it was that the arbitrators arrived at that figure. If my calculations are correct, it amounts to about $600 million, which itself would have been one of the largest awards in history. Did the arbitrators just throw darts? Did they sit around negotiating percentages, how about 30 or maybe 40? No, that's too high, let's make it 25." In this case, Ecuador won the underlying issue at stake: "I can only assume that Ecuador was and remains puzzled as to how it is that it can win the underlying issue giving rise to the case and still lose the largest award in ICSID history."

9.21. His final issue was that in his experience, there was a bias against governments in the system.

9.22. Even the right-wing Cato Institute in the US strongly opposes ISDS (Ikenson, 2014). While strongly supporting the TPPA, it sees ISDS as both wrong on its own merits

and a lightning rod for opposition to the TPPA. It has publicly joined forces with opponents such as the Ralph Nader-founded Public Citizen watchdog organisation and prominent US Senator and legal academic Elizabeth Warren in strenuous opposition to ISDS. While agreeing with many of the objections to ISDS explained here, it also argues that

> As a practical matter, investment is a risky proposition. Foreign investment is even more so. But that doesn't mean special institutions should be created to protect MNCs from the consequences of their business decisions. Multinational companies are savvy and sophisticated enough to evaluate risk and determine whether the expected returns cover that risk. Among the risk factors is the strength of the rule of law in the prospective investment jurisdiction. MNCs may want assurances, but why should they be entitled to them? ISDS amounts to a subsidy to mitigate the risk of outsourcing. (Ikenson, 2015)

Cases

9.23. Probably the best known ISDS case in New Zealand is that by tobacco multinational Philip Morris opposing Australia's decision to require plain packaging of cigarette packets to combat smoking. That has now been dismissed, but on technical grounds so the substantial matter has yet to be tested.

9.24. There are now hundreds of such cases. The number has increased exponentially in recent years, boosted in part by a growing number of specialist lawyers including some offering their services on a "no win no fee" basis, encouraging investors to take cases, and private equity funds taking over cases to run for a profit. Cases have impacted on health, medicine patents, environmental laws, standards for toxic chemicals, the recovery from financial crises and privatisations, and human rights. They have overridden not only government actions and laws but the decisions of courts and tribunals constituted to make environmental decisions. The average cost of each of these cases is huge in itself – estimated by the OECD to be US$8 million. But awards range from tens of millions of dollars to several billion as the case quoted by Kahale illustrates. For some countries these are equal to their health or education budgets.

9.25. A case decided in March 2015, illustrates some of these issues. The U.S. company Bilcon wanted to establish an open-pit mine and marine terminal in the Canadian province of Nova Scotia. However the local community strongly objected saying it would threaten marine species, commercial fisheries and traditional indigenous

hunting areas. The central and provincial governments convened a Joint Review Panel to hear the case. It recommended that because the project would breach "community core values", the central and provincial governments should reject the project, which they did.

9.26. Bilcon challenged the decision under NAFTA. The investor-state dispute tribunal found by two to one that Bilcon had been treated unfairly because similar Canadian panels had approved projects subject to conditions. It considered that "community core values" could not be an "overriding factor". It is now considering the level of "compensation" for Bilcon, which has claimed US$300 million. The third member of the tribunal strongly disagreed, saying it was "a remarkable step backwards in environmental protection", and that "a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages".

9.27. Note that this involved both the federal government (Canada) and provincial government (Nova Scotia). Canadian central government, having had a number of such findings against it as a result of subnational government actions, is now looking at ways to recover costs from provincial and local governments. Bilcon could have appealed the Joint Review Panel's decision through the domestic judicial system so the ISDS process effectively gave the investor a further avenue of appeal outside the Canadian judicial system which did not have to take Canadian law into account and was empowered to grant a substantial award which the domestic process would not offer.

9.28. The effect of these cases is not only the direct effects on the government accused of breaching the investment agreement. It is also to "chill" decision-making in both Canada and other governments. In the *Philip Morris* case, the New Zealand Government's delay in implementation of our own plain packaging laws until the case was decided literally cost lives.

Human rights including labour rights

9.29. As mentioned above, the South African government has decided to withdraw from ISDS agreements. It was likely triggered by a case (*Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*) (e.g. Peterson, 2007) taken against it by European mining investors which alleged that South Africa's Black Economic

Empowerment mining regime violated the terms of investment protection treaties. The then new law vested all mineral, petroleum rights with the South African government to enable it to pursue its Constitution's goal of redressing historical, social and economic inequalities, and ensure that mining companies progressed towards social, labour and development objectives set out in a mining charter. The claimants alleged uncompensated expropriation and denial of fair and equitable treatment and, with amazing effrontery, that they were victims of 'discrimination' by being treated less favourably than Historically Disadvantaged South Africans.

9.30. The claim was eventually settled by agreement, but the claimants considered that "had they exhausted the administrative process in South Africa, they would not have received the new order rights on the terms that they have now received them". ISDS had given them leverage against redressing the evils of apartheid.

9.31. The South African government announced in 2010 that it would terminate existing BITs and take a different approach in future. It had many reasons, including that ISDS presented "profound and serious risks to government policy", was ineffective in attracting investment, and that "BITs do not adequately take into account in particular the conditions found in South Africa, the complexities of our socio-economic challenges and the broad objectives of government policy".

9.32. This illustrates the potential of ISDS cases (and indeed all investment cases) to impact upon highly sensitive matters of human rights, in favour of investors. There have been other cases impacting on the human rights of indigenous peoples in Latin America (for example *Burlington Resources vs Ecuador*).

9.33. Human rights authorities have repeatedly warned about the dangers. A recent example is a statement by Alfred de Zayas of the US[13], an expert in human rights and international law who was appointed as the first Independent Expert on the promotion of a democratic and equitable international order by the UN Human Rights Council, in 2012. As well as expressing concern at the secrecy surrounding the negotiation of trade agreements like the TTIP and TPPA, he wrote:

> The expert is especially worried about the impact that investor-state-arbitrations (ISDS) may have on human rights, in particular the provision which allows investors to challenge domestic legislation and administrative decisions if these can potentially reduce their profits. Such investor-state tribunals are made up of arbitrators, mostly corporate lawyers, whose independence has been put into question on grounds of

[13] http://t.co/gMi4N4tUof

> conflict of interest, and whose decisions are not subject to appeal or to other forms of accountability. The apparent lack of independence, transparency and accountability of ISDS tribunals also entails a prima-facie violation of article 14 of the International Covenant on Civil and Political Rights (ICCPR), which requires that suits at law be adjudicated by independent tribunals. It has been argued that ISDS tilts the playing field away from democratic accountability, favouring "big business" over the rights and interests of labourers and consumers.
>
> Prior experience has shown that transnational corporations have sued States on account of their social legislation, labour laws, minimum wage provisions, environmental and health protection measures. Such lawsuits entail a frontal attack on democratic governance, in particular on the exercise of the State responsibility to legislate in the public interest, thus undermining both the commitment to the rule of law and to domestic and international democracy.

9.34. De Zayas emphasised that all States are bound by the UN Charter and thus all international treaties must conform with the Charter, whose provisions "stipulate the principles of equal rights and self-determination of peoples, respect for human rights and fundamental freedoms, sovereign equality of States, the prohibition of the threat of and the use of force and of intervention in matters which are essentially within the domestic jurisdiction of States". Otherwise the treaties and decisions by dispute tribunals would be null and void. He called for a moratorium on on-going negotiations while a review of these issues is carried out.

9.35. As he noted, ISDS impacts can also include labour rights. In a case launched in 2012, *Veolia vs Egypt*, the French group Veolia which has New Zealand operations including Auckland's urban rail service and Papakura's water supply, claimed that "changes to local labour laws – including recent increases in minimum wages – have impacted negatively on the company despite contract provisions designed to buffer the concessionaire from the financial implications of any such legal changes", according to specialist publication *Investment Arbitration Reporter* (1 July 2012). This and other cases (e.g. *Noble Ventures, Inc. vs Romania*, *UPS vs Canada*) make it clear that labour rights and conditions will be accepted by tribunals as matters to be considered. This emphasises the imbalance in power and rights that these systems represent.

No justification

9.36. The original justification for ISDS processes was that some states have corrupt or otherwise unreliable or undeveloped justice systems, unable to deal fairly with

investment disputes. Among the TPPA countries, we do not have ISDS with Australia. New Zealand investors long had a presence in Malaysia prior to formal investment agreements with it without needing the protection of ISDS. The predecessor to the TPPA, the Trans-Pacific Strategic Economic Partnership Agreement (P4) between New Zealand, Singapore, Brunei and Chile which came into force in 2006, had no ISDS (indeed, no investment) provision, so New Zealand has demonstrated its confidence in those countries' justice systems.[14] Mexico, Peru and Vietnam among the other TPPA Parties are the only ones for which there could conceivably be complaints about the reliability of their justice systems. They constitute just 5.9 percent of the combined GDP of the 12 countries[15]. This justification therefore holds little power.

9.37. We appreciate the optional exclusion of the use of ISDS "with respect to claims challenging a tobacco control measure" (art 29.5). We strongly support the government taking up this option, as it has signalled in the National Interest Analysis (p.16). However this exclusion only serves to highlight concerns that ISDS will be used against other health or similar measures taken in the public interest. It leaves open state-to-state challenges, as is happening currently against Australia in the WTO assisted by tobacco companies (Nebehay, 2012), and also leaves open action under ISDS by tobacco companies for other purported causes. The World Health Organisation and researchers have shown how the tobacco companies use many tactics to intimidate governments and delay tobacco control actions, including litigation even if its prospects of success are doubtful (e.g. World Health Organisation, 2012).

9.38. We acknowledge some improvements in the processes around ISDS and some further tightening of the wording intended to constrain dispute panels. However there is considerable expert opinion that these are only marginal improvements, and mixed with changes that give greater power to investors.

9.39. Amokura Kawharu, Associate Professor of Law at Auckland University, and an expert in international trade and investment law, arbitration, and international

[14] Before that, the New Zealand-Singapore Closer Economic Partnership Agreement which came into force in 2001 had an investor-state dispute provision, but no provisions on Expropriation or Minimum Standard of Treatment which give rise to the worst excesses of these processes. For Singapore and Brunei these arrangements were superceded by the ASEAN-Australia-New Zealand free Trade Area which included ISDS, but New Zealand's confidence in their justice systems had already been demonstrated.

