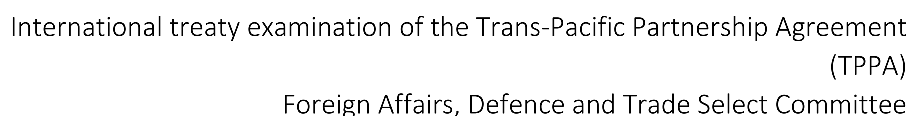

International treaty examination of the Trans-Pacific Partnership Agreement (TPPA)

Foreign Affairs, Defence and Trade Select Committee

## Abstract

The New Zealand government's National Interest Analysis is a poor document for allowing public understanding of the TPPA. It is badly written, poorly structured and lacks important information. The TPPA shifts the balance towards corporate interests and away from the public interest. The arguments that the ISDS regime is modern and sophisticated do not survive close inspection.

By minimizing the role of government and the benefits of a well provisioned public sector in delivering both wealth and human well-being the TPPA would fundamentally damage New Zealand including its people's wellbeing. The opportunities for small and medium enterprises are severely constrained and they would be big losers from the lack of options for local tendering. Well-founded criticism about the TPPA modelling and its likely impacts have not been addressed.

The TPPA's measures to "protect" the public domain are unconvincing and likely to be ineffective. They are weak and subject to a sinking lid. By its actions and policy positions the government is already undermining these meagre protections. The TPPA overturns centuries of judicial practice when there is no evidence of partner countries judicial systems being unfair to business interests.

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## 1. Introduction

I have used the government's National Interest Analysis (NIA) to prepare this submission and I will address a number of concerns. The main thrust of this submission is that the TPPA changes the balance between corporations and public good too far to the benefit of corporations and detriment of democracy, sovereignty, public services, and public assets.

Some of my submission is speculative. In part this is because the TPPA NIA does not provide enough information to understand what is going to happen. Important information is simply missing. In other cases it is because the NIA layout makes it impossible to understand. In other cases there may be misunderstandings but I have tried to use the supplied information to understand the impact of the agreement.

The TPPA normalises a view of corporations which is naïve and simplistic. In this worldview the only space for public service and public protections is through exceptions to this norm. This is not how healthy communities and democracies are created. It will lead to a world of ossified autocracy where power and wealth are entrenched and where serious problems, of which climate change is the most pressing, cannot be addressed because of the limited space for public action. Small and medium businesses will be heavily disadvantaged both in New Zealand and in overseas TPPA countries.

The government argues that "the risk under the TPPA of the government facing ISDS actions has been reduced to an acceptable level by what the NIA calls "mitigations, safeguards, reservations (non-conforming measures) and exceptions**".** The arguments offered in the TPPA to support this belief are largely weak and unconvincing. Some are seriously misleading

Finally there are some serious problems with the quality of the TPPA's National Interest Analysis and other documentation provided by the government. The TPPA's NIA is poorly constructed, seriously misleading and hard to read. Important information is missing. Other resources appear to be little more than marketing.

## 2. Protections for New Zealand's democracy and sovereignty & public well-being (or not).

### a) Good government consists of more than is acknowledged by the TPPA

Good government is more than a government that gets out of the way of corporations. A good government is a participant in national wellbeing and success. The TPPA, designed by corporations and their advocates in government ignores this and prefers to believe the prevalent mythology of corporate heroism and arthritic unresponsive government. However work by Marianna Mazzucatto, Ha Joon Chang and others economists shows that good government involves not only welfare, education and care (however broadly defined) but also has an important role in entrepreneurship, including social entrepreneurship, as creator, researcher, innovator, investor, futures thinker and partner. For example Mazzucatto argues convincingly that in the US the Google search engine's origins are in publicly funded research. Likewise the Apple stable of products, like the I-phone and I-pad have resulted from 12 separate public funded research projects. She demonstrates that In the UK biologic drugs (monoclonal antibody drugs) were researched, developed and tested using public funding. **Likewise** m**uch of our primary industry has its basis in public research and companies like Fletcher Challenge, Glidepath, Navman and Magritek have their origins in publicly funded research and policy. The TPPA ignores the innovative and entrepreneurial things that only governments (with**

**their scale and ability to take risks) can achieve.** The TPPA endangers the golden eggs laid by the goose of an effective and well provisioned public and research sector by limiting its role to the dead hand of funder and contractor.

