



TRANS-PACIFIC partnership



Trans-Pacific Partnership

National Interest Analysis

25 January 2016

[This page is intentionally left blank]

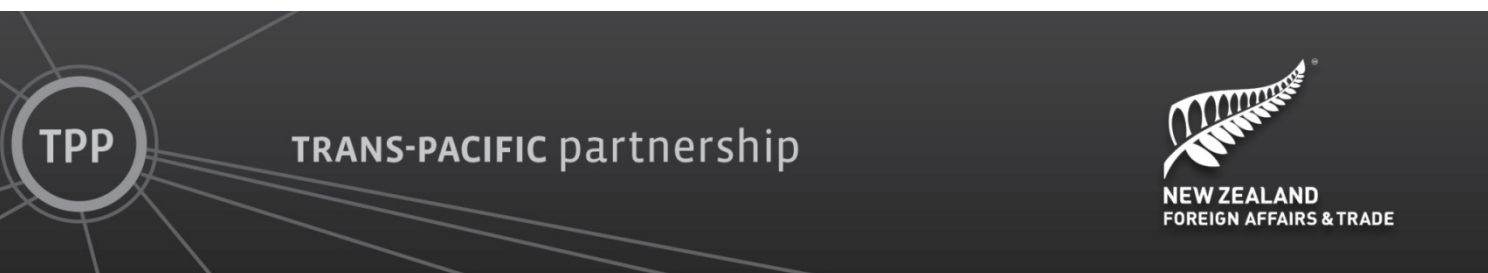
Table of Contents

Table of Contents	1
Frequently Used Acronyms and Terms	5
1 Executive summary	7
1.1 <i>Background</i>	7
1.2 <i>Reasons for New Zealand to become a Party to the Agreement</i>	7
1.3 <i>Advantages and disadvantages to New Zealand becoming a Party to the Agreement</i>	8
1.4 <i>Measures required in New Zealand to implement TPP</i>	20
1.5 <i>Economic, social, cultural and environmental effects</i>	21
1.6 <i>Consultations</i>	26
1.7 <i>Subsequent changes to TPP</i>	26
1.8 <i>Conclusion</i>	27
2 Nature and timing of proposed treaty action	28
3 Reasons for New Zealand becoming a Party to the Treaty	31
3.1 <i>Benefits from enhanced trade and economic links under TPP</i>	31
3.2 <i>The consequences of New Zealand not becoming a Party to TPP</i>	35
4 Advantages and disadvantages to New Zealand of the treaty entering into force and entering into force for New Zealand	37
4.1 <i>Trade in Goods</i>	37
4.2 <i>Rules of Origin</i>	44
4.3 <i>Textiles</i>	45
4.4 <i>Customs</i>	46
4.5 <i>Trade Remedies</i>	47
4.6 <i>Sanitary and Phytosanitary (SPS) Measures</i>	48
4.7 <i>Technical Barriers to Trade (TBT)</i>	49

4.8	<i>Investment (including Investor-State Dispute Settlement)</i>	51
4.9	<i>Cross-Border Trade in Services</i>	57
4.10	<i>Financial Services</i>	61
4.11	<i>Temporary Entry</i>	63
4.12	<i>Telecommunications</i>	64
4.13	<i>Electronic-Commerce</i>	65
4.14	<i>Government Procurement</i>	68
4.15	<i>Competition</i>	70
4.16	<i>State-Owned Enterprises</i>	71
4.17	<i>Intellectual Property</i>	75
4.18	<i>Intellectual Property: UPOV 91</i>	90
4.19	<i>Intellectual Property: Other IP Treaties</i>	93
4.20	<i>Labour</i>	95
4.21	<i>Environment</i>	96
4.22	<i>Cooperation and Capacity Building</i>	98
4.23	<i>Competitiveness and Business Facilitation</i>	98
4.24	<i>Development</i>	100
4.25	<i>Small and Medium Enterprises</i>	101
4.26	<i>Regulatory Coherence</i>	101
4.27	<i>Transparency Chapter – Pharmaceuticals Annex</i>	102
4.28	<i>Legal and Institutional Issues</i>	105
5	Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms	109
5.1	<i>Initial Provisions and General Definitions</i>	109
5.2	<i>National Treatment and Market Access for Goods</i>	109
5.3	<i>Rules of Origin and Origin Procedures</i>	116
5.4	<i>Textile and Apparel Goods</i>	120
5.5	<i>Customs Administration and Trade Facilitation</i>	121
5.6	<i>Trade Remedies</i>	122
5.7	<i>Sanitary and Phytosanitary Measures</i>	122
5.8	<i>Technical Barriers to Trade</i>	128

5.9	<i>Investment</i>	137
5.10	<i>Cross-Border Trade in Services</i>	150
5.11	<i>Financial Services</i>	154
5.12	<i>Temporary Entry for Business Persons</i>	160
5.13	<i>Telecommunications</i>	162
5.14	<i>Electronic Commerce</i>	167
5.15	<i>Government Procurement</i>	169
5.16	<i>Competition Policy</i>	175
5.17	<i>State-Owned Enterprises</i>	176
5.18	<i>Intellectual Property</i>	182
5.19	<i>Labour</i>	210
5.20	<i>Environment</i>	212
5.21	<i>Cooperation & Capacity Building</i>	217
5.22	<i>Competitiveness & Business Facilitation</i>	218
5.23	<i>Development</i>	218
5.24	<i>Small and Medium Enterprises</i>	218
5.25	<i>Regulatory Coherence</i>	219
5.26	<i>Transparency and Anticorruption</i>	219
5.27	<i>Administrative and Institutional Provisions</i>	223
5.28	<i>Dispute Settlement</i>	224
5.29	<i>Exceptions</i>	225
5.30	<i>Final Provisions</i>	228
5.31	<i>Side Instruments to TPP</i>	229
6	Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation	231
6.1	<i>Changes Required</i>	231
6.2	<i>Trans-Pacific Partnership Agreement Bill</i>	236
7	Economic, social, cultural and environmental costs and effects of the treaty action	238
7.1	<i>Economic effects</i>	238
7.2	<i>Social effects</i>	248
7.3	<i>Cultural effects</i>	253

7.4	<i>Environmental effects</i>	257
8	The costs to New Zealand of compliance with the treaty	260
8.1	<i>Summary of Costs</i>	260
8.2	<i>Tariff revenue</i>	260
8.3	<i>Costs to government agencies of implementing and complying with the FTA</i>	261
8.4	<i>Costs to businesses of complying with the FTA</i>	264
9	Completed or proposed consultation with the community and parties interested in the treaty action	265
9.1	<i>Inter-departmental consultation process</i>	265
9.2	<i>Public consultation process</i>	265
9.3	<i>Issues covered in the consultation process</i>	268
10	Subsequent protocols and/or amendments to the treaty and their likely effects	270
11	Withdrawal or denunciation provision in the treaty	271
12	Agency Disclosure Statement	272
	Guide to TPP Chapters	273