[15] International Monetary fund data for 2013.

disputes resolution documents this in some detail and concludes her analysis of the investment chapter (Kawharu, 2015, p. 19):

> The investment chapter adopts many of the now familiar provisions intended to preserve policy space, and adopts several new ones through a patchwork of exceptions, savings, clarifications and annexes. To this extent, the final agreed text is an improvement on the standard policy safeguards that are included in the United States model BIT. At the same time, more safeguards are needed, because the starting point, the United States model BIT, is a pro-investor template. The chapter takes what might be called moderate approaches to safeguards on core issues like expropriation. This must mean something, and tribunals could reasonably determine that a lower level of safeguarding was intended as compared to other recent investment treaties involving New Zealand and other TPPA countries, increasing legal uncertainty and risk. Again, stating the obvious, agreeing to arbitrate claims made by investors from countries with high levels of inwards investment into New Zealand also increases risk. New Zealand's courts should feel somewhat left out in the cold, through the provisions allowing arbitration of contract claims and the lack of any requirement for prior resort to local remedies.

9.40. Lise Johnson and Lisa Sachs, respectively head and director of investment law and policy at Columbia Center on Sustainable Investment at the Columbia Law School and Earth Institute at Columbia University, have responded to assertions by the US Trade Representative that TPP improves ISDS (L. Johnson & Sachs, 2015). After a point by point response they conclude (p.18):

> Overall, the US claims to have made a number of improvements to the ISDS system and investment protection standards included in the TPP. While reforms would of course be welcome, the changes that have been made to the TPP do not address the underlying fundamental concerns about ISDS and strong investment protections; in some cases, the changes represent just small tweaks around the margins, while in other cases, the provisions represent a step backwards. At their core, ISDS and investor protections in treaties establish a privileged and powerful mechanism for foreign investors to bring claims against governments that fundamentally affect how domestic law is developed, interpreted and applied, and sideline the roles of domestic individuals and institutions in shaping and applying public norms. For this reason, the TPP should drop ISDS altogether, or replace it with a new and truly reformed mechanism that addresses the myriad concerns that are still lurking in the TPP.

9.41. Even Luke Nottage, Professor of Comparative and Transnational Business Law at University of Sydney, who in general favours ISDS provisions, has described it as "mostly more of the same" (Nottage, 2015).

9.42. The changes leave in place a privileged dispute system for investors that puts them on an equal legal footing with nation states allowing them to undermine democratic decisions made in the interests of the people of New Zealand.

10. Cross-Border Trade in Services

10.1. We have long standing concerns about the impact of Services provisions on public services and on private provision of social services such as health and education because of the increasingly blurred line between public and private with public contracting out of services to private suppliers and structures like public-private partnerships and charter schools.

10.2. In this regard, it is important to have available policies like economic needs tests and limits of numbers of suppliers, but they are prevented by art 10.5 Market Access unless an exception is scheduled.

10.3. We are also concerned on the Local Presence provision in art 10.6 which prevents New Zealand from requiring a service supplier into New Zealand to maintain a local office. There are times when it is very important that there is someone who customers, clients, students and patients can front up to in New Zealand. Equally, law enforcement is considerably more difficult when there is no responsible individual present in New Zealand.

10.4. On the one hand we are pleased that art 10.8 Domestic Regulation does not impose strict tests of necessity such as whether qualification requirements and procedures, technical standards and licensing requirements are “not more burdensome than necessary to ensure the quality of the service”, or “do not constitute unnecessary barriers to trade in services”. These standards and requirements can include regulatory measures important for safety, health, educational standards, building standards and so on. Commercial interests should not override social needs. Under TPPA Parties need only “endeavour” to ensure this. On the other hand, however, in practice this relative freedom does not apply to New Zealand because under Most Favoured Nation (art 10.4), suppliers can use the provisions of the FTA with S Korea (art 10.8) to demand these constraining tests.

10.5. New Zealand’s Annex II lists sectors or activities which are exempted from certain articles of the Investment and Cross-border Trade chapters. However as noted under Investment, this does not exempt them from some important provisions such as ISDS.

10.6. While there is an exception in Annex II for “any measure for public health or social policy purposes with respect to wholesale and retail trade services of tobacco products and alcoholic beverages”, it does not extend to other products which can threaten health such as high sugar or high fat food and drinks. It applies only to distribution services and not for example advertising which is a likely area for regulation in this context (as it is with tobacco and alcohol). Further, the exception applies only to Market Access in Cross-Border Trade in Services (which covers rules on the number and size of firms, restrictions on volume or value of sales and form of ownership) and not Investment.

10.7. There is no exception that would protect the policy space for rules such as plain packaging whose removal or minimisation of company logos and trademarks was the focus of the ISDS case brought by tobacco multinational Philip Morris against Australia, action in the WTO on intellectual property grounds by certain countries influenced by the tobacco lobby, and a current one by Philip Morris against Uruguay to oppose tobacco plain-packaging laws.

10.8. As the Council of Trade Unions we are especially concerned that there are no exceptions for human rights or labour rights, leaving open the ability of investors to challenge government actions taken to protect or strengthen those rights in ways that affect their profits. The Labour chapter of the agreement (Chapter 19) provides no protection, being in practice unenforceable and placing requirements only on the TPPA governments, not on investors.

10.9. There are general exceptions under art 29.1(3) which are imported from art XIV of the GATS agreement under the WTO. These include measures “necessary” to protect public morals or to maintain public order; to protect human, animal or plant life or health; and to enforce laws or regulations which are not inconsistent with the provisions of this agreement including those relating to safety, fraudulent practices, and the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts. They do not apply to investment which has other exceptions whose strength is debated.

10.10. They apply to Cross-Border Trade in Services and a number of other chapters including Chapter 17 on State-Owned Enterprises. However the test is exceptionally tough to meet, requiring that the measure is “necessary” in addition to requirements about not being arbitrary or unjustifiable discrimination or disguised barriers to trade.

Similar general exceptions have been tested by countries in WTO disputes 44 times. Only one of those cases was deemed to have satisfied all the conditions for the exception to be allowed; 43 failed. Fifteen of them failed on the "necessity" test (Public Citizen, 2015). The exception privileges commerce and cannot be relied on to protect social, environmental and cultural values. They are therefore unreliable. Relying on the exception before an ISDS investment tribunal would be even more precarious.

10.11. Annex II at p.1 allows a range of non-conforming measures for "the provision of public law enforcement and correctional services"; and a list of areas "to the extent that they are social services established for a public purpose". We note however that they are not exempt from art 10.5 Market Access requirements (see our concerns above). The list encompasses childcare, health, income security and insurance, public education, public housing, public training, public transport, central government public utilities, social security and insurance, and social welfare. However as mentioned above it is often not clear where a "public purpose" begins and ends. For example is a traditional private school (such as Christ's College in Christchurch) established for a public purpose? If so, then arguably all privately supplied services are established for a public purpose. The question becomes even more difficult for a charter school which is funded at the same rate or better than a state school.

10.12. We believe that "public", "public services" and their scope should be self-defined by each Party to the TPPA for services in their country and not subject to challenge.

10.13. The exception for water is welcome (Annex II p.3), but it does not apply to market access, performance requirements or ISDS. Conservation of water or maintenance of water quality may require limits on supply of water or number of suppliers.

10.14. There are significant extensions of past GATS commitments at p.14 and Appendix A to Annex II which are exempt only from art 10.5 Market Access. These include a wide range of postal and courier services (p.34), "Language training provided in private specialist language institutions" and "Tuition in subjects taught at the primary and secondary levels, provided by private specialist institutions operating outside the New Zealand compulsory school system" (p.37), Customs Clearance Services (p.38), Maritime Agency Services (p.39), Aircraft repair and maintenance Services (p.39), airport Cargo and baggage handling and Ramp handling services (p.39).

10.15. At p.21 of Annex II is an exemption for “the right to adopt or maintain any measure with respect to the promotion of film and television production in New Zealand and the promotion of local content on public radio and television, and in films.” This appears to be a partial clawback of the right to mandate local content levels in broadcasting that was given away in 1994 in GATS commitments. We wonder whether the right to “promote” local content is sufficient to require local content quotas.

10.16. We support the exemption for cabotage (preference for local shipping between New Zealand ports), fleet operation of New Zealand flagged vessels, and registration of vessels at p. 29 of Annex II.

10.17. However we have not had time to analyse the Annexes fully.

11. Financial Services

11.1. We are concerned at the inclusion of Financial Services in Chapter 11. It starts from the position in articles 11.3 (National Treatment), 11.5 (Market Access for Financial Institutions) and 11.7 (New Financial Services) that the financial sector should not be limited, apparently assuming that as many financial entities, as many financial products and as great a volume of these products as possible is desirable. That ignores evidence that there can be “too much finance” (see 3.27) (as well as too little) for economic, stability and equity reasons.

11.2. Limitless growth in the sector encourages institutions growing “too big to fail” (e.g. Laeven, Ratnovski, & Tong, 2014), too complex to manage or regulate effectively (e.g. Alperovitz, 2012; Boot, 2011) and “too connected to fail” – including international connections – where an institution has so many dependencies that its failure causes a cascade of failures (e.g. Espinosa-Vega & Russell, 2015; Minoiu, Kang, Subrahmanian, & Berea, 2013; Tintchev, 2013). Beyond a certain level, increased competition may not be a good thing if it encourages risky and herd behaviour in order to maintain or increase market share.

11.3. While in theory, prudential and macroprudential regulations should take care of these matters, in practice the greater the complexity and size of both sector and institutions, the more difficult it is to regulate effectively. This is even more strongly the case when some of the entities are overseas owned with the ability to game the system by moving funds between jurisdictions, using special purpose financial instruments and other increasingly sophisticated means.

11.4. Art 11.7 (New Financial Services) additionally requires New Zealand to accept new financial products from an overseas financial entity where they have not actually been banned. While the financial authorities may require authorisation, this places a huge responsibility on those authorities to assess new products which may be complex and risky but with little international experience to learn from. Again, it is a recipe for expansion of size, complexity and risk of the financial sector. It becomes increasingly difficult to effectively regulate.