Professor Sir Paul Callaghan's view was of a New Zealand where small and medium companies can grow to become effective suppliers of niche technology. The option to have this supported by a preference for local goods on the part of public authorities is severed with the TPPA (and the WTO government procurement agreement signed as a condition of ratifying the TPPA. All the "open tendering initiatives" and "TPPA SME working groups" to consider the plight of small and medium entrepreneurs will not replace what is being lost with the TPPA and the World Trade Organisation's GPA. Indeed entrepreneurial local companies with unique and valuable products will be big losers. TPPA will create further impetus towards the conditions for exploitation of local markets by "one size fits all" overseas corporations.

The NIA says that "reservations allow New Zealand to take any measure that sets out the approval criteria to be applied to the categories of overseas investment that require approval under New Zealand's overseas investment regime". However Annex 11 also expressly forbids any new exclusions to be added to the annex of special regulations exempted from the TPPA's provisions. This is a danger and locks New Zealand into a regulatory framework that will ossify as new situations develop. The text also says that the TPPA "is subject to a "standstill" provision meaning that no TPPA country can adopt new non-conforming measures that are more restrictive than the ones already listed" in the TPPA. However human progress, new technology and innovation will continually create new public policy challenges that need a policy and legislative response. The TPPA rules also demand that legislation is the minimum that allows for the reserved areas to addressed. This would prevent an effective action when new situations require a regulated or policy response.

Existing 'light handed' regulations coupled with the sinking lid on public policy options inherent in the TPPA that would be unable to prevent inward investment that would be damaging to our people or environment. Novel situations could apply in any sphere (the point is we do not know what the future holds). In particular those that are highly profitable – novel and risky such as new investment models, drones, robotics, nano-technology and intrusive technology based psychology interventions, the internet of things or novel and profitable but potentially damaging approaches to agriculture may become an issue requiring public good legislation. But NZ may be prevented from regulating effectively against new harms because the new issues are not part of the "reserved legislation."

### b) "Protected legislation and activities in the TPPA are already undermined.

The TPPA NIA also says that non-conforming measures (i.e. many public services and protective legislation) are "subject to a 'ratchet' clause which means that if the Government liberalises a service by repealing or amending a restriction, that liberalisation gets locked-in as the new (more liberal) level of commitment." This means that a future government will automatically lose the right to reinstate the public services under government control or to reinstate protective legislation. The government's current policy settings include the Better Public Services approach where a number of the background documents (and here and here) make it quite clear that best sourcing i.e. privatisation and contracting should always be actively considered in delivering public services. Therefore the ratchet clause is already in place for public provision and if the TPPA is ratified the protections will (at the very least) apply only to services that have not been privatised or outsourced already.

## 3. Risks to democracy

**The TPPA is inherently risky to democracy. Yet the TPPA has accepted the introduction of untested new elements of policy into the TPPA regime and has failed to respond to well-founded, research based critique of the TPPA from commentators in NZ and overseas and has seriously misrepresented the data on the prevalence of ISDS cases.**

### c) Requirement for prior notification could hobble newly elected governments

Under the TPPA provisions on 'technical barriers to trade' the agreement requires prior notification by government of all proposed actions. These could include notifying all policy decisions, decisions to fund or defund programmes, legislation & regulation that could in any conceivable way impact on importers, services providers and investors that might consider signing an investment agreement with government or doing business in New Zealand. While transparency is desirable there is no corresponding strong requirement to provide information to citizens. These new requirements could effectively hobble an incoming government from taking democratic actions for months or even years.

### d) New elements in the TPPA with unknown, untestable impacts

The TPPA brings many significant new elements into a trade agreement for the first time in New Zealand. Some of these untested and untestable provision are brought about because, for the first time, NZ is considering being part of an agreement that encompasses 40% of world trade. Others relate to areas that have been newly opened up for corporate exploitation.

