

1. Open Government and Autonomy

The Trans-Pacific Partnership Agreement (TPPA) is described as a 21st century agreement that will reach further 'behind the border' than any previous free trade or investment agreement. **Parliament will have no effective say over these new rules unless they require changes to New Zealand's domestic law.**

There are around 29 chapters in the agreement, very few of which involve old-fashioned trade. Most of them aim to 'discipline' the process and content of governments' domestic policy and regulatory decisions.

In practice, the TPPA would give foreign governments and well-resourced foreign companies the right to influence our domestic decisions, and marginalise our own national priorities, advocates and agencies, including Parliament and our courts.

New rules would limit our ability to regulate in our own interests on intellectual property, investment, financial services, government procurement, etc. Many chapters have separate processes to vet and challenge a government's actions. Novel chapters on regulatory coherence and transparency aim to discipline general policy-making *processes*.

All these rules are weighted towards commercial priorities and light-handed regulation. Domestic policy makers will need to understand and comply with their extent and complexity. Health officials dealing with the Smokefree policies are already struggling to navigate such a minefield.

The most potent threat to open government and national autonomy is the Investor-State Dispute mechanism that would allow investors from TPPA countries, especially the litigious US, to sue our government directly in private offshore tribunals. The leaked TPPA investment text shows Australia has exempted itself from investor-state disputes; NZ did not.

Investors can claim compensation if a government's actions significantly harms their value or profitability. They can challenge acts of central and local governments, SOEs and even court decisions. Recent disputes involve other countries' actions on mining, medicines, stalled privatisations, climate change mitigation, vulture funds, PPP contracts, private water concessions, tobacco control. New Zealand has few agreements with such provisions, none with the US.

[Known investment disputes](#) have skyrocketed; 58 new cases were lodged in 2012, the highest ever. The US is the source of 24% of disputes. The [OECD estimates](#) average costs at US\$8 million; some exceeded \$30 million. The tribunals are ad hoc and secretive, with no binding precedent or appeal structure. [Arbitrators](#) are mainly drawn from global law firms that also act for investors who bring such disputes. They can award compensation for lost value and loss of future profits, with compound interest. Outcomes are unpredictable and both the rules and the choice of arbitrators bias outcomes towards investors and away from wider national interests.

Cases themselves are ultimately not the biggest risk. The invisible danger is the chilling effect that the threat of a dispute has when a government weighs up its options, including the fiscal, legal and reputational risks of an investment dispute. Habitual self-censorship is the lot of those who lack true independence.

The TPPA is a potent threat to national sovereignty over decision-making processes and institutions, and to open and accountable government.