11.5. Liberalisation of the finance sector, and particularly international financial liberalisation, is also a transmitter of increasing inequality. Some forms of finance may reduce inequality, but these tend to be ones such as access to credit by low-income households, which are less attractive for overseas investors. These findings have been demonstrated in a number of studies (for example, Furceri & Loungani, 2013; International Labour Office, 2013; Jaumotte et al., 2013; Naceur & Zhang, 2016). International liberalisation also allows rapid contagion when financial crises strike, and financial and economic crises in themselves raise inequality and may negate economic benefits from increased goods trade.

11.6. The problems of the finance sector highlighted by the GFC require more regulation rather than more size and complexity, and agreements such as this should focus on reining in the finance sector rather than further liberalisation.

11.7. Our concerns are even more intense given these entities have ISDS available to them, giving already powerful financial institutions such as banks the power to sue the government for regulatory actions.

11.8. We note the exceptions for prudential reasons in art 11.11(1) but we are concerned that the definition of "prudential reasons" is limited. Footnote 10 defines the term as including "the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers as well as the safety, and financial and operational integrity of payment and clearing systems". That does not extend to financial *system* stability (other than the payment and clearing systems) nor to macroeconomic matters which are crucial considerations. The use of this exception is also subject to a test of conforming with the provisions of the TPPA generally.

11.9. Further, when used as a defence in disputes, the exceptions are subject to challenge which must be settled either as a form of state-to-state dispute (art

11.22(2 and 3)) or by the ISDS panel (art 11.22(4)). This may have the effect of limiting the breadth of policies authorities feel they may follow to the orthodoxy of their most powerful TPPA counterparts, rather than designing them in the interests of New Zealanders.

12. Labour mobility

12.1. Chapter 12: Temporary Entry for Business Persons, provides for entry into New Zealand by certain classes of people. Art 12.2(2) states that "This Chapter shall not apply to measures affecting natural persons seeking access to the employment market of another Party, nor shall it apply to measures regarding citizenship, nationality, residence or employment on a permanent basis". However recent experience raises our concerns that this is capable of misuse because the line between temporary entry and "access to the employment market" can be tenuous.

12.2. New Zealand's commitments in Annex 12-A under this Chapter include (p.5):

> **Installers and Servicers** comprise a business person who is an Installer or Servicer of machinery or equipment, in situations when installation or servicing by the supplying company is a condition of purchase of the machinery or equipment. An Installer / Servicer cannot perform services which are not related to the service activity which is the subject of the contract.

They are entitled to "Entry for periods not exceeding three months in any 12-month period".

12.3. The recent case of maintenance workers brought in from China to work on rail rolling stock in inferior conditions and paid less than minimum New Zealand standards raises a number of issues. Such workers would plausibly be provided entry under the above provision. In this example, MBIE took no action, taking the view that they were not part of the New Zealand labour market and therefore not subject to New Zealand labour law. The example shows that this is open to abuse, both in the treatment of the workers and in its potential to be used to undercut the employment of local workers.

12.4. We seek assurance that these provisions will not be misused to avoid hiring local workers, nor to undercut local wages and conditions, nor to deny rights under New Zealand laws including the right to join any applicable collective employment agreement. We also seek assurance that action will be taken by MBIE to test

whether local workers could have done the work, and to ensure that the temporary workers are employed under the conditions we have described.

13. Government Procurement

13.1. We are concerned at the restraints placed on the use of government procurement by Chapter 15: Government Procurement. It restricts the government's ability to use its purchasing to assist the growth of local firms and economic development. Chapter 17 (State Owned Enterprises and Designated Monopolies) also prevents public entities covered by that Chapter from favouring local suppliers.

13.2. A number of provisions enforce this restraint on government procurement including National Treatment and Non-Discrimination in art 15.4(1) and the ban on "offsets" in art 15.4(6). These make it difficult for governments to find a way to prioritise local employment or local or national economic benefits in selecting contracts.

13.3. Art 15.4(6) on offsets states that "no Party, including its procuring entities, shall seek, take account of, impose or enforce any offset, at any stage of a procurement." Under art 15.1,

> **offset** means any condition or undertaking that requires the use of domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade or similar action to encourage local development or to improve a Party's balance of payments accounts;

13.4. Art 15.4(1) also prevents future governments from boycotting supplies from other countries where gross human rights abuses are occurring, as happened with racist apartheid South Africa.

13.5. We sought assurances during the negotiations that the Chapter would not prevent future governments using procurement contract conditions to raise employment standards such as to raise health and safety and employment conditions above the legal minimum (including paying a Living Wage) and require responsible contracting behaviour. We have not received a clear reply.

13.6. Art 15.8 (Conditions for Participation) requires that New Zealand "shall limit any conditions for participation in a covered procurement to those conditions that ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to fulfil the requirements of that procurement". That does not appear to allow other conditions such as quality of employment. There is unlikely

to be help from art 15.3 (Exceptions) because they apply only if the measure is *necessary* and to protect public morals, order or safety; human, animal or plant life or health; etc. Decent employment conditions do not appear to fall into any of those categories, and if they were above minimum requirements could be attacked as not being "necessary" or as constituting "a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties" even if that was not the intention.

13.7. Further, would these "better employer" conditions be regarded as a breach of national treatment or as discrimination when local suppliers are competing with overseas suppliers from low wage countries?

13.8. We note in this regard that art 15.8(5) states:

> For greater certainty, this Article is not intended to preclude a procuring entity from promoting compliance with laws in the territory in which the good is produced or the service is performed relating to labour rights as recognised by the Parties and set forth in Article 19.3 (Labour Rights), provided that such measures are applied in a manner consistent with Chapter 26 (Transparency and Anti-Corruption), and are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between the Parties

13.9. This 'clarification' applies only to minimum standards, and then only to a limited list of them (see our comments on Chapter 19 (Labour)) so recognises only a very limited right. It implies that applying labour conditions, and particularly ones above a very low minimum, could constitute "a means of arbitrary or unjustifiable discrimination between the Parties" and therefore be subject to dispute. That reinforces our concern expressed in paragraph 12.7.

13.10. The Chapter requires further negotiations to expand its coverage including to local government three years after the TPPA comes into force. We would oppose it applying to local government and would expect to be consulted on any expansion.

13.11. The National Interest Analysis (p.69-70) justifies these commitments as providing new opportunities to firms selling to other TPPA governments. This misconceives the advantages of using government procurement for economic and social development purposes. It is not simply that government purchasing is a market for firms; the point is that it is a familiar, reliable, relatively secure purchaser in which

they can be given some advantage in order to gain scale or to develop new products, perhaps with a view to growing their confidence and capability for exporting. It is also a public policy channel for fiscal stimulus and encouraging investment when needed in the economy. Exchanging this for access to overseas government purchasing says to firms “here’s another export market” when the critical point is that they may not be ready to export. It also weakens the government’s ability to stimulate the economy and encourage employment during a downturn.

13.12. In short, it is discarding a powerful economic development tool.

13.13. The National Interest Analysis suggests there are no disadvantages to committing to this Chapter because “New Zealand would not be required to change its current procurement practice or regulatory framework on entering TPP, as the obligations for New Zealand are consistent with New Zealand’s Government Rules of Sourcing”. Put another way, it locks in the current Government’s policy on procurement. Future governments will be blocked from making needed changes to it to retrieve its important policy functions. That this repeats the mistake made in acceding to the WTO’s Agreement on Government Procurement does not make it any more acceptable.

14. State-owned enterprises and Designated Monopolies

14.1. While New Zealand uses the term “State-owned enterprises” in a technical way under the State Owned Enterprises Act, this Chapter applies to any publicly controlled entity with annual revenue over approximately $400 million which is “principally engaged in commercial activities” and which is over 50 percent owned or controlled by the government. The revenue threshold will be adjusted every three years.

14.2. This includes Air New Zealand, KiwiRail, New Zealand Post (including Kiwibank), Genesis Energy, the Lotteries Commission, Meridian Energy, Mighty River Power, Solid Energy and Transpower. Television New Zealand is not far below the threshold at $350 million in 2015. Sovereign wealth funds such as the New Zealand Superannuation Fund are excluded.

14.3. Under the TPPA those entities that are covered are required to adopt a purely commercial approach to buying and selling goods and services, subject to a complex exception when it is delivering on a public service mandate. They are

effectively locked into the commercial straitjacket that is already problematic in the State Owned Enterprises Act (illustrated by the publicly owned electricity sector), removing the ability of future governments to give them public interest objectives.

14.4. They cannot favour local suppliers or purchasers of their goods or services. For example, this would rule out KiwiRail favouring locally sourced rolling stock. It is not clear what it means for an international operator like Air New Zealand which might, for example, like to say it is displaying Kiwi products in all it does.

14.5. They may not receive government support on a non-commercial basis that has an adverse effect on the interests of investors or suppliers from another country in the TPPA. However a service supplied only within New Zealand is excluded. That may cause difficulties when a service is supplied both locally and abroad, such as Air New Zealand and New Zealand Post's international operations. If they trade overseas they are limited in the government funding they can receive, such as share capital or loans, to funds provided on a commercial basis. The government is constrained in helping them grow if they are competing overseas in other TPPA countries. This may force splitting of some of these entities.

14.6. In all, this chapter reduces our ability to use public enterprises in an economic development or public interest role.

15. Intellectual Property and Medicines

15.1. We are not in position to address the complexities of the intellectual property provisions of the TPPA. However the longer monopolies conferred by intellectual property rights are a restriction on trade, not freer trade. These monopolies will be a net negative for New Zealand working people through higher costs and reduced availability of products. Intellectual property law is supposed to be a balance between encouraging invention and the gains to be made by free use of the invention. These changes alter the balance in favour of the corporate owners of most intellectual property rights, such as pharmaceutical and entertainment multinationals. They have fought hard to increase their profits through agreements such as this, and they will be the winners. Working people will be among the losers.

15.2. The model being pursued, particularly in the area of digital products, ignores the realities of technology and tries to fit a intellectual property protection model designed for conventional products to easily copied digital products. It also risks suppressing innovation because much innovation is built on previous inventions.

Locking them away slows future invention. As an article in the *Economist* recently said ("Time to fix patents," 2015):

> The patent system is expensive. A decade-old study reckons that in 2005, without the temporary monopoly patents bestow, America might have saved three-quarters of its $210 billion bill for prescription drugs. The expense would be worth it if patents brought innovation and prosperity. They don't.
>
> Innovation fuels the abundance of modern life. From Google's algorithms to a new treatment for cystic fibrosis, it underpins the knowledge in the "knowledge economy". The cost of the innovation that never takes place because of the flawed patent system is incalculable. Patent protection is spreading, through deals such as the planned Trans-Pacific Partnership, which promises to cover one-third of world trade. The aim should be to fix the system, not make it more pervasive.