TPP is the first time that New Zealand has included a separate chapter of provisions and commitments on financial services in a Free Trade Agreement. For the first time the TPPA allows ISDS claims to be made related to all stages an investment from the initial planning stages including the period before an actual investment is made. For the first time Pharmac services delivering pharmaceuticals and medical devices are included at the very time when new generations of personalised drugs should be being brought on stream. New processes, new requirements, increased costs and 'transparency provisions' which could impact Pharmac's negotiating ability are involved.

For the first time local government is involved firstly with additional reporting requirements and within a few years from ratification local government is likely to be included in the TPPA provisions and this would likely include the restrictive provisions of the investment, finance, environment and state owned enterprise chapters. For the first time there is consent for investors to bring ISDS claims in respect of investment authorisations or investment agreements. Each of these elements bring significant new but unmeasurable risks to the public sphere.

### e) Lack of Response to well-founded criticism

ThE NIA contains no credible riposte to many well founded criticisms. The Tufts University academic analysis that shows that the TPPA could kill 3/4M jobs worldwide. There has been no response to criticism by Geoff Bertram and others to show that ¾ of the calculated benefits come from rules reduction rather than trade. Bertram's research has also shown that the economic models only work in one direction. Any reduction of rules in the model automatically confers an economic benefit even though it can be readily demonstrated that often the opposite is in fact true. Regulation can build markets by holding companies to higher standards which then confer a trade advantage. (New Zealand's firm precautionary GM stance to date has been a case in point). There has been no response to the commentary by Alfred de Zayas, UN special rapporteur on democracy who says that the TPPA puts company rights ahead of human rights

and that over the years ISDS decisions have "led to inconsistent, unpredictable and arbitrary awards contrary to national and international public order". There is no explanation for the absence of climate change references from the agreement and about the very real concerns demonstrated by Naomi Klein, and the Sustainability Council amongst others that the rights accorded to business trump the rights of the environment and that the TPPA provisions, like those in other trade agreements, will prevent effective action to limit climate change to 1.5C.

### f) The booming level of ISDS cases worldwide

The NIA reports that "given a claim has never been made against a New Zealand Government under an international agreement, the actual costs of responding are unknown and, in any case, would depend on the substance of the claim itself". The NIA reports that the majority of cases are won by governments saying "where New Zealand successfully defends a claim (and, as outlined below, States have been successful in the majority of cases) New Zealand would be able to seek costs from the unsuccessful investor claimant" the report says.

In contrast the United Nation's conference on trade and development (UNCTAD)'s research is quite different. It shows that 52% of concluded ISDS cases have ended in an outright loss for the government or a settlement with the foreign investor. Governments lose most of the cases taken and it appears that the NIA figure includes opportunistic cases with little merit. UNCTAD has published the latest data on recent ISDS cases, revealing that the surge in ISDS cases is not only increasing but that foreign investors launched more ISDS cases in 2015 than in any prior year - twice the number launched just five years earlier. (The newest data show more than 50 cases in each of the last five years, while fewer than 50 cases were launched total before 2000.) All of the above, of course, excludes cases that are not publicly known. To date, the UNCTAD report says that foreign investors have launched nearly 696 cases against more than 107 governments.

## 4. Protection for governments from ISDS claims

The NIA text makes much of the case that the opportunities for taking compensation cases have been limited. The NIA advises that ISDS are present in other trade agreements but have not yet been used in NZ and advises that "there are several important features that would affect the likelihood of a claim successfully being brought. However in many of the safeguards statement made in the NIA I have shown that the reassurance is **weak and implausible**, when it is not downright misleading.

## "Modern" fit for purpose ISDS regime

I had hoped to see evidence of the smart, modern fit for purpose provisions limiting the scope for frivolous and injurious ISDS cases that were suggested by Trade Minister Tim Groser. However the mitigations (variously described) providing protection for governments from ISDS action seem only to add to the level of uncertainty for states and to increase the options for investors to take action against them..