ANZCERTA	The Australia and New Zealand Closer Economic Relations Trade Agreement.
AANZFTA	The ASEAN-Australia-New Zealand Free Trade Area.
ANZTEC	The Economic Cooperation Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation.
ASEAN	The Association of Southeast Asian Nations.
AVE	Ad-valorem equivalent, a method of quantifying a barrier to trade by determining an equivalent barrier expressed in terms of a percentage of price (the ad valorem equivalent).
The Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, July 24, 1971.
The Budapest Treaty	Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended on September 26, 1980.
CER	New Zealand-Australia Closer Economic Relations, a comprehensive set of trade and economic arrangements including the Australia and New Zealand Closer Economic Relations Trade Agreement which entered into force on 1 January 1983.
CGE	Computable General Equilibrium (CGE) models, used by economists to capture the effects of changing trade barriers on GDP, trade flows, national welfare and other variables.
Customs	The New Zealand Customs Service.
FDI	Foreign Direct Investment.
FTA	Free Trade Agreement.
GATS	Global Agreement on Trade in Services. (The WTO Agreement covering trade in services.)
GATT	Global Agreement on Tariffs and Trade 1994. (The WTO Agreement covering trade in goods.)
GDP	Gross Domestic Product.
GI	Geographical indications, a sign or name used in relation to goods that have a specific geographical origin and qualities essentially attributable to that origin, for example Champagne.
GPA	WTO Agreement on Government Procurement.
HS	The Harmonized Commodity Description and Coding System (Harmonised System, HS), a near-universal method for classifying international trade.
ICT	Information and communication technology.
ILO	International Labour Organization.
IP	Intellectual Property.
IPONZ	Intellectual Property Office of New Zealand, the government agency responsible for the granting and registration of intellectual property rights.
ISDS	Investor-State dispute settlement.

Frequently Used Acronyms and Terms

Medsafe	New Zealand Medicines and Medical Devices Safety Authority. Responsible for the regulation of medicines and medical devices in New Zealand, and ensuring that medicines and medical devices are acceptably safe.
MBIE	The Ministry of Business, Innovation and Employment.
MFAT	The Ministry of Foreign Affairs and Trade.
MPI	The Ministry for Primary Industries.
MFN	Most-favoured-nation, a requirement that preferential treatment extended to one country (the “most favoured”) be extended to others (e.g. to other TPP Parties).
MNZFTA	Malaysia-New Zealand Free Trade Agreement.
National Treatment	A requirement that the same level of treatment extended to domestic entities be extended to others (e.g. to other TPP Parties).
NIA	National Interest Analysis.
NTM	Non-tariff measure.
NZTE	New Zealand Trade and Enterprise.
ODI	Outward Foreign Direct Investment
OECD	Organisation for Economic Co-operation and Development.
PHARMAC	Pharmaceutical Management Agency. The New Zealand government agency that decides which pharmaceuticals to publicly fund in New Zealand.
PVR	Plant variety rights, which provide the breeders of new varieties of plants with limited rights to control the commercial exploitation of their new varieties.
SDR	International Monetary Fund Special Drawing Rights, a unit of account used by the International Monetary Fund and based on a basket of international currencies.
SMEs	Small and medium-sized enterprises.
SOE	State-Owned Enterprise.
SPAM	Unsolicited commercial electronic messages.
SPS (Agreement)	Sanitary and Phytosanitary. (WTO Agreement on the Application of Sanitary and Phytosanitary Measures.)
TBT (Agreement)	Technical Barriers to Trade. (WTO Agreement on Technical Barriers to Trade.)
TNF	Trade Negotiations Fund. A New Zealand government inter-agency fund for the negotiation of Free Trade Agreements and to maximize the scope for New Zealand to enter and to gain from these agreements.
TPP	The Trans-Pacific Partnership.
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights.
UNCTAD	United Nations Conference on Trade and Development.
UPOV	The International Convention for the Protection of New Varieties of Plant.
WCT	WIPO Copyright Treaty, done at Geneva, December 20, 1996.
WIPO	World Intellectual Property Organization.
WPPT	WIPO Performances and Phonograms Treaty, done at Geneva, December 20, 1996.
WTO	World Trade Organization.

1 Executive summary

1.1 Background

The conclusion of negotiations of the Trans-Pacific Partnership (TPP) was announced on 6 October in Atlanta, Georgia by the twelve TPP Trade Ministers of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America (the US) and Viet Nam.

With the objective of building on the high-quality benchmarks set in 2005 by the P4 Agreement between New Zealand, Brunei, Chile and Singapore, TPP's foundations were set in September 2008 when the US announced its participation in comprehensive negotiations for an expanded P4 Agreement. This announcement was followed by Australia, Peru and Viet Nam. The first round of negotiations was held in Australia in March 2010. Malaysia joined the third round of negotiations in Brunei in October 2010, with Canada and Mexico joining the negotiation at the fifteenth round in December 2012 in Auckland. At the eighteenth round in 2013 Japan was welcomed as the newest TPP participant, bringing the TPP membership to twelve. A total of nineteen formal rounds were held, plus a number of informal negotiating meetings and meetings between Ministers and Leaders.

TPP includes 30 chapters and a number of Annexes. The final section of this National Impact Analysis (NIA) lists these chapters, and provides a guide to the topics they cover.

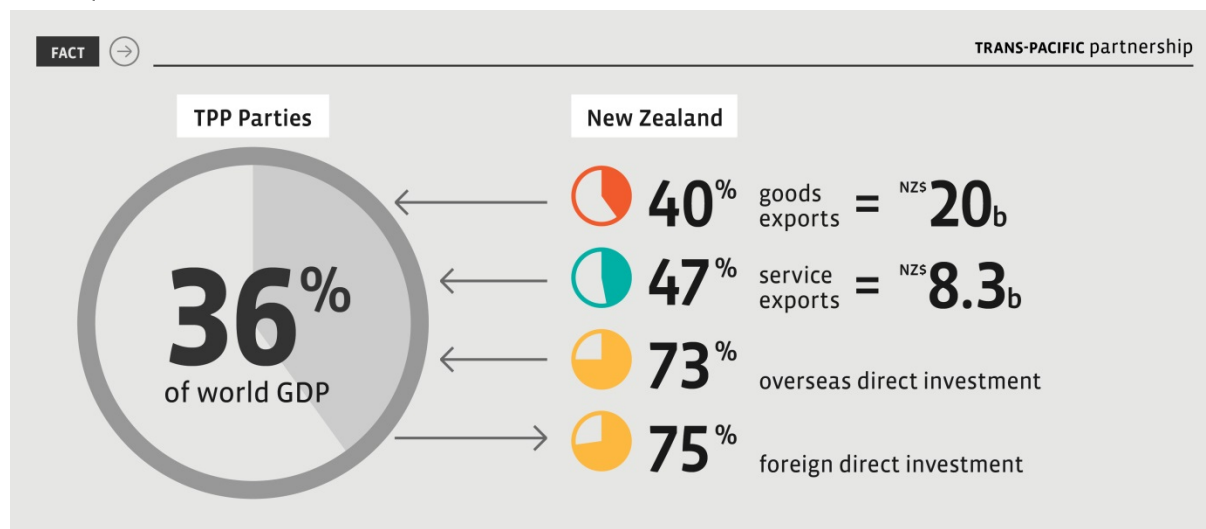
This NIA assesses the TPP from the perspective of its impact on New Zealand and New Zealanders. The NIA does not seek to address the impact of the TPP on other TPP Parties.

1.2 Reasons for New Zealand to become a Party to the Agreement

The reasons for New Zealand becoming a Party to TPP are both economic and strategic. Trade is critical to continued growth and prosperity, and the Government's Business Growth Agenda (BGA) identifies the high-level goal of growing exports to 40 percent of GDP by 2025. New Zealand's core objective in trade policy is to broaden and deepen the opportunities available to businesses. Key to this objective is removing and reducing barriers to trade and investment, as well as establishing frameworks through which trade and investment linkages can evolve and expand, thereby driving economic growth.