15.3. The negative impact on innovation has raised concern among some of the most innovative firms: technology developers. One of the most outspoken has been Jim Balsillie, former co-CEO of Research In Motion, the Canadian developer of the Blackberry smartphone. In recent article in the *Globe and Mail* (Balsillie, 2016), he described many economic development problems in Canada that are familiar to New Zealand: a reliance on low value commodity exports; a failure to commercialise intellectual property; net intellectual property imports. TPPA won't help, he says. In fact it will make things worse:

> Our traditional commodity industries will benefit in the short term from tariff reductions afforded by the TPP. Innovative high-growth Canadian technology companies trading high-margin products, often cloud-based, will not see competitive benefits from this agreement. TPP will further solidify U.S. hegemony over global technology standard-setting because harmonization entails adopting what the large sophisticated market decides. These standards entrench the profit-making abilities of companies who own the IP embedded in them.
>
> Without national strategies for standards and regulations, and little valuable IP, Canada has not positioned itself to be a standard-setter. That's why no one can show how new technology standards harmonization in TPP will increase the bottom line of a specific Canadian technology company.
>
> But technology is no longer the sole purview of high-tech entrepreneurs. It permeates all industries and is the only wealth driver in the 21st-century economy. IP rights are the global currency for innovators in all markets to capture and extract value. This is why companies in traditional sectors are also building IP arsenals. When Canadian farmers

> buy a tractor from John Deere or consumers buy a car from General Motors, they acquire a restricted licence to use proprietary technology. These new business models strengthen corporate control over their customers. Broader and stronger IP ownership laws create a neo-feudal economic structure where large IP owners have ever more unassailable profit-making positions.

15.4. He points out that intellectual property is becoming increasingly important in all forms of product, and says that it may well become the principle form of competitive advantage for businesses and trade. Even if the growing importance of intellectual property were only partially true, there is no doubt about that trend. That means that even if the quantifiable losses from the increased monopoly protection for intellectual property such as patents, copyright and data are relatively small today (and they are significant even at that level) they will grow as a proportion of the economy.

15.5. The essence of the TPPA deal is for countries like Canada and New Zealand to exchange disappointingly small gains in the low-value commodity sectors of the economy which are of decreasing relative economic importance for losses in the dynamic, growing and increasingly ubiquitous sectors of the economy that rely on their intellectual property content and the statutory monopoly given to it for their value. Balsillie writes:

> The Trans-Pacific Partnership agreement is a legal and economic framework that will determine how its signatory nations make their living for the rest of the 21st century. As the world's biggest exporter of intellectual property, the United States can make an even better living off its high-margin intellectual property (IP). Canada, which owns little valuable IP, will continue to make its living by selling low-margin resources and agricultural goods such as beef, canola and softwood lumber, and competing with low-cost manufacturing labour from Mexico, Peru and Vietnam. Global economic opportunities will continue to shift from traditional goods to IP-based goods, and as a large IP importer, Canada's prospects are bleak.

15.6. Local software innovators in the NZRise group have voiced similar concerns. Intellectual property and international trade expert Professor Susy Frankel of Victoria University pointed out the costs to innovation in a recent seminar (Frankel, Kolsky, Anderson, & Jones, 2016).

15.7. Once again, this does not look like a 21st century agreement but one of the last century that entrenches existing commercial advantage with an outdated model of intellectual property.

15.8. Having said that, we recognise that New Zealand's negotiators in the intellectual property area faced some of the heaviest pressure to capitulate to US demands but largely stood firm and deserve praise. Many concerns remain despite that unfortunately.

15.9. We have librarians among our affiliates' members, many of whom are concerned at the longer copyright period and the restrictions on disabling of technological protection measures which sometimes needs to be done. This raises costs and locks up for longer culturally significant New Zealand works for study and performance, despite the extended copyright being of little or no benefit to the owners of the intellectual property rights (e.g. M. Johnson, 2015).

Biologic medicines

15.10. We are particularly concerned at the position of biologic medicines. Biologics are an important new group of medicines like Herceptin and Keytruda which are potentially very effective but very expensive: often tens of thousands of dollars per year but in some cases well over $100,000. Spending on them is growing much faster than other medicines. According to Pharmac, "While global spending on all medicines grew 24 percent from 2007-2012, spending on biologics grew 367 percent over the same period… In New Zealand, expenditure on biologic medicines has increased 48 percent over the last five years. By comparison total expenditure on other medicines decreased 5 percent over the same period." (Pharmac, 2014a)

15.11. In New Zealand, current protection of the test data for such medicines ('data protection') is 5 years from the date on which Medsafe approves them for use. The US was pushing for 12 years and got dragged back to 8 years. Data protection means that lower cost versions of the original biologic ('biosimilars') cannot use the data of the original biologic to demonstrate their fitness to be approved, making their entry to the market prohibitively expensive.

15.12. The compromise in the final hours of the negotiations is seen in art 18.51 where countries were given a choice between 8 years formal data protection and 5 years plus "other measures" and "market circumstances" that would "deliver a comparable outcome in the market".

15.13. The length of protection is crucial. For the period of protection, Medsafe cannot approve lower cost versions of the original biologic ('biosimilars') and the supplier of the original will hold the price high, to the point where it may be unaffordable to

Pharmac and to patients desperate enough to consider paying for it themselves. As Pharmac says: “Biologic medicines are often very expensive due to the lack of competition. Biosimilars will help PHARMAC to increase competition which will reduce costs, improve access for patients to these important medicines, and provide access to other medicines.” (Pharmac, 2014a)

15.14. There is good evidence that biosimilar competition reduces costs. Pharmac estimates it has saved over $5 million a year for each of two biologic medicines, Filgrastim and Infliximab. For Filgrastim, this was achieved by switching to a cheaper biosimilar, and for Infliximab it just threatened to switch when competing biosimilars were close to being approved for treatments in New Zealand. Filgrastim (under the brand name Zarzio) is used to treat low white blood cell counts in people having chemotherapy for cancer. Inflixamab (sold as Remicade) is used to treat certain auto-immune conditions, including rheumatoid arthritis, Crohn’s disease and ulcerative colitis. (Pharmac, 2014b, Pharmac, 2014c, Pharmac, 2015)

15.15. Parties to the TPPA are now hotly debating what the words “deliver a comparable outcome in the market” in art 18.51 means. This was clearly a formula designed to allow all to say they had got what they wanted. In New Zealand’s case we are told that we will not need to change: that biosimilars will be available just as soon as they are now. However that claim is problematic. It appears to assume that even a brief extension of New Zealand’s current 5 years would satisfy the requirement to “deliver a comparable outcome in the market”.

15.16. That is certainly not the view of some powerful US officials. The US Administration is under pressure from Republicans in the US Congress who are threatening to drop support for the TPPA when Congress votes to either accept or reject it unless a number of changes are obtained. One of those demands is ensuring a longer protection on biologics and they see the 5 year option as unacceptable. The leading voice on this is influential Senate Finance Committee Chairman Orrin Hatch who is reported to be working on a proposal to take to the US administration (“Administration, Hatch Hold High-Level Talks On TPP Biologics,” 2016, “U.S. Official Says Hatch’s Specific Proposals For TPP Fixes Nearly Ready,” 2016).

15.17. There is support from within the US Administration for the interpretation that whichever option is taken means an effective 8 years. In November, White House Press Secretary Josh Earnest has argued that “The agreement actually puts in place an effective standard of eight years” (“Earnest Defends TPP Biologics Outcome,

Rejects Call For Renegotiation," 2015). The same message was emphasised by Deputy US Trade Representative Robert Holleyman during a speech to the US Chamber of Commerce. He said "One way is to provide a minimum of at least 8 years of data protection. The other way is to deliver a comparable outcome through both data protection of at least 5 years plus other measures like regulatory procedures or other administrative actions. There are many ways to provide effective market protection that are strong and meaningful. As many of you know, Japan does this through their post-marketing surveillance process, which gives effectively more than 8 years of protection for these drugs." (Holleyman, 2015)

15.18. The likely path for the US to force this is through a process called 'certification'. The US Congress requires certification by the Administration that other countries to the agreement have implemented it as interpreted by the US. The Administration enforces this by refusing to permit implementation of the agreement until all other parties have implemented the agreement to the satisfaction of the US. Art 30.5 (Entry into Force) means that the deal cannot come into force unless the US ratifies it.

15.19. We hope and expect that New Zealand would strongly resist any extension of biologic protection. However because of the efficiency of Medsafe processes, it is difficult to see how it could achieve an effective protection of 8 years (an additional three years) without significantly extending the time taken beyond current practice. Ministry of Health documents recently released under the Official Information Act[16] state that Medsafe approval processes for biosimilars are taking between 1 and 2 years (Ministry of Health, 2015, p. 4). We have examined the period between Medsafe's application and approval dates for four biosimilars, using its Product/Application search facility on its web site[17]. Their approval times were as follows, and show even shorter times than the Ministry of Health advised:

- Binocrit (active ingredient Epoetin alfa): 8 months.
- Nivestim (active ingredient filgrastim): 13 months.
- Omnitrope (active ingredient somatropin): 7 months.
- Zarzio (active ingredient filgrastim): 14 months.

[16] Available at http://www.asms.org.nz/news/asms-news/2016/03/15/longer-wait-higher-prices-likely-life-saving-medicines-tppa/ divided into six parts along.
[17] http://www.medsafe.govt.nz/regulatory/dbsearch.asp

15.20. Extending the protection by 3 years to 8 years would therefore delay biosimilars becoming available by between one and almost two and a half years.

15.21. The Ministry advised that there were two other factors leading to additional delays in biosimilars becoming available, and counted on these plus the above delay in approval to achieve the data protection the TPPA requires:

- Patent protection could be relied on for many but not all biologics as some are not under patent.
- The time it takes biosimilars to be made available in New Zealand by their suppliers.

15.22. The problem with relying on these last two factors is that it could be argued that they would still largely apply if there were 8 years statutory protection so they don't help to degrade 5 year protection to be "comparable" to 8 years, or at most partially. Certainly for the biologics without patent protection the second factor doesn't hold. , This situation is not uncommon because of the nature of these pharmaceuticals and is likely to be in the pharmaceutical companies' minds.