The examples are dispersed throughout the text and not gathered together in one place making them hard to identify. In the NIA document these supposedly protective elements are described variously as: mitigations, safeguards, reservations (non-conforming measures) and exceptions. These classes of 'protections' are not defined and at times the terms are used interchangeably.

### g) The exclusions themselves are full of expressions that give cause for concern.

The whole edifice of 'protection from ISDS claims' lies in the original decision of the TPPA to normalise commerce and to marginalise public service, public ownership of public assets and the role of the public sector. In the information on "regulatory coherence' it says regulation must be "*the minimum necessary to achieve public policy objectives, and that trade and investment liberalisation <must be>*

*taken into account when considering new regulation*". Every public service is regarded as a non-normative exception from a worldview which sees normality as corporate capital freed from constraints. Measures to protect public services including social services, health education and public transport are legitimate only "*to the extent that they are social services established for a public purpose".* Neither term is defined. In another example the text states "*except in rare circumstances, the Government's action will be protected from the ISDS mechanism in the case of any alleged expropriation of an investment*". Elsewhere we are advised that "*Government action (or where the Government does not take an action) that is inconsistent with an investor's expectations will not in and of itself constitute a breach of the Investment chapter leading to potential ISDS*" Finally "*Additional provisions that confirm Government action to implement legitimate public welfare measures, such as public health, safety and the environment, is very unlikely to constitute indirect expropriation*". In each case the wording hints at a situation of a very poor level of protection for public services as well as a grab bag of reasons that investors could use to make threats of ISDS action.

### h) The tobacco carve shows lesser protections may not be effective.

The NIA advises that the government will take advantage of a specific provision which allows Governments to rule out ISDS challenges over tobacco control measures. The mere fact that the specific provision has been required in order to get the agreement over the line after the injurious experience faced by Australia in the Philip Morris case. This was an interesting example of the absolute unacceptability of ISDS provisions being used against legitimate public policy objectives. That a 'carve out' is needed for one product makes it pretty clear that similar 'carve out' measures would also be required to ensure that new public health provisions can be introduced. Corporate lawyers would readily make the case that measures to limit alcohol, use of the content in foodstuffs of sugar, salt, fats or GM altered foods, or demanding particular labelling standards (as examples) were not covered by a carve-out preventing a compensation case from going ahead.

Already, in advance of ratification, tobacco companies have indicated that they may still seek to develop a case that their trade mark rights would be inhibited by plain packaging regulations and the Prime Minister has agreed that these companies "have a point". His casual remark may already have compromised any protections for plain packaging regulations under the TPP as tobacco companies could seek to make a case that Key's comments convey the government's beliefs of the situation with respect to trade marks and therefore plain packaging. Key clearly appeared to believe that actions limiting trademark usage are inherently wrong.

### i) Limited awards?

The NIA advises that the TPPA protects governments by limiting the types of monetary awards and damages that can be made against them. However the main example provided appears to be an exclusion for punitive damages. The NIA says that compensation would be limited but there is no description of how the claimed losses would be limited i.e. capped.

### j) Cuckoo companies

The recent Philip Morris case involved a cosmetic relocation of an Australia based regional head office to Hong Kong to meet the ISDS requirements of a Hong Kong Australia FTA. The case was reported as costing the government $A50M in legal fees, despite the government 'winning' . This is an indication that even ill-founded cases can prove both expensive and time consuming and can constrain public good legislation for years pending an outcome. There is no indication, amongst the measures listed however, that would prevent a NZ company, or even a non-TPPA country wishing to take New Zealand through an ISDS process could not set-up a "cuckoo"

regional head office in another TPPA country. Despite the exhortations that frivolous cases would not succeed there is no information in the NIA outlining what these tests of frivolity consist in.