Free trade agreements (FTAs) with key trading partners, such as TPP, are an important means of achieving this. TPP would be New Zealand's first FTA with five countries, including our fourth and fifth

largest trading partners (the US and Japan). TPP countries account for NZ\$20 billion (40%) of New Zealand's global goods exports, NZ\$8 billion (47%) of New Zealand's global services exports, and three quarters of New Zealand's outwards and inwards investment.



TPP would serve as a platform to support the integration of New Zealand business into regional supply chains and would provide consistency and certainty to traders and investors in TPP markets. TPP will continue to evolve and grow through future expansion. The agreement provides a platform for wider, regional economic integration, and supports the foundation for an FTA of the Asia Pacific.

The counterfactual scenario – New Zealand standing aside from the opportunities of TPP – risks marginalisation and decline for New Zealand in the region. New Zealand's competitiveness in TPP markets would be eroded, and trade and investment would be diverted away from New Zealand to other TPP members. The opportunity to shape future trade liberalisation in the region would also be lost.

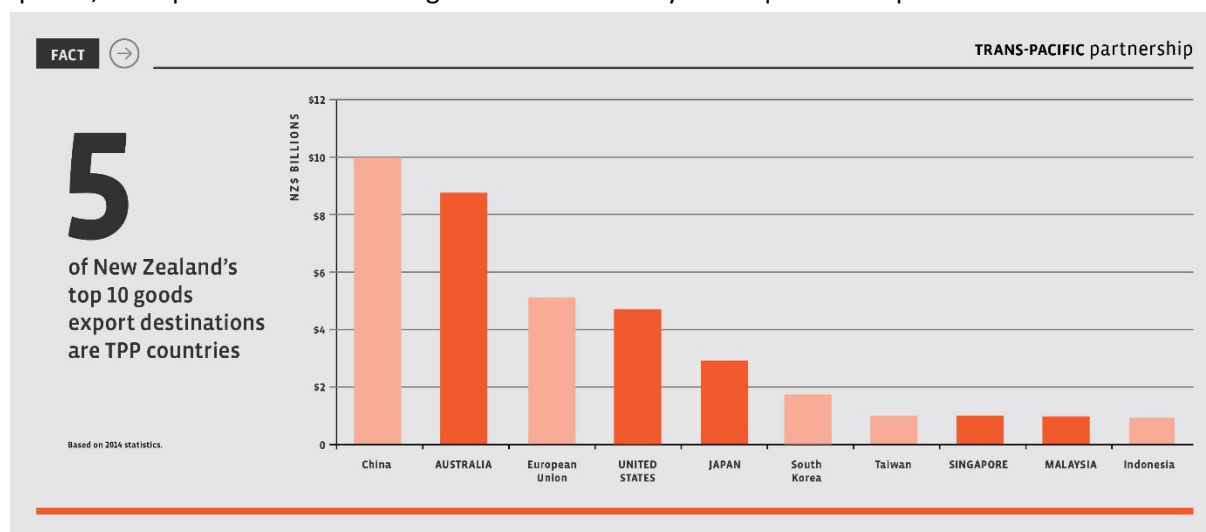
1.3 Advantages and disadvantages to New Zealand becoming a Party to the Agreement

Joining TPP would provide a significant net advantage for New Zealand, resulting from increased exports and greater regional economic integration.

1.3.1 Trade in Goods

Joining TPP would provide immediate economic benefit for New Zealand goods exporters on entry into force of the Agreement, particularly from reduced tariff rates in key markets with which New Zealand does not currently have an FTA. The TPP region is the destination for approximately 40% of NZ's goods exports (NZ\$20 billion in 2014), and includes five of New Zealand's top ten goods export markets.

An estimated NZ\$334 million is paid annually in duties on New Zealand exports to the five TPP countries with which we do not have existing FTAs (the US, Japan, Canada, Mexico and Peru).¹ While TPP has not delivered the full elimination of tariffs on our exports that New Zealand sought, it would deliver substantial benefits to exporters from the moment the Agreement enters into force, and the full elimination of tariffs on 95.4% of New Zealand exports when fully phased in, saving NZ\$272 million in duties in these five new markets. In addition, all tariffs on products of trade interest with Malaysia and Viet Nam not eliminated in previous FTAs will also be eliminated in TPP providing additional tariff savings of NZ\$2.4 million when fully implemented. This means that total savings on New Zealand exports to the TPP region, when the Agreement is fully phased in are estimated at NZ\$274 million. In addition, TPP would provide new dairy market access into the US, Mexico, Canada and Japan through quotas, an improvement on existing access restricted by small quotas and prohibitive duties.²



There would also be significant benefits for exporters by ensuring that they are able to compete on a level playing field with their main competitors in the future.

Table 1.1: Estimated Tariff Savings per annum by Country³

Country	New Zealand exports	Estimated tariff savings at entry into force		Estimated tariff savings once fully implemented ^B	
	NZ\$, millions	NZ\$, millions	% of exports ^A	NZ\$, millions	% of exports ^A
<i>Parties where New Zealand has no existing FTA</i>					
Japan	3,430	83	75.24%	207	90.63%
US	4,417	45	97.19%	52	99.61%
Mexico	418	3.1	73.70%	6.6	81.42%
Canada	645	4.8	99.16%	5.2	99.89%
Peru	135	0.9	99.65%	0.9	100.00%

¹ Tariff and tariff saving figures are based on an average of trade from 2012-2014.

² Tariff quotas are where a certain volume of goods can be imported at a low duty. A higher (and often prohibitive) tariff is applicable to trade outside the quota.

³ The table shows total annual tariff savings from TPP, including the elimination/reduction of in-quota tariffs for trade under existing WTO tariff quotas, as applicable. Values are in NZ\$, representing average exports over the period 2012-2014.

Country	New Zealand exports	Estimated tariff savings at entry into force		Estimated tariff savings once fully implemented ^B	
	NZ\$, millions	NZ\$, millions	% of exports ^A	NZ\$, millions	% of exports ^A
<i>Parties with existing FTAs with New Zealand^C</i>					
Malaysia	1,035	0.1		1.6	
Vietnam	468	0.6		0.8	
Overall	10,550	137		274	

^A Percentage of exports that would benefit from tariff elimination. Where New Zealand exports are not subject to elimination, most would benefit from new quota access.

^B Almost all (99.5%) tariff savings would be realised within sixteen years. The remaining tariff savings would be realised over 20 or 30 years.

^C Tariffs that would be eliminated under TPP that were excluded from the ASEAN-Australia-New Zealand and Malaysia-New Zealand FTAs (e.g. wine, liquid milk etc).

Table 1.2: Estimated Tariff Savings per annum by Sector⁴

Sector	New Zealand exports ^A	Estimated duties paid	Estimated tariff savings once fully implemented
	NZ\$, millions	NZ\$, millions	NZ\$, millions
Dairy	2,141	132	96
Fisheries	347	9	9
Forestry	773	11	11
Horticulture	694	34	34
Industrials	2,274	9.6	9.6
Meat	1,923	101	84
Other Agriculture	352	19	12
Textiles	96	3.4	3.3
Wine	461	16	16
Overall	9,060	334	274

^A "New Zealand exports" column does not include trade with Malaysia and Viet Nam that benefits from, or would benefit from, duty free access under New Zealand's existing FTAs.

Key benefits from tariff liberalisation would be:

- *At entry into force:* tariffs eliminated on NZ\$3.8 billion of New Zealand exports currently subject to tariffs, including many horticultural and forestry goods, a number of dairy products, some wine, many manufactured products, and much fish and seafood. Specific product examples include such items as: the US (bottled still wine, sheepmeat, prepared meats, protein isolates); Japan (kiwifruit, squash); Canada (wine); Mexico (mussels, kiwifruit, milk albumin); and Peru (buttermilk powder). As a result, 87.9% of New Zealand exports to these new FTA markets would enter duty free on the day the Agreement enters into force, with estimated tariff savings of NZ\$137 million.