15.23. There is therefore a high risk that despite assurances, the monopoly protection on original biologics will increase, hold up their price and reducing their availability.

15.24. At the least, the TPPA rules will lock in the current protection period and processing time, making it impossible to benefit from the gains of greater efficiency, biosimilars entering New Zealand more quickly, or improving the law affecting data protection or patent terms.

15.25. This move is in the face of the advice from the Ministry that "there is no justification for NZ to move beyond five years of data protection for biologics" (Ministry of Health, 2014, p. 1) and in fact that "given the greater barriers to market for biologics and biosimilars, they may need less protection – not more" (p.2). Further, there is evidence that the big pharmaceutical companies are gaming the system and deliberately delaying entry of biosimilars into the New Zealand market. The Ministry advised that increasing the length of data protection would increase the scope for this to occur (p.16).

15.26. The bottom line is well expressed by the Ministry (p.19):

> Delaying competition in the biologics market will mean that the government will pay higher prices for innovator biologics for longer and savings within the capped

pharmaceuticals budget will therefore be foregone. This will mean either that health gains for patients are foregone, or the government will have to pay more to maintain the same health outcomes, or a combination of both."

16. Labour

16.1. The National Interest Analysis describes the Labour Chapter (Chapter 19) of the agreement as "the strongest outcome on trade and labour contained in any FTA negotiated by New Zealand to date, in terms of both the scope and nature of its provisions". That is correct, but only because previous labour chapters, memoranda of agreement and similar have been so weak. They have been at best agreements to consult, with no ability to enforce and little specificity about what they protected.

16.2. This Chapter is based on the standard US model, such as that in the US-Peru FTA. It has the advantage of being more comprehensive and in theory enforceable, but has grave weakness that make it weak and in practice unenforceable. The TPPA chapter made only minor changes to that model. It stands in stark contrast to the multiple and intensified protections for investors in the rest of the TPPA. The difference symbolises what is wrong with the whole agreement.

16.3. With our colleagues in peak union bodies in other TPPA countries and the International Trade Union Confederation (ITUC) we developed a Model Labour Chapter, also based on the US model. This benefited particularly from the expertise and experience of specialists in the US union movement who have tried to operate existing labour chapters in US international commerce agreements. The Model Labour Chapter[18] was supported by union centres in Australia (ACTU), Canada (CSN and CLC), Japan (RENGO), Malaysia (MTUC), Mexico (UNT), New Zealand (NZCTU), Peru (CATP, CGTP and CUT), Singapore (NTUC), and the US (AFL-CIO).

16.4. As the ITUC said when the TPPA text was made public, comparing it to the Model Chapter:

> The actual TPP labour chapter, while including minor concessions to the unions' concerns, fails to include the most critical amendments that workers in TPP countries had proposed. It does not refer directly to ILO Conventions. The labour chapter still relies on a state-state dispute mechanism which relies entirely on the discretion of TPP governments to prosecute claims against one another; this stands in stark contrast to

[18] Available at http://www.ituc-csi.org/the-union-proposal-for-the-labour?lang=en

> the investor-state mechanisms available to corporations. In the US, such labour cases have taken several years, with the Guatemala case still not completed after seven years. Enhanced protections for migrant workers were omitted from the TPP, just as a crisis in migrant workers' rights is unfolding globally. Proposed mechanisms to enhance industrial relations transnationally were also left out.[19]

16.5. We return to these matters in more detail below.

New Zealand compliance

16.6. One crucial test for us is the impact of the TPPA Labour Chapter on breaches of ILO conventions in New Zealand's labour legislation. If it does not require law change or the Government refuses to change the law to bring it into compliance then it is clear that the chapter is weak and toothless. We note that the National Interest Analysis comments on the Labour Chapter (section 4.20, pp.96-97) gives no analysis of New Zealand's compliance, and no assurance that New Zealand is compliant.

16.7. New Zealand's most egregious breach of international labour conventions is the amendment to the Employment Relations Act (ERA) under pressure from Warner Brothers in October 2010, passed without the usual public consultation under urgency. The Employment Relations (Film Production Work) Amendment Act 2010 (the Warner Brothers Amendment) affects all workers in film and video game production, pre and post production and marketing. Because the definition is industry-based it affects a wide range of workers including, for example, cleaners, cafeteria staff, administrative staff, labourers, technical and production staff, extras, and actors.

16.8. The effect of the Warner Brothers Amendment is as follows. When taking on new workers, an employer can prevent a person from being given the legal status of an employee even if the real nature of their employment relationship is that of an employee. To achieve that, the employer only needs to offer a written employment agreement that does not specify that the worker is an employee. For workers in all other industries[20] it is the "real nature of the relationship" between the worker and employer that determines whether they are an employee (see s.6 of the ERA): the wording of their employment agreements is not final.

[19] See http://www.ituc-csi.org/fears-over-trans-pacific.
[20] Barring real estate agents and sharemilkers who have long been subject to a separate regime.

16.9. Faced with this situation in the film and video game sector, the worker's only choice is either to walk away from the position or accept it on terms of being a contractor (a contract for service), not that of an employee (a contract of service). Given unequal bargaining power (recognised in s.3(a)(ii) of the ERA), the would-be employee can be forced to accept the position as a contractor rather than an employee.

16.10. Not being an employee has many consequences. The worker is no longer entitled to numerous rights and protections under the ERA, nor under other legislation including the Holidays Act 2003 and the Minimum Wage Act 1983. These rights and protections include rights to bargain collectively, strike, a statutory duty of good faith, grievance procedures, and have access to minimum conditions such as the minimum wage, annual leave, and sick leave. The Amendment Act represents a significant reduction of workers' rights in the film and video game industries.

16.11. This clearly breaches at least the following ILO conventions: No 87 (Freedom of Association and the Right to Organise) and 98 (Right to Organise and Collective Bargaining).

16.12. It therefore breaches both the letter and the spirit of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) ('the ILO Declaration') to which under art 19.2(1), Parties to the TPPA affirm their obligations "regarding labour rights within their territories".

16.13. Under art 19.2(2) "the Parties recognise that, as stated in paragraph 5 of the ILO Declaration, labour standards should not be used for protectionist trade purposes".

16.14. Under art 19.3(1) (Labour Rights) each Party agrees to "adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration: (a) freedom of association and the effective recognition of the right to collective bargaining;…".

16.15. According to footnote 3, this obligation "refers only to the ILO Declaration", gravely weakening its effectiveness (see below) but it is still an obligation under art 1(2) of the Declaration expressed as follows:

> … all Members [of the ILO], even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the

> Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining; …

16.16. Even this weaker obligation is clearly breached by the Warner Brothers Amendment to the ERA. It denies workers in the film and video game industries "effective recognition of the right to collective bargaining". It also compromises several rights that are fundamental parts of freedom of association such as the right to strike and various union access rights.

16.17. Art 19.3(2) carries a further obligation:

> Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health

16.18. Once again, this is clearly breached by the Warner Brothers Amendment in that it denies workers in the film and video game industries their rights as to minimum wages, hours of work (including the legislation recently adopted regarding Zero Hours), and those rights available only to employees in occupational safety and health (such as requirements that employers pay for personal protective equipment, and employee rights to receive pay in the first five days of time off under Accident Compensation entitlements).

16.19. Footnote 4 of the Labour Chapter (p.19-2) enforces art 19.2(2) by specifying:

> To establish a violation of an obligation under Article 19.3.1 (Labour Rights) or Article 19.3.2, a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties.

16.20. This is further explained in art 19.4 (Non Derogation) which states that "The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws".

16.21. Affecting trade or investment was an explicit reason for reducing the protections in the ERA for film and video game workers. Film and video game production can take the form of either or both trade in services or investment. For example, the Prime

Minister in announcing the agreement with Warner Brothers to amend the law (and other concessions) described the legislative component as follows:

> "We will be moving to ensure that New Zealand law in this area is settled to give film producers like Warner Bros the confidence they need to produce their movies in this country." (Key, 2010)

16.22. Following the passage of the legislation, the then Minister of Economic Development, Gerry Brownlee, who had been involved in the negotiations, described the amending legislation as follows:

> "The legislative clarification is also a signal to investors throughout the world that New Zealand is a place that values the creative industries, and we expect to see a steady flow of further investment in the years ahead." (Brownlee, 2010)

16.23. The maintenance of the October 2010 Warner Brothers Amendment is therefore a clear breach of this Chapter.

16.24. The government should provide its own assessment of New Zealand's compliance with this Chapter. If it either asserts that the Warner Brothers Amendment is compliant with the Labour Chapter, or agrees that the amendment is not compliant and fails to repeal it, the weakness of the Chapter will have been amply demonstrated.

16.25. It should be noted that the Chapter does not give working people of a TPPA country or the unions who represent them the right to challenge the non-compliance of their own government.

16.26. The Warner Brothers Amendment should be repealed in any case given that it is also in breach of ILO conventions and other international labour agreements New Zealand has in force, such as the New Zealand-Malaysia Agreement on Labour Cooperation, a side agreement to the NZ Malaysia Free Trade Agreement which was signed in 2009 and came into force in August 2010[21]. Other aspects of New Zealand's employment law are also in breach of ILO conventions and should also be brought into compliance.

The labour chapter is weak

[21] See https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/malaysia-fta/

16.27. As the view of the ITUC, quoted in paragraph 15.4 states, this chapter fails on multiple fronts. Labour law expert, Victoria University Professor Gordon Anderson said in a recent seminar (Frankel et al., 2016) that it is weak and ineffectual.

16.28. It does not require membership of, let alone adherence to, international labour conventions, only to the ILO Declaration which is in itself weak in its obligations and limited in its scope. The Chapter does not require countries who are not party to important ILO conventions (such as the US) to join them.

16.29. It places requirements only on the TPPA governments, not on investors or employers, contrasting with the rights that they are given to challenge government measures including ones concerning labour rights. It applies only to central government measures, whereas in federal TPPA countries including the US and Canada, important parts of their labour law are at state or provincial level.

16.30. The minimum standards it mentions are a limited subset of the important ones, excluding for example those relating to wages (in addition to minimum wages), workers' representatives, termination of employment, and social security and retirement. Little of the Chapter is enforceable. As the ITUC noted, for the parts that are enforceable, the experience of our US colleagues, the AFL-CIO, with similar US Labour agreements is that it is impossible in practice to enforce. Workers and unions cannot require or trigger enforcement with respect to the actions of their own governments: it relies on other state parties.