### k) A limited range of activities subject to ISDS?

The investment agreements (which are subject to ISDS compensation cases) are described as a "limited range of activities, including natural resources that a national authority controls, the supply of services on behalf of the Party for consumption by the general public, and infrastructure projects" the NIA states. Is this reassuring? **These three (limited) categories would bring into the ISDS provisions our land and water, our entire public sector and our public assets in their entirety. It is hard to see exactly what is being limited here.**

In the same example describing investment authorisations the NIA says "this paragraph only applies to the extent that the investment authorisation, including instruments executed after the date the authorisation was granted, creates rights and obligations for the disputing parties". That is, it only applies to contracts between governments (supplier) and corporates (provider). Again, given that it is an investment agreement aimed at loosening up public provision for private opportunity, aren't these are the main kinds of investments that are relevant? The limits on government's ability to prevent other kinds of inward investment are, after all, catered for by provisions which limit government's ability to stop undesirable inward investments.

### l) Limited application of ISDS to 1 or 2 chapters?

The NIA advises that the ISDS mechanism in TPP applies "to the Investment Chapter (including provisions on investment agreements and investment authorisations), and limited aspects of the Financial Services Chapter which relates to investment in financial services". It says "the scope of application of ISDS has been deliberately narrowed".

This is not true however. The agreements apply to many more chapters than the Investment and financial services chapters. There are statements in the environment, health, labour and State Owned Enterprises chapters that the provisions apply there as well. In fact in the pharmaceuticals chapter we are advised that "but unlike most outcomes in TPP, implementation of the Annex's provisions cannot be enforced or challenged by TPP's dispute settlement mechanisms, nor under ISDS".

The writers may have a different technical meaning of 'deliberately narrowed' but it is not one that this lay reader can discern.

### m) Misleading information about Australia's proportion of in-country investment in NZ.

The National Impact Analysis says that the TPP's ISDS provisions would not apply between New Zealand and Australia as Australian foreign direct investment (FDI) is responsible for three-quarters of the total (stock) of investment from TPP countries into New Zealand. Therefore only the remaining quarter of investment would be subject to ISDS provisions. This assertion is highly misleading for the following reason.

Currently Australian FDI predominates amongst TPPA countries (and its stock value is about $NZ50bn or approximately ½ of the total). The situation is changing rapidly, even without the TPPA in place. Figures from Statistics NZ show that in the year to June 2015 there was $5.6bn of new inwards investment. A KPMG report for the two years to December 2014 show that Australian FDI accounted for only 11% of the total new (inward flow) of investment. In contrast Canada's proportion was 22%; the USA's 13%; Japan's was 7% and from Malaysia 2%. So at

least 44% of inwards investment came from other TPPA countries and investment from China and South Korea, not TPPA member but which would be treated the same as TPPA countries through Most Favoured Nation status was in excess of 14% of the total. So on current trends upwards of 58% of New Zealand's new inward investment will be from TPPA countries where the ISDS are applicable. If these trends continue by 2030 Australia's dominance will have been comprehensively overturned and could be as low as 1/3 of the TPPA country stock of Foreign Direct Investment.

### n) The supposed Overseas Investment Act Protection

The NIA states that "a country-specific exception means that Government decisions under the Overseas Investment Act to grant or decline consent for foreign investment are not subject to ISDS. This provision "protects the Government's ability to control approval of foreign investment in significant business assets, sensitive land and fishing quota". Elsewhere in the NIA document it is revealed that the provisions of the OIA were only accepted because they have never actually been used. Under these circumstances whether they could now be used effectively must surely be open to question and to challenge.

### o) The two for the price of one clause

Additionally the NIA tells is " where multiple cases are separately submitted with commonalities, the Investment Chapter provides for a tribunal to hear consolidated claims which would also reduce costs" This gives the lie to the idea promoted elsewhere in the document that ISDS cases would be infrequent in the TPPA.

## 5. A high quality ISDS tribunal mechanism?

Several of the provisions that protect government from ISDS cases relate to the tribunal process. These too are problematic.