⁴ The table shows total annual tariff savings from TPP, including the elimination/reduction of in-quota tariffs for trade under existing WTO tariff quotas, as applicable. Values are in NZ\$, representing average exports over the period 2012-2014.

- *By the 5th year after entry into force:* tariffs eliminated on an additional NZ\$199 million of New Zealand exports currently subject to tariffs, including: the US (beef, fish sticks, asparagus); Canada (beef); Japan (hoki and other frozen fish, carrot juice, sausages and mandarins); Mexico (wine). This constitutes 2.2% of total current New Zealand exports to the US, Japan, Canada, Mexico and Peru. This means that 90.1% of New Zealand exports to these markets would enter duty free within five years after entry into force of the TPP. Estimated total tariff savings in the fifth year after entry into force are NZ\$197 million.
- *By the 10th year after entry into force:* tariffs eliminated on an additional NZ\$184 million of New Zealand exports currently subject to tariffs, including in the US (infant formula, ice-cream, tableware and sugar); Mexico (apples, sheepmeat and beef); Japan (tongues, hides, bluefin tuna and apples) and Viet Nam (wine). This constitutes 2.0% of total current exports to the US, Japan, Canada, Mexico and Peru. This means that 92.1% of New Zealand exports to these markets would enter duty free within ten years after entry into force of the TPP. Estimated total tariff savings in the tenth year after entry into force are NZ\$236 million.
- *By the 15th year after entry into force:* tariffs eliminated on an additional NZ\$242 million of New Zealand exports currently subject to tariffs, including in Japan (cheese, sawn wood and offals); and Malaysia (liquid milk and wine). This constitutes 2.7% of total current exports to the US, Japan, Canada, Mexico and Peru. This means that 94.8% of New Zealand exports to these markets would enter duty free within fifteen years after entry into force of the TPP. Estimated total tariff savings in the fifteenth year after entry into force are NZ\$273 million.
- *When fully phased in:* tariffs eliminated on an additional NZ\$57 million of New Zealand exports currently subject to tariffs. Tariffs on one of New Zealand's highest traded cheese tariff lines in the US would be eliminated over twenty years (with a transitional safeguard lasting a further five years). Tariffs are also eliminated on milk powder exports to the US, with skim milk powder eliminated over twenty years, and whole milk powder eliminated over 30 years with a transitional safeguard lasting a further five years. There are estimated total tariff savings of NZ\$274 million per year at full implementation, not taking account of dynamic impacts.

Products Receiving Less than Full Tariff Liberalisation: For a small number of agricultural products with New Zealand's key affected export interests being dairy in some countries and beef in Japan it was not possible to achieve complete tariff elimination. Instead, TPP access would provide improved access through tariff reductions or tariff quota access.

- *Tariff reductions:* Tariffs on an additional NZ\$239 million of goods would be significantly reduced, but not eliminated, allowing for improved market access. Beef exporters would benefit from a 77% reduction in Japan's tariff for beef. This would be reduced from the current 38.5% (with the potential to 'snap-back' to a 50% duty if a WTO volume safeguard level is exceeded) to 9% over sixteen years, with an initial sharp cut at entry into force. There will be a transitional volume-based safeguard applying to all TPP beef imports into Japan, set above current trade levels, with a growth rate.⁵ The safeguard will be abolished by Year 20 at the earliest. This outcome is the best outcome that Japan has agreed in a FTA to date, and immediately re-

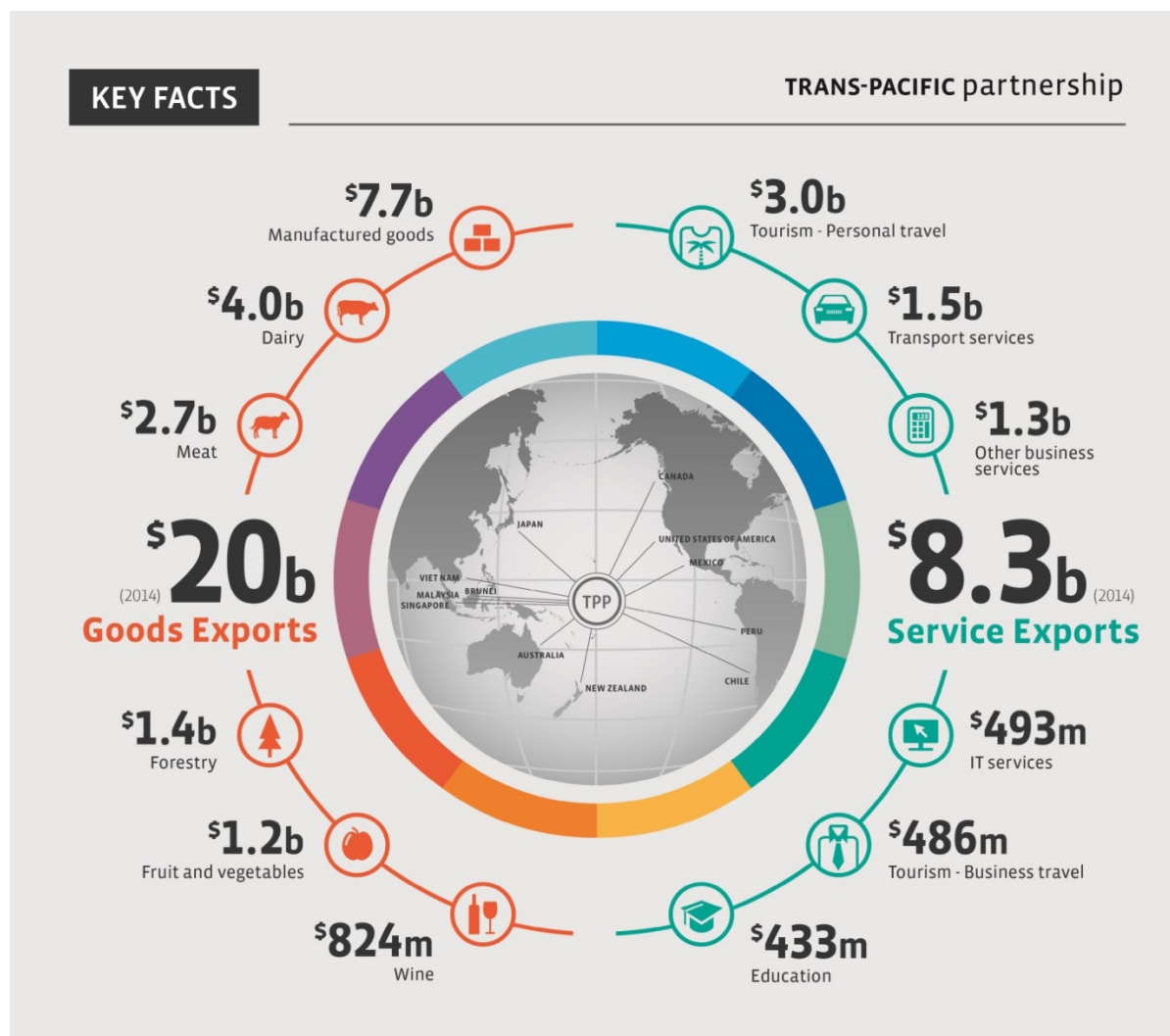
⁵ Under a volume-based safeguard, a higher duty is applied if the volume of imports exceeds a pre-set level.

establishes a level playing field with Japan's largest beef supplier, Australia, after the Japan-Australia Economic Partnership Agreement entered into force in early 2015. Japan will also reduce the tariff for ice-cream by two-thirds, from 21% today to 7% over six years, opening up new export opportunities given the significantly reduced tariff.