16.31. A detailed critique by the ITUC, *TPP Labour Chapter Scorecard - Fundamental Issues Remain Unaddressed*[22] is appended to this submission.

16.32. Given that the Chapter is based on a US model, it is important to understand how it has worked with regard to the US.

16.33. In November 2014 the United States Government Accountability Office (GAO) published a report into how the US and other parties to its free trade agreements were addressing their commitments on labour (Gianopoulos, 2014). The GAO's one-page summary is appended. While it found some steps had been taken to implement commitments, it also found that "U.S. agencies reported, and GAO found, persistent challenges to labor rights, such as limited enforcement capacity, the use

[22] Available at http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf

of subcontracting to avoid direct employment, and, in Colombia and Guatemala, violence against union leaders."

16.34. It found just five formal complaints made under these commitments, against Bahrain, Dominican Republic, Guatemala, Honduras and Peru. In every case there were long delays in addressing them and "stakeholders expressed concerns that delays in resolving the submissions, resulting in part from DOL's exceeding its review time frames, may have contributed to the persistence of conditions that affect workers and are allegedly inconsistent with the FTAs." The worst example was a complaint filed about conditions in Guatemala in 2008 which has still not been resolved (it is now awaiting a dispute panel decision).

16.35. The GAO's report showed that for any chance of success, considerable resources needed to be put into monitoring and enforcement of compliance. Even then, the weakness of the provisions undermines them.

16.36. The US union peak body, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has analysed the TPPA provisions with this experience in mind (AFL-CIO, 2016), Their report both analyses the current chapter and reports on the labour conditions in TPPA countries. It finds three countries with "critical labor rights violations": Brunei, Mexico, Vietnam and Malaysia which had flagrant examples of breaches of labour rights and other human rights, forced labour and repression. A further three countries – Chile, Peru and Singapore – were of "serious concern". The US itself has failed to accede to important ILO conventions.

16.37. Regarding the TPPA Labour Chapter the AFL-CIO says (p.3):

> Unfortunately, the grim conditions facing workers in TPP partner countries were not effectively addressed in the TPP text or consistency plans. Many commitments to improve labor rights remain vague, and the proposed enforcement scheme relies on the discretion of the next administration. The failure of the TPP to incorporate needed improvements to labor commitments that already have proved themselves inadequate in previous agreements belies the agreement's stated commitment to workers.

16.38. It addresses in detail the way the Chapter fails to remedy the problems found in previous agreements. Regarding the Chapter's enforceability (p.3-4):

> The TPP's supporters note that the TPP's labor provisions are "enforceable." This is the wrong measuring stick. The correct measurement is whether there are sufficient provisions to provide confidence that they will be enforced. The United States has

never imposed trade sanctions or even a fine as a response to labor violations by FTA partner countries. It has only attempted dispute settlement once, against Guatemala. The Guatemala case has been ongoing since 2008 and workers have yet to experience any measurable improvements as a result.1 Despite receiving numerous specific recommendations, informed by experience, on how to turn theoretical enforceability into actual enforcement, the United States Trade Representative (USTR) failed to incorporate these recommendations. For example:

- The TPP fails to require parties to advance to the next stage in the dispute settlement process when an earlier stage proves ineffective (Article 19.15). This failure means that future labor submissions are likely to languish as the Guatemala case has.

- The TPP fails to include deadlines for its public submission process that would require parties to advance TPP submissions they receive in a timely manner (Article 19.9). This failure means that parties will be able to use “administrative delays” to indefinitely defer acting on such submissions, as happened with the Honduras case, in which the petitioners waited for an initial report for two and half years, and formal consultations have still not commenced.

- The TPP fails to clarify the obligations of the parties with respect to International Labor Organization (ILO) standards (Article 19.3). This vagueness as to what the obligation regarding freedom of association and other fundamental labor rights mean makes it less likely the labor obligations will be enforced effectively.

- The TPP fails to include measureable benchmarks or an independent evaluation to determine whether the consistency plans for Vietnam, Brunei and Malaysia are met. This failure means the determination that a consistency plan has been fulfilled and the TPP is ready for entry into force is wholly discretionary. The decision will be subject to immense commercial pressures to prematurely declare fulfillment. Such pressure was brought to bear regarding the Colombia Labor Action Plan (LAP), which also contained positive objectives, but lacked benchmarking criteria or an independent evaluation mechanism. As a result, success was declared prematurely, and Colombia has been out of compliance with its labor obligations since Day One of the agreement. This premature certification of compliance with the LAP apparently has deterred the U.S. government from self-initiating labor consultations with Colombia even though workers continue to be subjected to threats and violence, up to and including murder, in order to discourage them from the free exercise of their fundamental labor rights. There is no reason to expect a different outcome from the TPP plans.

- The TPP contains different dispute settlement mechanisms for foreign investors and working people (Chapters 9 and 19). Foreign investors can bring cases against TPP parties on their own, without having to petition their own government to do so. Working people must petition their governments, and then engage in years-long campaigns to attempt to move the cases through the arduous process. The negotiators demonstrated they know how to create effective dispute settlement mechanisms when they want to (Article 9). Thus, we conclude the failure to equalize the dispute settlement procedures available to workers was purposeful.

16.39. It points out (p.5) that while the Chapter requires parties to have laws requiring "acceptable conditions of work with respect to minimum wages, hours or work and occupational safety and health", it sets no minimum standards for these laws.

16.40. The Chapter's provision regarding trade in goods made with forced labour,

> requires parties only to "discourage" trade in such goods "through initiatives it considers appropriate" (Article 19.6). This language ensures a TPP party can judge for itself whether it is "discouraging" such trade. A TPP country not inclined to do much might, for example, put up a poster alerting customs employees that trade in goods made with forced labor should be discouraged… Thus, this provision provides no assurances that workers would be protected from forced or compulsory labor, including forced or compulsory child labor – and explicitly prioritizes trade obligations over obligations to protect human rights.

16.41. More generally, the impact of the TPPA on labour rights must be considered more broadly than the content of this Chapter. For example, there is nothing to prevent labour measures taken by governments being the subject of challenge under the investment chapter, and in particular through ISDS. As detailed starting at paragraph 8.29, there are cases which provide precedent for this concern. The intensification and spread of supply chains threatens increased offshoring, weakening the position of affected employees. We have presented evidence of the potential effects of increased imports and financial integration on job and wage loss and income distribution. Chapter 15 on Government Procurement may weaken governments' ability to use procurement conditions to raise labour standards.

16.42. The representations of both the NZCTU and the international union movement on these matters in the TPPA were largely disregarded. The profound weakness of the Chapter stands in stark contrast to the great increases in powers given to investors and other corporate entities in the TPPA. The US experience shows clearly that it

will fail to “help level the playing field for New Zealand companies and employees” as claimed in the National Interest Analysis (p.97).

17. Environment

17.1. Like the Labour Chapter, the Environment Chapter is weak and unenforceable. As Simon Terry, Executive Director of the Sustainability Council concluded in his paper assessing *The Environment Under TPPA Governance* (Terry, 2016, p. 4),

> Adopting the lens of the foreign investor when making broad governance changes through the TPPA has sidelined the opportunity to properly integrate management of the economy with management of other domains – such as the environment. The overall result for environmental governance is window dressing on the upside, and serious threats on the downside.
>
> In marked contrast to TPPA chapters that involve core commercial areas such as intellectual property, the environment chapter sets almost no new standards, with each partner country essentially left to set its own.
>
> …
>
> The TPPA’s enforcement provisions are very similar to those first developed for the US/Peru FTA, and it is continued violations of Peru’s obligations under that agreement have become the case study in how enforcement of such environmental protections has failed.

17.2. The chapter (and the agreement) is particularly weak in its response to the key 21st Century issue, climate change. As Terry says:

> The section on climate change contains two impotent paragraphs that do not mention the words “climate change” nor the relevant global treaty, the UNFCCC. The aspirations contained in the newly minted Paris agreement (made under the UNFCCC) are entirely disconnected from what the parties are willing to sign for in a treaty that carries trade sanctions as a penalty for non-performance.

17.3. Associate Professor in the resource and environmental planning programme at Massey University, Christine Cheyne concludes similarly (Cheyne, 2016):

> Overall, the TPP's chapter on the environment is weak. Many provisions are framed as "best endeavour efforts" which can be easily neglected. Strong and binding rules are needed to restore, protect and enhance marine, aquatic and terrestrial biodiversity. It is

likely that the TPP's rules will be too feeble to have an impact and it remains unclear how they will be enforced.

Among its more highly publicised and contentious elements are the investor-state dispute settlement provisions, which allow international companies to sue governments for making decisions that threaten their profits. Recently, Canada and Germany's governments have been sued for placing restrictions on coal burning, and temporarily banning hydraulic fracturing. These are more than just ominous signs that the TPP may end up undermining government efforts to protect the environment.

Promoting sustainable development requires some hard choices to ensure the economic growth goal of the TPP does not compromise the environment. The agreement provides little reassurance in this respect.

17.4. A common theme is that the weak environment chapter is trumped by much more powerful investor rights in the investment chapter and ISDS, along with increased powers throughout the agreement.

18. Exceptions

18.1. We are very concerned that general exceptions for purposes such as health, safety and conservation of natural resources, imported from the GATT or GATS agreements carry high risks of being successfully challenged and so cannot be relied on. They do not clearly and unambiguously protect human rights, including labour rights.

18.2. As noted above, in the TPPA the main exceptions are read in from GATT Article XX (into art 29.1(1)) and Article XIV of the GATS (into art 29.1(3)). They include the adoption and enforcement of measures “necessary to protect public morals” and “necessary to protect human, animal or plant life or health”.

18.3. These are frequently quoted as protections when considering the effect on health or the environment. However they do not apply to the Investment Chapter, and therefore not to ISDS. Wording in parts of that chapter give limited protection but its effectiveness is contested (e.g. Kawharu, 2015).

18.4. Further, the words must be read carefully and in the light of precedent in dispute adjudications. For example, the word “necessary” is a tough test. It means that commercial interests protected by the TPPA are primary and the measures taken to protect (say) health may be no more than necessary to achieve the stated objective.