### p) Reason advanced why the ISDS tribunal process is appropriate

The NIA says that it is the provisions of the TPP and not the ISDS that determine whether a case can be taken. This seems somewhat self-evident. Then we are reassured that 'there are also provisions in the Investment Chapter which provide that ISDS tribunals must be constituted with sufficient expertise and jurisdiction to resolve claims appropriately'. Elsewhere the NIA says that corporations cannot take trivial cases and that the responsibility lies with the claimant to demonstrate the non-trivial nature of the case. The NIA says that "investment obligations in TPP have been drafted in a way that would "impose a high burden of proof on investors to establish that a TPP government had breached obligations such as 'expropriation' or 'minimum standard of treatment'. The sentence does not make clear whether this high standard is required to bring the party to negotiating table (prior to an ISDS case), to take a case or to succeed in taking a case.

These conditions –of basic competence – would be more suitable to participants in a game of competitive Scrabble or a high school moot than a trade agreement covering 40% of the world's trade. They describe a very low bar indeed in demonstrating a robust process.

### q) Equivalence to local courts?

The NIA advises that ISDS cases are equivalent to cases taken in local courts. It says "similar resources would be involved defending a case if, for example, a TPP Government was asked by one of its investors and decided to pursue a remedy via State-to-State dispute settlement, or pursue the issue through the domestic avenues (such as the New Zealand courts)." However the cost and lawyer skills needed to prepare for an ISDS tribunal is to miss an important point.

Without the TPPA investment issues and contract law would be addressed through the courts of a sovereign nation, or through international courts. In both cases jurisprudence has been built up over hundreds of years to ensure due process and procedural fairness.

### r) National courts are not fair to investors arguments?

The NIA says that "including ISDS ensures security for New Zealand investors and avoids putting them at a relative disadvantage to other investors in TPP countries". This is particularly the case, the NIA continues, "in relation to countries whose investment policies and legal systems have historically not been as robust as in New Zealand". However very few of the TPPA countries could be construed as having investment policies and legal systems that are not robust. Of the TPPA countries Brunei is an outlier in jurisdictional terms as it has adopted only recently the Sharia Law system of justice but the other countries have well developed, robust and entrenched legal systems of longstanding.

### s) Does public really mean public for ISDS cases?

THE NIA tells us that there are "provisions that mean hearings will be open to the public, and which allow tribunals to accept submissions from experts and the public". Also some classes of documents related to the case have to be lodged publicly. However not all ISDS process will be held in the open those where security exceptions chapter and (ordinary) exceptions chapter apply. It is not clear from the NIA where the hearings will be held and whether this will be of any practical use to people who want to be involved.

### t) Are the pre-negotiations to ISDS cases held in public?

The NIA report says that "amongst the mitigations are time limits on taking cases and resolution by seeking a negotiated outcome the investor must initially enter into consultation and negotiations to attempt to resolve the claim with the New Zealand Government. Any preliminary objections from the Government, e.g. that the claim goes beyond a tribunal's jurisdiction or is manifestly without legal merit, must be resolved before the full arbitration commences". There is no reassurance in the NIA document about the openness of pre-ISDS negotiations and this gave rise to a concern that the NZ government will compensate or will fail to legislate in response to ISDS threats that remain private.

In the TPPA's investment chapter it is clear in section 9.18 it becomes clear that the NIA is misleading. The TPPA investment chapter says "for greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal". I take this to mean that these prior negotiations could be held in secret and the general public would be unaware of them.

### u) New case law changing the intent of the TPPA

The NIA states that there are "A number of provisions that allow TPP governments to issue binding interpretations on ISDS tribunals". It is not clear from the NIA document however whether successful corporates can also issue binding interpretations, with either side effectively creating case law, when their cases are successful. In either case the TPPA may morph into an agreement which may be substantially different to the understanding of the TPPA as signed and (as the winners of the larger number of cases to date) these changes could be driven mainly by the agendas of corporate winners and their advocates in governments.

## The NIA's Poor drafting

The government's TPPA National Impact Analysis is, frankly, a failure as a democratic tool.

The 279 pages of the NIA gives the impression of having been cut and pasted together by people who were close to the action and who feel that their only responsibility is to the National and ACT parties in order to fulfil the requirements of ratification rather than for the general public. It's not difficult to understand why the independent peer reviewed work done with Law Foundation grants is proving a much more attractive resource for finding out about the TPPA.