- *Tariff Quota Access:* For dairy, a portion of the overall benefits would come from improved market access through tariff quota access. New quota access for butter, cheese and milk powders (where tariffs are not eliminated) would have a market value (at current world prices as of October 2015) of approximately NZ\$310 million at entry into force of the Agreement, growing to NZ\$670 million over fifteen years. This access, spread across TPP importing countries, would be shared amongst exporters from the TPP countries.
- *Peru Price Band:* While Peru will eliminate all tariffs it has not committed to eliminate the price-band mechanism for a range of products including dairy. The Price Band acts as an additional duty if imported prices fall below a reference price.

TPP includes a number of other outcomes that would improve access for New Zealand goods exports to the region, as well as creating a framework to further reduce barriers to trade in the future:

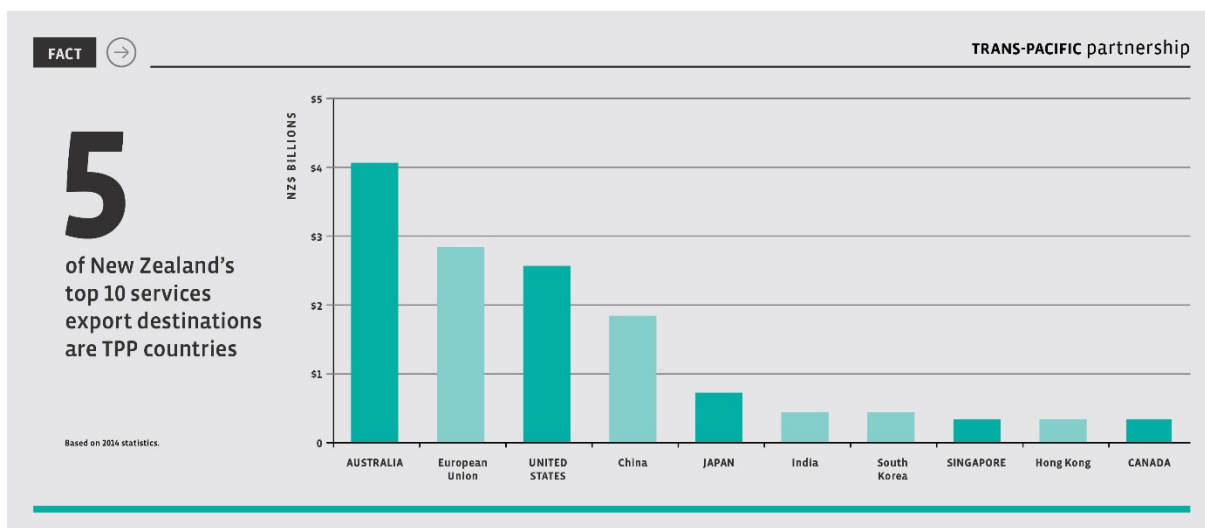
- Elimination of the use of agricultural export subsidies within the TPP region. Taken together with the decision on agricultural export subsidies at the Tenth WTO Ministerial Conference (MC10) in Nairobi in December 2015, this is a significant development in terms of New Zealand's long-standing aim to eliminate agricultural export subsidies globally.
- The most detailed rules of any New Zealand FTA on quota administration should result in transparent timely and predictable administration conditions, while imposing minimal additional administrative burdens on exporters.
- Rules of origin (for accessing preferential tariffs under TPP), primarily based on a specified change in tariff classification approach, that would allow processing undertaken in TPP Parties to be counted towards achieving the origin threshold ("cumulation"); give options to business when calculating regional value content; and provide for simple documentation (self-declaration).
- Customs commitments that would benefit exporters through increased efficiency at the border and expedite the release of goods. This includes advance valuation rulings for imports which would provide certainty and predictability for New Zealand exporters.
- Mechanisms to minimise negative trade effects of Sanitary and Phytosanitary (SPS) measures and Technical Barriers to Trade (TBT). This would contribute to the reduction over time of non-tariff measures faced by New Zealand exporters.
- A Wine and Distilled Spirits Annex to simplify the sale and export of New Zealand wines in TPP markets and reduce costs for New Zealand wine producers.



1.3.2 Trade in Services

Joining TPP would make it easier for New Zealand service exporters – such as providers of professional, business, education, environmental, transportation and distribution services – to exploit new trade opportunities and increase their competitiveness and profitability. Services are critical to New Zealand’s international competitiveness, accounting for 64 percent of GDP (NZ\$140 billion in 2014), with exports worth NZ\$17.7 billion (around a quarter of total exports). Nearly half these exports (NZ\$8.3 billion) go to TPP countries.

Improved commitments under TPP for services (and investment) would also be important for many New Zealand goods exporters, which increasingly look to undertake services related activities to support their international business (such as establishing an in-market presence, forming commercial partnerships and providing after-sales service).



In addition to the Investment Chapter discussed below, TPP includes four chapters that relate specifically to trade in services:

- Cross-Border Trade in Services:* Commitments are designed to ensure New Zealand exporters are not discriminated against in TPP markets (subject to limited exceptions) and that domestic regulation in TPP countries does not operate as a barrier to services trade, including sectors such as accountancy, construction, engineering and architecture services. This would benefit New Zealand exporters including in transport services (NZ\$1.5 billion exported to TPP countries in 2014), other business services (NZ\$1.3 billion to TPP countries in 2014), and IT services (NZ\$500 million exported to TPP countries in 2014). It would also support education and tourism exporters, for example making it easier to establish in-market presence for marketing or sales. For New Zealand, these obligations would be low-cost to fulfil, as our domestic regulatory regime already operates in an open and non-trade restrictive way. Like existing New Zealand FTAs, public services provided in the exercise of governmental authority, and social services such as healthcare and public education, are also excluded from the scope of New Zealand's services market access commitments in TPP.
- Financial Services:* TPP is the first time that New Zealand has included a separate chapter of provisions and commitments on financial services in a FTA. New Zealand sold NZ\$136 million of financial services to the TPP region in 2014, the majority of which was NZ\$99 million to Australia. These exports were a relatively small proportion of the total NZ\$621 million of financial services New Zealand exported in 2014, indicating potential for increased exports under TPP. New Zealand already has an open and transparent financial services policy regime. This, together with the policy space preserved under TPP to impose prudential regulation, means there would be little policy risk and minimal disadvantage for New Zealand to enter TPP with respect to Financial Services.
- Temporary Entry:* TPP will commit Parties to provide streamlined and transparent procedures for temporary entry applications, including a requirement to publish explanatory information on the requirements for temporary entry and the typical timeframes for application in each country. Increased information would assist New Zealand business people when doing business

in all TPP countries. New Zealand's commitments do not apply to people seeking employment in New Zealand or to immigration matters, such as citizenship or permanent residency applications.

- *Telecommunications:* TPP includes additional commitments that would apply to telecommunication services, aimed to underpin effective market access and competitive markets in telecommunications services in the TPP area. All the disciplines in the Chapter are assessed as consistent with current New Zealand regulatory settings.