Measures that might be better 'than necessary' for health are not permitted if they would impede the commercial interests. It allows challenges on the basis that there were alternatives to the policy which would achieve a sufficient outcome in a way that would have less effect on commerce – in other words, it allows litigation of the decisions of public health authorities. Tobacco companies for example frequently insist that public education campaigns are preferable to high taxes or plain packaging, and question the effectiveness of those choices. In addition there are other requirements for the general exceptions to have effect.

18.5. As described at paragraph 9.10, general exceptions have been tested by countries in WTO disputes 44 times. Only one of those cases was deemed to have satisfied all the conditions for the exception to be allowed; 43 failed. Fifteen of them failed on the "necessity" test (Public Citizen, 2015). The exception privileges commerce and cannot be relied on to protect social, environmental and cultural values.

18.6. All the public interest exceptions should apply to the entire agreement, and all should to a much greater extent be self-defined and not subject to challenge by other states or investors.

19. Te Tiriti o Waitangi

19.1. New Zealand's standard Treaty of Waitangi exception (art 29.6) requires revising and strengthening. It relies on the Crown to recognise that a measure is "in fulfilment of its obligations under the Treaty of Waitangi" in order to give it protection. Historically, Governments have been reluctant to acknowledge that rights exist under Te Tiriti and mounting a defence on this basis may be seen as creating an unwanted precedent domestically. Even then it is subject to testing whether the measure is "used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment".

19.2. In any case, Māori were not adequately consulted about the TPPA before it was signed. We join with many Māori in the strong view that the TPPA is an unwanted imposition on their and New Zealand's sovereignty.

19.3. As Jones, Charters and Kelsey state (Jones, Charters, & Kelsey, 2016), the TPPA "conflicts with Māori rights and Crown obligations under te Tiriti", and

The TPPA fetters the sovereignty of New Zealand governments and has the potential to chill their future decisions, including those relating to Māori under te Tiriti o Waitangi.

20. Conclusion

20.1. The TPPA is an agreement of the 1980s and 1990s rather than one that meets the needs of the 21st century. While it is resolutely in the economic sphere, many of its provisions do not have robust economic justifications and instead privilege influential commercial interests against the interests of working people.

20.2. The agreement would have a markedly negative effect on the sovereignty of New Zealand and other signatories. While it can be said that any international treaty has an impact on sovereignty, it is the size and nature of the impact that is important. In the case of the TPPA it is large and unacceptable to the CTU, its affiliates and a large part of the New Zealand population.

20.3. We have provided detailed analysis and evidence for these statements. Ratifying the TPPA is not in New Zealand's interests. We call on the Foreign Affairs, Defence and Trade Committee to recommend that it does not proceed to ratification.

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22. Appendix

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TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD
FUNDAMENTAL ISSUES REMAIN UNADDRESSED

At the beginning of the negotiation process for the Trans-Pacific Partnership (TPP), trade unions in the countries negotiating the agreement proposed labour and dispute resolution chapters which would, if adopted, address their concerns.[1] Unfortunately, the vast majority of those proposals are not reflected in the final TPP text. While acknowledging minor reforms, the TPP labour chapter will not prove to be an effective mechanism to guarantee the full enjoyment of fundamental labour rights and workplace standards. The labour chapter still maintains a state-state dispute mechanism which relies entirely on the discretion of TPP governments to prosecute claims against one another; this stands in stark contrast to the investor-state mechanisms available to corporations.

This document focuses on the major issues raised by the trade unions, their proposals and the final TPP text. In each case, the new TPP text fails to fully address the unions' concerns. In referring to pre-TPP FTAs, we here refer to the US-Peru FTA, on which the TPP labour chapter is based.

I. LABOUR OBLIGATIONS

1. Labour Rights:

Previously, the labour chapter referred to the 'rights as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.' They also included a footnote providing that the obligations 'as they relate to the ILO, refer only to the ILO Declaration.' However, the incorporation of the principles rather than that of the conventions created ambiguity as to the precise rules, which is not cured by referring to the 'rights'. The uncertainty threatens full respect for the fundamental rights and the consistent application of the labour chapter.

Unions therefore urged that the text refer instead to the ILO conventions.

Article 19.3.1 of the TPP maintains the reference to the ILO Declaration, as well as the footnote.

SCORE: NOT ADDRESSED

2. Acceptable Conditions of Work

Previously, governments were merely required to enforce laws concerning "acceptable conditions of work," defined as minimum wage, hours of work and health and safety, to the extent they had them. There was no requirement that such laws exist or confirm to any international standard, nor was there a prohibition on waiving those laws to attract trade or investment.

Unions proposed three amendments. First, they recommended that the definition of acceptable conditions of work be expanded to include wages (including minimum wages), hours of work, occupational safety and health, workers representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement. Second, unions recommended that each party adopt and maintain statutes and regulations with regard to acceptable conditions of work, giving full effect to the ILO conventions and recommendations related to acceptable conditions of work. Third, the unions recommended a strict non-waiver of any labor laws, not just those related to fundamental rights.

1 The full text of the unions' proposal is available on the ITUC website at http://www.ituc-csi.org/the-trans-pacific-partnership-16694

Article 19.3.2 of TPP provides that a party have laws related to 'acceptable conditions of work', rather than merely a commitment to enforce those laws that a party may have—if any. It does not expand the definition of acceptable conditions of work however. Further, it does not require that those laws adhere to any particular international standard, but rather 'acceptable conditions as determined by the party.'[2] Thus, a party may still comply with this text merely by having laws governing hours of work, even if the maximum hours of work are excessive. There is a prohibition against the waiver of acceptable conditions of work, but it is only applicable in a special trade or customs area, such as an EPZ.

SCORE: NOT ADDRESSED

3. Non-Derogation

Previously, the non-derogation language provided that 'no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes and regulations implementing paragraph 1 [fundamental labour rights] in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.'

Unions raised a number of concerns. First, in referring to statutes or regulations implementing paragraph 1, it excludes from the clause "acceptable conditions of work." This allows a country to weaken its wage, hour and health and safety laws to attract trade and investment without sanction. Second, the last clause of the article allows a country to weaken laws related to a fundamental right to attract trade and investment, so long as they are not reduced to a point where they would be inconsistent with the minimum guarantee of that fundamental right. If a country were to have better laws than the international minimum, they could be reduced to the minimum level at which they would comply with international standards without sanction. Finally, unions objected to the fact that non-derogation had to happen "in a manner affecting trade or investment" (E.g. does a worker have to establish that more trade or investment actually resulted from a given waiver or derogation?). The unions proposed therefore a straight prohibition on waiving or derogating from labour laws or offering to do so.

The only amendment in TPP is that it is now prohibited to waive or derogate or to offer to do so with regard to acceptable conditions of work in EPZs.

SCORE: NOT ADDRESSED

4. Enforcement of Labour Laws

Previously, a violation of the enforcement chapter would occur only when there is a sustained or recurring course of action or inaction. Unions were deeply concerned just how much evidence they would be required to submit in order to make a claim under the agreement, particularly given limited resources. Unions recommended this requirement be met by submitting 2 or more cases and that this requirement be waived in the case of an egregious case requiring immediate attention so as not to forestall action. Further, FTAs required that a violation occur in a manner affecting trade or investment between the Parties. This has raised several questions about what is required, e.g., an intent to affect trade or investment and/or a measurable trade-distortion between the parties. It is also unclear if a violation "affects" trade if the failure to enforce the law is in a sector that does not produce goods for export but rather produces inputs for goods that are later exported.

Unions suggested eliminating this clause or at the very least defining it read broadly so that it would reach any violation in any workplace that produces a good or performs a service that enters into international trade between the parties or which is otherwise related to the direct or indirect investment of a party, no matter how small. Further, it should not be required that the petitioner need demonstrate any quantifiable impact of the labor violation on trade or investment. For example, the NAFTA Labour side agreement had no such requirement, instead imposing in the end a penalty based on the volume of trade between the parties.

Article 19.5 of the TPP simply copies the past text with regard to these issues.

SCORE: NOT ADDRESSED

2 Article 19.3.2, fn 5.

5. Forced Labor

Previously, there was a requirement to effectively enforce laws on forced labour (consistent with the ILO Declaration). There was no additional obligation to take measures to combat the trade in forced labour made goods.

Unions therefore recommended an import ban on goods made in whole or in part from forced labor as an additional measure to combat better the exaction of forced labour.

Article 19.6 of the TPP requires countries to 'discourage' the importation of goods made by forced labor or forced child labor, even from countries not a party to the TPP. While progress, it falls short of a clear prohibition on the importation of such goods as urged by trade unions.[3] It remains unclear what action will be required to discourage such imports in order to satisfy the agreement, but the text gives broad discretion to the parties to purse 'initiatives it considers appropriate'.

SCORE: NOT ADDRESSED

6. Migrant Workers

The NAFTA Labour Side Agreement included protection of migrant workers, but no subsequent US FTA has done so. As the TPP includes a number of countries with significant migrant worker populations at risk of abuse, and may include more countries which may accede to the agreement, unions recommended the inclusion of text which would require equal treatment under the law to migrant workers, as well as the adoption of an annex on fair recruitment practices.

Article 9.10 on cooperative activities provides that areas of cooperation may include 'promotion of equality and elimination of discrimination in respect of employment and occupation for migrant workers, or in the areas of age, disability and other characteristics not related to merit or the requirements of employment' and 'protection of vulnerable workers, including migrant workers, and low-waged, casual or contingent workers.' While we support cooperative activities in these areas, they create no obligations on any parties.

SCORE: NOT ADDRESSED

7. Corporate Accountability

Previously, labour commitments were addressed only to states, not to enterprises. To change this, unions had recommended a clause where the parties would give full effect to the OECD Guidelines for Multinational Corporations.

Articl3 19.7 provides that each party shall 'endeavor to encourage enterprises to voluntarily adopt CSR initiatives on labor that have been endorsed or supported by that party.' As states don't typically endorse or support CSR initiatives (other than the OECD Guidelines), one assumes that parties will make an effort to try to get corporations to comply with them. Unfortunately, this is text which impossible to enforce.

SCORE: NOT ADDRESSED

8. Public Submissions

Previously, each party was required to accept submissions concerning issues arising under the labour chapter. However, there were no minimum procedural requirements and in many cases such guidelines were simply not adopted or made publicly available. Unions suggested the adoption of detailed procedural guidelines as to complaints submitted to the contact point.

Article 19.9 of the TPP does require the adoption and publication of procedural guidelines, though they are less prescriptive than recommended.