The NIA has many faults. It is partisan, blinkered as to the differential effects in society of the TPP's implementation, more or less silent on the impact of reciprocal rights afforded to overseas corporates in New Zealand, poorly argued, misleading, missing important information about the process to be followed (such as the United States certification process of NZ legislation that brings the TPPA into compliance with US expectations). However it is the NIA's poor drafting and presentation that make it illogical, impossible to follow and difficult to reference for this submission. It is not adequate that a document to inform the public does not clarify important issues such as whether pre-ISDS negotiations are able to be held in secret. It is a poor document on its own terms of being a National Interest Analysis for a major trade agreement. These are some of the issues identified.

1. The format – a giant pdf files makes it hard to read, reference and navigate.
2. There are frequent changes of point of view related to whose interests are being protected or served (government or corporate) making the text hard to follow.
3. There is no sign-posting section, as part of the executive summary, along the lines "how to use this document" which is often included in long technical documents to help orient the reader.
4. There is no summary of achievements outlining the positive outcomes for exporters, or analysis from the perspective of different groups in society (such as employees, small businesses or local authorities) as there is for the equivalent document for Australia where the benefits are outlined for each agriculture sector and for small businesses.
5. More detailed material is not separated out into appendices, as the Australian NIA has done, with the result that we are waylaid with the situation for growers of so called 'ice wines' and other specific instances in material that purports to be scene setting.
6. Information related to complex structures and processes could have been presented as diagrams, charts or maps. There are none. In fact information that is related is found in multiple locations for reasons that are unclear but which make it impossible to for even a close reading to map the inter-relationships, structures and processes described.
7. Frequently content is inconsistent with section headings for example disadvantages (of this section) is often followed by listing further advantages or a statement that there are no disadvantages is immediately followed by a significant disadvantage
8. There is no glossary with definitions but many terms have TPPA specific or technical trade meanings. Examples are: certification, certificate of origin, cumulation are significant and subsequently used interchangeably eg "mitigations, safeguards, reservations (non-conforming measures) and exceptions" In other cases precise meaning cannot be gleaned.
9. The document contains no cross referencing in the text e.g. from a word or phrase to its definition.
10. The layout of the document means that these new terms are met before they are defined. The word impartial is used 9 times to describe government obligations to businesses before its specific meaning is outlined on page 221.

11. There is no bibliography of references which makes it hard to understand the substantive research base that underlies the thinking. (There are a few references to supporting documents made in the page they are referenced).
12. There is no index to help navigate the document or the figures and tables are not consistently referenced– a few are included in the table of contents but others eg 5.12 temporary entry for business persons is not included.
13. Links to and references from the NIA to the actual text of the TPPA, allowing people to make the connections between the summary and the full text, are only available in some chapters.
14. There is no consistency in the use of language and explanations where there are differences. It's not clear whether the TPPA 'requiring' something the same as it 'obliging' something or not. Is cumulation (a technical term to do with where goods are sourced) the same as accumulation (used once but possibly a typo) or is it different? This difference is not clear from the text.
15. Important qualifiers which overturn the intent of the substantive text are hidden in reviews of Annexes to the main agreement (although this follows the TPPA layout)

With its many communications staff the government could have done much better.

## Conclusion

In summary the New Zealand governments National Interest Analysis is a poor document for democracy and public understanding of the TPPA. It is badly written, poorly structured and lacks important information.

The TPPA shifts the balance too far towards corporate interests and away from the public interest. The TPPA drafters understanding of the role of government and the benefits of a well provisioned public sector in delivering both wealth and human well-being fundamentally misunderstand the role of both.

In addition the TPPA settings will be catastrophic for small and medium enterprises. Well-founded criticism about the TPPA's modelling and the likely impacts have not been addressed.

The TPPA's measures to "protect" the public domain are unlikely to be effective. They are weak and subject to a sinking lid. By its actions and policy positions the government is already undermining these meagre protections.

The TPPA overturns centuries of judicial practice when there is no evidence of partner countries judicial systems being unfair to business interests