1.3.3 Investment and Investor-State Disputes Settlement

Joining TPP would benefit New Zealand investors, providing improved conditions when making investments in other TPP Parties for many sectors, including our agricultural, manufacturing and natural resource industries. Improved conditions for investment are also important for many New Zealand goods and services exporters, who increasingly look to undertake investment activities to support their international business (such as establishing an in-market presence, forming commercial partnerships and providing after-sales service). New Zealand's outward foreign direct investment (ODI) in TPP countries represents about 73% of total investment abroad, and TPP will reduce barriers to investment and facilitate the navigation of complex regulatory systems.

TPP would be the first time New Zealand has entered into FTA investment commitments with Canada, Japan, Mexico, Peru and the US, and will also improve on the partial investment arrangements with several other TPP Parties including Brunei, Chile, Malaysia, Singapore and Viet Nam.

Foreign Direct Investment (FDI) from TPP countries totals 75 percent of all FDI into New Zealand. This is an important source of capital to keep building New Zealand's competitive and productive economy. Membership in TPP would also send a signal to investors in TPP Parties about the investment environment into New Zealand by generating increased confidence and knowledge in New Zealand's stable and transparent investment regime, which would be expected to encourage inward investment flows in New Zealand.

Under TPP, New Zealand would increase the threshold above which a non-government investor from a TPP Party must get approval to invest in significant business assets from NZ\$100 million to NZ\$200 million. (Note that non-government investors from Australia are already screened at a higher threshold, currently NZ\$497 million, under ANZCERTA.) Other than this specific threshold, TPP would not have any further implications for the investments currently screened under the Overseas Investment Act 2005. No changes would be required to the way New Zealand currently approves foreign investment in sensitive land (including farm land over five hectares) or fishing quotas. TPP rules do not provide the ability for a government to ban TPP nationals from buying property in New Zealand. Under TPP, however, New Zealand would be able to impose some types of new, discriminatory taxes on property and, as noted above, continue to require approval to require approval for foreign investments in sensitive land. New Zealand would also retain the flexibility to make the approval criteria under the Overseas Investment Act more or less restrictive.

As with many of New Zealand's existing FTAs (with Korea, China, and ASEAN members), the provisions of the TPP Investment Chapter are supported by recourse to investor State dispute settlement (ISDS). ISDS is a dispute resolution mechanism that allows foreign investors to pursue remedies directly against a TPP Party in relation to breaches of TPP's investment provisions.

The ISDS mechanism would provide positive recourse for New Zealand investors in TPP countries, but also has the reciprocal potential consequence of an increased exposure of the New Zealand Government to ISDS claims. While ISDS has been included in many of New Zealand's existing trade and investment agreements, it has never been utilised. However, the size of the TPP region and the potential number of new investors in New Zealand could increase the risk that New Zealand may face an ISDS claim (and the actual cost of responding to such a claim) in the future. This increased risk has been suggested by some commentators as potentially preventing future governments from taking regulatory action in areas of importance to New Zealand, such as for environmental objectives.

There are several aspects of ISDS in TPP that are considered to provide sufficient mitigation to balance the advantages and disadvantages of ISDS as acceptable for the New Zealand Government. For example:

- There are safeguards, reservations (non-conforming measures) and exceptions that ensure New Zealand retains the ability to regulate for public health, the environment and other important regulatory objectives.
- A specific provision allows the Government to rule out ISDS challenges over tobacco control measures. The Government intends to exercise this provision.
- The 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'.
- Limiting the types of monetary awards and damages that can be made against the Government.
- Provisions that mean hearings will be open to the public, and which allow tribunals to accept submissions from experts and the public.
- A number of provisions that allow TPP governments to issue binding interpretations on ISDS tribunals.
- ISDS provisions would not apply between New Zealand and Australia. This means that three-quarters of all FDI from TPP countries in New Zealand would not have recourse to ISDS under TPP.
- There are a number of other mitigating features (outlined in detail in this NIA).

ISDS does not change New Zealand's obligations under TPP, it simply provides an avenue for TPP investors to pursue a claim in the case a government has not met certain obligations. 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).

1.3.4 Intellectual Property

The TPP Intellectual Property Chapter contains the most extensive set of intellectual property obligations in a FTA negotiated by New Zealand. Most provisions of the chapter are consistent with New Zealand's existing intellectual property regime. But some provisions require New Zealand to make changes to law or practice before we can ratify the Agreement, most notably in the areas of copyright and related rights, and patents. New Zealand will also need to amend its plant variety rights regime within three years of TPP entering into force. In many cases New Zealand has negotiated flexible approaches to these obligations, as well as exceptions and limitations. Overall, however, the obligations in the Intellectual Property Chapter would involve a net cost to New Zealand (primarily the net cost due to copyright term extension, conservatively estimated at NZ\$55 million, and the loss of future policy flexibility in other areas).

Some of these obligations regard copyright and related law:

- The most significant impact for New Zealand would be a requirement under TPP to extend the copyright term to 70 years. New Zealand law currently protects copyright for 50 years.⁶ New Zealand negotiated an eight-year transition period in TPP, during which time works that would originally have fallen into the public domain would have their copyright term extended to 60 years (rather than 70). While some New Zealand copyright owners would benefit from copyright extension, overall it would impose a significant net cost – due to New Zealand consumers foregoing savings from works falling into the public domain earlier. Over the very long term, the average annual cost to New Zealand is conservatively estimated to be NZ\$55 million.
- TPP would require Parties to prohibit the circumvention of technological protection measures (TPMs)⁷ without permission of the rights owner, as well as some related obligations. While New Zealand law is already consistent with many of these requirements, TPP would require are new civil and criminal sanctions against a person who circumvents a TPM directly. The TPM provisions would not require New Zealand to prohibit uses of copyright works that are currently legitimate under New Zealand law.
- TPP would require New Zealand to give performers new economic and moral rights in their performances, similar to those of other copyright owners, including the right to authorise any copying of the sound recording of their performance, the selling of the sound recordings, the communication of their performance to the public, as well as the right to be identified as the performer and to object to derogatory treatment of their performances and sound recordings of their performances. This may benefit some New Zealand performers, but is also expected to incur some transaction costs for New Zealand.

Some provisions in TPP relating to pharmaceuticals are assessed to be a net disadvantage to New Zealand, but not to the extent of posing a significant cost or risk:

⁶ The copyright term for films and sound recordings (including recorded music) currently expires 50 years after the end of the calendar year in which they were made or published. The copyright term for books, screenplays, music, lyrics and artistic works currently expires 50 years after the end of the calendar year in which the author died.

⁷ TPMs include digital locks on copyright works or services that distribute copyright works.

- TPP would require New Zealand to provide extensions to the patent term for pharmaceuticals for delays in regulatory approval processes in certain circumstances. If these circumstances arise, a patent term extension would delay entry to the market of cheaper generic versions of that pharmaceutical. Given the efficiency of New Zealand's processing times, very few unreasonable delays are expected to occur in New Zealand, and only in exceptional circumstances. While the cost of any delays would depend on the case, the average cost is estimated at NZ\$1 million a year.
- TPP would require a Party to provide either eight years' data protection for biologic pharmaceuticals, or five years along with other measures to provide additional effective market protection (a period of protection before which competition from generic pharmaceuticals was allowed). The second option can be met by current New Zealand policy settings and practice.
- TPP would require New Zealand to provide a form of patent linkage for pharmaceutical products. But the obligation in TPP has been limited to requiring patent owners to be notified when a person sought approval to market a generic version of their product, and making available remedies to enable the resolution of disputes about a pharmaceutical patent. These measures would not require any change to New Zealand practice, and as a result would not result in any disadvantage to New Zealand.