SCORE: PARTIALLY ADDRESSED

3 This formulation is likely in order to conform to existing US trade law which does not now impose an outright ban in such circumstances. Section 1307 of the Tariff Act of 1930 19 USC 1307 (1930) amended in 2000, prohibits the importation of such goods only to the extent that the US also produces such goods in such quantities to satisfy domestic consumption. The legislation was clearly motivated to prevent unfair competition which would undercut US manufacturing, rather than taking a stand on principle against forced labor.

II. DISPUTE SETTLEMENT

While dispute settlement procedures have improved marginally, unions noted that governments have total discretion as whether to accept and prosecute the complaint and that the process remains far too long to provide an effective remedy. Below are some of the key issues:

1. Governments have total discretion to accept and move complaints through consultations and dispute settlement, even when complaints are completely meritorious. Thus, unions recommended that once a labor complaint has been accepted, the party should proceed through dispute resolution on all meritorious claims until the matter has been fully resolved. Unions urged the adoption of detailed action plans on the basis of complaints, which could serve as the benchmarks for assessing compliance.

2. Past FTAs provide that if a party does not implement the final arbitration report, the parties may enter into negotiations for compensation. However, negotiating the transfer of funds of a mutually agreeable amount of funds from one treasury to another will likely do little to improve labor conditions on the ground. The option to buy one's way out here should be eliminated. Similarly, the agreement allows a party to offer to pay an annual monetary assessment in lieu of suspension of benefits. The assessment is half the value of the suspension of benefits, unless otherwise agreed. This too seems ill suited for labor complaints. Targeted suspension of benefits would have the purpose of encouraging compliance with the law by employers in that sector, and would also likely result in pressure on the government from better performing firms to crack down on the worse actors in the sector. Simply paying off the US would not create the incentives needed to change corporate and governmental behavior, especially if the monetary assessment is not sufficiently high to dissuade future bad behavior.

3. It remains unclear how labour violations may be monetized for purposes of fines or sanctions. Depending on the country and sector, the monetary impact on trade or investment may in fact be low, providing no dissuasive power. There should be established a minimum suspension of benefits, regardless of the number or severity of the cases, which would be high enough to encourage parties to resolve violations of the labor chapter at the initial stages of dispute resolution.

4. Finally, as the enterprises violating the law in the first place are not sanctioned directly, unions urged that arbitrators be provided authority to tailor sanctions to impact firms directly, in addition to governments.

In general, unions suggested the following procedure:

1. The contact point should accept for review any labor complaint that sets forth facts that, if proven, would establish a violation of the labor chapter of the trade agreement. Upon acceptance of the petition, the contact point should conduct a thorough investigation of the complaint, including site visits and interviews with the petitioners, other aggrieved workers, employers and the government. The process should also include a public hearing where evidence with regard to whether the employers violated the labor laws of the party and whether the party failed to effectively enforce those laws can be presented. A report should be issued setting forth findings of fact and law on all of the claims and providing specific recommendations to the employers and the government for resolving the matter. Following its issuance, the parties should engage in ministerial consultations, be based on the recommendations and in consultation with the petitioners. The purpose of the consultations should be to negotiate an action plan with clear timelines and benchmarks for fully addressing the violations raised in the petition.

2. If the matter is not resolved through consultations, or if the plan has not been implemented, a party shall take the matter to arbitration. An arbitration panel comprised of a panel of labor law experts would review the record de novo and issue a final report, including its findings and recommendations. Based on the arbitrators' report, a binding action plan would be issued. The violating party would be given a reasonable and specific timeline to implement the action plan.

3. If a party believes that the plan has not been fully implemented, the same panel of arbitrators would be empaneled to determine if the party did in fact fail to implement the action plan, in whole or in part. If the party has failed to implement the final report, the panel should authorize suspension of benefits in the sectors in which the labor violations occurred. In addition to penalizing the government, arbitrators should be empowered to impose sanctions on employers implicated in the petition who have failed to comply with the arbitrators' report.

SCORE: NOT ADDRESSED

III. TPP INSTITUTIONS

Unions recommended that there was a strong argument that a transnational institution be established to address labour relations in a regional context. Indeed, NAFTA, which covers a tightly integrated North American region, established the Commission for Labor Cooperation. A labor commission, restructured and reformed to address the many lessons learned from the NAALC experience, including political independent staff, would be very valuable, especially as the proposed TPP membership potentially expands to an APEC-wide agreement. The purpose of such a Commission would be to act both as a forum for the social partners to address transnational labor issues and to provide research on, for example, labor law and labor inspection, labor market trends in and among countries, labor migration, industry studies and the like. It was also recommended that it be entrusted with providing regular, independent reports on compliance with the labor chapter of the TPP in order to reduce the political nature of reviews in response to submissions. An advisory council made of up government, labor and business would help to shape and guide the institution.

Under the TPP, no such institution was created. Instead, Article 19.12 of the TPP continues the inter-governmental Labour Council model, with some means to consider the views of the public (Article 19.14). Article 19.14, like past agreements, requires the establishment of national consultative bodies. In the past, Labour Council meetings have not proved effective in providing a full opportunity for workers to raise their grievances or to see them addressed.

SCORE: NOT ADDRESSED

IV. TRANSNATIONAL LABOR RELATIONS

Finally, the unions noted that FTAs do nothing to actually enhance cross-border labor relations, while at the same time promoting the global expansion of the activity of enterprises. Thus, the unions recommended that structures be established that would give employers and workers the ability to address labor relations across supply chains. It was suggested that the TPP parties adopt of language that would allow organized workers employed by a common employer in two or more TPP countries to form a council to address labor relations matters.

The TPP includes no such provision.

SCORE: NOT ADDRESSED

GAO Highlights

Highlights of GAO-15-160, a report to congressional requesters

November 2014

FREE TRADE AGREEMENTS

U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed

Why GAO Did This Study

The United States has signed 14 FTAs, liberalizing U.S. trade with 20 countries. These FTAs include provisions regarding fundamental labor rights in the partner countries. USTR and DOL, supported by State, are responsible for monitoring and assisting FTA partners' implementation of these provisions.

GAO was asked to assess the status of implementation of FTA labor provisions in partner countries. GAO examined (1) steps that selected partner countries have taken, and U.S. assistance they have received, to implement these provisions and other labor initiatives and the reported results of such steps; (2) submissions regarding possible violations of FTA labor provisions that DOL has accepted and any problems related to the submission process; and (3) the extent to which U.S. agencies monitor and enforce implementation of FTA labor provisions and report results to Congress. GAO selected CAFTA-DR and the FTAs with Colombia, Oman, and Peru as representative of the range of FTAs with labor provisions, among other reasons. GAO reviewed documentation related to each FTA and interviewed U.S., partner government, and other officials in five of the partner countries.

What GAO Recommends

DOL should reevaluate its submission review time frame and better inform stakeholders about the submission process. USTR and DOL should establish a coordinated strategic approach to monitoring and enforcement labor provisions. USTR's annual report to Congress should include more information of USTR's and DOL's monitoring and enforcement efforts. The agencies generally agreed with the recommendations but disagreed with some findings, including the finding that they lack a systematic approach to monitor and enforce labor provisions in all FTAs. GAO stands by its findings.

View GAO-15-160. For more information, contact Kimberly Gianopoulos at (202) 512-8612 or gianopoulosk@gao.gov.

What GAO Found

Partner countries of free trade agreements (FTA) that GAO selected—the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) and the FTAs with Colombia, Oman, and Peru—have taken steps to implement labor provisions and other initiatives to strengthen labor rights. For example, U.S. and foreign officials said that El Salvador and Guatemala—both partners to CAFTA-DR—as well as Colombia, Oman, and Peru have acted to change labor laws, and Colombia and Guatemala have acted to address violence against union members. Since 2001, U.S. agencies have provided $275 million in labor-related technical assistance and capacity-building activities for FTA partners, including $222 million for the four FTAs GAO reviewed. However, U.S. agencies reported, and GAO found, persistent challenges to labor rights, such as limited enforcement capacity, the use of subcontracting to avoid direct employment, and, in Colombia and Guatemala, violence against union leaders.

Since 2008, the Department of Labor (DOL) has accepted five formal complaints—known as submissions—about possible violations of FTA labor provisions and has resolved one, regarding Peru (see fig.). However, for each submission, DOL has exceeded by an average of almost 9 months its 6-month time frame for investigating FTA-related labor submissions and issuing public reports, showing the time frame to be unrealistic. Also, union representatives and other stakeholders GAO interviewed in partner countries often did not understand the submission process, possibly limiting the number of submissions filed. Further, stakeholders expressed concerns that delays in resolving the submissions, resulting in part from DOL's exceeding its review time frames, may have contributed to the persistence of conditions that affect workers and are allegedly inconsistent with the FTAs.

Five Labor Submissions Accepted by DOL Regarding Free Trade Agreements

FTA	Year accepted	Alleged violations	Status
Bahrain	2011	Violation of right to freedom of association, discrimination	Open
Dominican Republic	2012	Human trafficking, forced labor, retaliatory firing of workers for union activities	Open
Guatemala	2008	Violation of right to freedom of association, violation of rights to organize and bargain collectively, unacceptable work conditions	Open
Honduras	2012	Violation of right to freedom of association, violations of rights to organize and bargain collectively, child labor	Open
Peru	2011	Failure to comply with labor laws related to collective bargaining	Closed as resolved (2012)

Source: GAO analysis of Department of Labor (DOL) information. | GAO-15-160

In 2009, GAO found weaknesses in the Office of the U.S. Trade Representative's (USTR) and DOL's monitoring and enforcement of FTA labor provisions. In the same year, the agencies pledged to adopt a more proactive, interagency approach. GAO's current review found that although the agencies have taken several steps since 2009 to strengthen their monitoring and enforcement of FTA labor provisions, they lack a strategic approach to systematically assess whether partner countries' conditions and practices are inconsistent with labor provisions in the FTAs. Despite some proactive steps, they generally rely on labor submissions to begin identifying, investigating, and initiating steps to address possible inconsistencies with FTA labor provisions. According to agency officials, resource limitations have prevented more proactive monitoring of all FTA labor provisions. As a result, USTR and DOL systematically monitor and enforce compliance with FTA labor provisions for only a few priority countries. USTR's annual report to Congress about trade agreement programs provides limited details of the results of the agencies' monitoring and enforcement of compliance with FTA labor provisions.