Under TPP, New Zealand would need to adopt a plant variety rights system that gave effect to the most recent 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91). (This is a New Zealand-specific alternative to an obligation in TPP to accede to UPOV 91.) While New Zealand has acceded to UPOV 78 (the 1978 version of the Convention), accession to the more prescriptive UPOV 91 had been seen as potentially reducing some of the options available to the Government when deciding how to respond to the recommendations of the Waitangi Tribunal report *Ko Aotearoa Tēnei* (WAI 262) in respect of indigenous plant varieties. Under TPP, the Government would have flexibility to decide, in consultation with the relevant partners and stakeholders, how best to meet New Zealand's obligations while taking into account the recommendations in WAI 262. New Zealand would have three years from TPP's entry into force to meet this obligation. New Zealand would also be able to adopt any measure necessary to fulfil Treaty of Waitangi obligations in meeting this plant varieties obligation under TPP.

TPP would also require New Zealand to accede to or ratify six further international conventions and treaties related to intellectual property, none of which are expected to bring significant advantage or disadvantage.

There would be some advantages for New Zealand in joining TPP from the Intellectual Property provisions. Requirements for due process regarding the protection of geographical indications (a sign or name used in relation to goods that have a specific geographical origin and qualities essentially attributable to its origin). Exporters would be able to seek to ensure that they can continue to use common names for goods by objecting to proposals in export markets to protect them as geographical indications. Consistent enforcement procedures for intellectual property would also benefit exporters that rely on protecting intellectual property overseas. Provisions on traditional knowledge provide a

framework within which TPP Parties can cooperate to improve understanding of issues related to traditional knowledge and genetic resources, including mātauranga Māori and taonga species.

1.3.5 Other Areas of the Agreement

There are a number of other areas of potential significance for New Zealand in TPP:

- TPP would be the first time New Zealand entered Government Procurement commitments with Malaysia, Mexico, Peru and Viet Nam. This would provide New Zealand exporters new government contracting opportunities, without requiring changes to New Zealand's procurement practice or regulatory framework. In most developed countries, government procurement typically represents 14-20 percent of GDP (OECD estimates).
- TPP would require the Pharmaceutical Management Agency (PHARMAC) to meet requirements aimed at promoting transparency and good process in decisions to fund pharmaceuticals and medical devices – for example, introducing a review mechanism. While it was not New Zealand's preference to include this issue in TPP, most provisions reflect existing PHARMAC practices. The total estimated impact of these rules for PHARMAC is NZ\$4.5 million in one-off establishment costs, plus NZ\$2.2 million ongoing per year costs. There would be no change to the fundamentals of PHARMAC's model. PHARMAC's ability to prioritise and decide what pharmaceuticals are funded in New Zealand, and the negotiating model it uses to achieve the best health outcomes from the funding available, would not be affected by TPP.
- TPP contains provisions on State-Owned Enterprises (SOEs) that recognise each Party's right to establish and maintain SOEs while aiming to establish a level playing field between state-owned or controlled companies and their competitors. The provisions do not apply to SOEs which operate principally on a not-for-profit or cost-recovery basis, and include an exception for SOEs with annual revenue below around NZ\$400 million (thus excluding the majority of New Zealand entities from TPP's commitments). Services that are provided in New Zealand by New Zealand SOEs are also excluded from key obligations in the Chapter. The Chapter would support New Zealand exporters and investors operating in TPP markets, and would entail no real disadvantage for New Zealand, primarily because New Zealand state-owned commercial companies are set up to operate on a level playing field with privately-owned companies and are subject to competition laws.
- TPP's labour and environment outcomes are the most comprehensive included in any of New Zealand's FTAs. TPP will promote sustainable development and higher standards of environmental and labour protection in the TPP region. Key outcomes for New Zealand include commitments by Parties to adopt and enforce strong domestic labour and environmental laws, and obligations to address forced and child labour, the illegal take of and trade in wild flora and fauna, subsidies for overfished fish stocks, and illegal, unreported and unregulated (IUU) fishing.
- A number of chapters will contribute to facilitating economic efficiency, consumer welfare, and the ease of doing business, for example chapters covering Competition, Competitiveness and Business Facilitation, Small and Medium Enterprises, and Regulatory Coherence.

- TPP's Electronic Commerce Chapter aims at promoting the adoption of domestic frameworks capable of building confidence among e-commerce users, while avoiding the imposition of unnecessary barriers to the use and development of e-commerce.

Some obligations in TPP would constitute new obligations for New Zealand but would not require any changes to our law or practice. These new obligations would not therefore directly disadvantage New Zealand. The new obligations would, however, place new limitations on the Government's ability to modify New Zealand's policy settings to ensure they are appropriate for our domestic circumstances. Whether locking in current policy settings materially disadvantages New Zealand depends principally on how prescriptive the relevant obligation is and the availability of other policy tools to achieve the relevant future policy objectives. For example, some obligations in the Intellectual Property Chapter could place new limitations on the Government's ability to adopt certain intellectual property settings in response to new circumstances or technological change, and the SOEs Chapter could prevent the Government from subsidising SOEs to specifically undertake commercial activities in other TPP countries.

1.4 Measures required in New Zealand to implement TPP

Most of the obligations in TPP are already met by New Zealand's existing domestic legal and policy regime. In summary, this is because New Zealand already has an open economy that places few barriers in the way of trade and investment. Also, we have an independent, fair and effective judicial system and an efficient administrative system that together provide the kinds of procedural guarantees for foreign businesses that are required under some of the chapters in TPP. This is evidenced by the fact that New Zealand consistently ranks as one of the easiest countries in the world to do business in.

However, a number of legislative and regulatory amendments are required to align New Zealand's domestic legal regime with certain of the rights and obligations created under TPP and thereby enable New Zealand to ratify TPP. These include:

- Changes to the Tariff Act 1988 to implement TPP's preferential tariff rates and transitional safeguard mechanisms (and may include emergency action measures for textiles and apparel), to the Customs and Excise Act 1996 to implement advance rulings for valuation, and to the Customs and Excise Regulations 1996 to implement rules of origin. TPP would also require an export license allocation system for quota-controlled dairy products to the US market.
- Some amendments to various Acts to give effect to notification, comment, and transparency requirements under TPP.
- Within three years of TPP entering into force, a change to the Wine Act 2003, or regulations under the Act, defining the type of wine permitted to be exported as "ice wine".
- Amendments to the Overseas Investment Act to increase the screening threshold for non-government investments in significant business assets from TPP Parties to NZ\$200 million.
- Within three years of TPP entering into force, amendments to the Plant Variety Rights Act 1987 to give effect to the International Convention for the Protection of New Varieties of Plants

(UPOV 91), while adopting any measure necessary to protect indigenous plants in fulfilment of any related obligations under the Treaty of Waitangi.

- Amendments to the Copyright Act 1994 to give new exclusive rights to performers, extend the copyright term from 50 to 70 years (with a delayed transition), provide new civil and criminal remedies against the circumventing of TPMs (while determining exceptions to allow legitimate circumvention), providing additional protection for rights management information, providing the New Zealand Customs Service *ex officio* powers to temporarily detain suspected copyright-infringing goods, and broadening the existing protection of encrypted program-carrying signals.
- Amendments to the Patents Act 2013 to provide a grace period for public disclosures of an invention before a patent application has been filed, and to provide for patent term extension in the case of certain unreasonable delays.
- Amendments to the Trade Marks Act 2002 to provide authority to Courts to award additional damages for trade mark infringement, introduce measures to prevent the export of infringing trade mark goods, introduce measures to provide the New Zealand Customs Service *ex officio* powers to temporarily detain suspected trade mark infringing goods, and require the Courts to order the destruction of counterfeit goods in infringement proceedings except in exceptional cases.
- Amendments to the Agricultural Compounds and Veterinary Medicines Act 1997 to extend current data protection for new agricultural chemicals from five to ten years.

1.5 Economic, social, cultural and environmental effects

1.5.1 Economic effects

The overall impact of TPP on the New Zealand economy would be the result of the complex interaction of the different aspects of the Agreement.

- Economic modelling commissioned by the New Zealand Government estimates that once fully in effect, TPP would result in New Zealand's GDP being about 1% larger than if TPP had not existed, adding NZ\$2.7 billion to GDP (in 2007 dollars) in 2030.
- TPP would also carry some costs for New Zealand, estimated at up to NZ\$79 million each year. This cost includes two components:
 - Fiscal costs (e.g. foregone tariff revenue for the Government, and costs associated with the implementation of TPP) estimated at up to NZ\$24million.
 - The net economic effect of extending copyright period, conservatively estimated at an average of NZ\$55 million a year.

From the first year of entry into force, TPP would be of net benefit to New Zealand⁸. This net benefit would grow substantially as the benefits from TPP come on line (e.g. tariffs phased out over longer

⁸ While not appropriate for a direct comparison, the \$79 million in annual costs listed here (which is an over-estimate of the costs in the first year of TPP's entry into force), would be less for example than the NZ\$137 million of tariffs that would be

periods). Total benefits after three years are predicted to be ten times larger than costs, with the gap continuing to widen as the economic benefits of greater export opportunities were made available to New Zealand businesses.

Table 1.3: Summary of Benefits and Costs

Area	Annual Net Cost / Benefit (NZ\$)	Description
Reductions in tariffs and quota barriers on goods trade. (Economic benefit.)	\$624 million	Additional GDP for the New Zealand economy by 2030 (CGE modelling). Around half of tariff elimination for New Zealand exports is from entry into force.
Reductions in non-tariff measures (NTMs) on goods trade. (Economic benefit.)	\$1.46 billion	Additional GDP for the New Zealand economy by 2030 (CGE modelling).
Improved trade facilitation measures. (Economic benefit.)	\$374 million	Additional GDP for the New Zealand economy by 2030 (CGE modelling).
Reductions in barriers on services trade. (Economic benefit.)	\$250 million	Additional GDP for the New Zealand economy by 2030 (CGE modelling).
Copyright term extension. (Economic cost.)	- \$55 million	Net cost over long term, based on economic modelling. Actual cost would increase gradually over first 20 years.
Foregone tariff revenue. (Fiscal cost.)	- \$20 million	This maximum is reached after seven years.
TPP Institutional arrangements and outreach activities. (Fiscal costs.)	- \$1 million	Participation in on-going TPP committees etc. and public engagement.
Administrative costs. (Largely fiscal cost.)	- \$3.2 million	Costs for implementing certain TPP obligations (primarily, the fiscal cost in relation to new administrative procedures PHARMAC would implement, and impact of any extensions to pharmaceutical patent) Note also one-off costs to PHARMAC of NZ\$4.5 million, and Customs of NZ\$0.4 million.

Economic modelling

The economic modelling commissioned by the Ministry of Foreign Affairs and Trade (MFAT)⁹ estimated the overall impact of TPP on New Zealand's economy, once all trade liberalising measures were assessed to have come into place by 2030. The four ways in which the modelling assumed TPP would liberalise trade were:

- *Reductions in tariffs and quota barriers on goods trade*, corresponding to New Zealand GDP being NZ\$624 million larger by 2030. This figure corresponds to the economic benefit that

eliminated from New Zealand goods exports at TPP's entry into force (in addition to which New Zealand would see improved market access from removal of NTMs in goods, services and investment).

⁹ Anna Strutt, Peter Minor and Allan Rae, "A Dynamic Computable General Equilibrium (CGE) Analysis of the Trans-Pacific Partnership Agreement: Potential Impacts on the New Zealand Economy", 28 September 2015. Available at www.tpp.mfat.govt.nz.

would accrue to New Zealand from improved market access into TPP markets due to lower tariffs. The model captures gains from allocative efficiency as relative prices adjust encouraging a shift in New Zealand production into areas where we have better competitive advantages. It would also account for increased value from lower tariffs on imports into New Zealand, although this effect would likely be relatively low given New Zealand's already low tariff structure.

- *Reductions in non-tariff measures (NTMs) on goods trade* cumulating in an additional NZ\$2.91 billion to GDP after fifteen years. While the removal or lessening of NTMs can represent one of the most significant outcomes from trade agreements, and the impact of NTMs on global trade is well-documented, available data and approaches to modelling NTMs are not as developed as for, say, the liberalisation of tariff barriers. For this reason the Government took a conservative approach to considering the benefits of reductions of NTMs on goods under TPP, and assumed that estimated gains from addressing NTMs on goods would be only half of this predicted value, i.e. NZ\$1.46 billion.
- *Improved trade facilitation measures*, estimated to add NZ\$374 million to New Zealand's GDP after fifteen years. These gains were estimated to come from faster times for goods to clear borders, for example resulting from TPP's outcomes on trade facilitation such as commitments aimed at facilitating the flow of goods across borders, including through ensuring customs procedures and practices are transparent and consistent, and expediting certain forms of trade.
- *Reductions in barriers on services trade*, estimated to contribute an additional NZ\$250 million to New Zealand GDP by 2030. TPP would liberalise trade flows across a range of areas that would be expected to benefit New Zealand in these areas (for example in Cross-Border Trade in Services, Financial Services, Temporary Entry, and Telecommunications).

These estimated gains to New Zealand's GDP in 2030 compare the impact of TPP against the scenario where TPP never enters into force. In reality, TPP will almost certainly enter into force regardless of whether New Zealand joins. If TPP goes ahead without New Zealand, New Zealand would be placed at a competitive disadvantage in the region, incurring a significant net cost to the economy.

Estimation of costs

In the context of launching TPP negotiations, the Government also commissioned a study on the effect on New Zealand of raising a number of intellectual property (IP) protections in New Zealand at that time¹⁰. This included a quantification of the impact of extending New Zealand's copyright term from 50 to 70 years, an obligation that eventuated in TPP. Ergas et al. (2009) found that New Zealand was a "very substantial net importer of IP protected goods (e.g. books, recorded music, films, software, pharmaceuticals)", meaning the greater benefit of any additional IP protection in New Zealand would accrue to foreign IP owners.

The study looked at the potential costs of term extension in terms of its effect on the price and usage of copyright-protected content in New Zealand, as well as the potential benefits on New Zealand

¹⁰ Jennifer Orr, Jason Soon, Henry Ergas. "Economic Impact of Potential Changes to New Zealand's IP Laws as a Result of Trade Negotiations", September 2009 (copyright term extension results available at www.tpp.mfat.govt.nz).

exports in this area. The study estimated the cost of copyright extension for books and recorded music, corresponding to an average annual real cost of NZ\$21 million and NZ\$17 million respectively. These costs constitute the most recent estimation of the net cost to New Zealand of an extension to copyright term under TPP (although creative markets have changed during this time, as a result of digitisation and consumer trends). While not included in the Ergas et al model, copyright extension would also have an important effect for audio-visual works, including films and television. The net economic impact for audio-visual works is estimated to be roughly equivalent to the annual cost of recorded music. As a result, the real annual cost of TPP on these three areas of copyright, is estimated to be NZ\$55 million annually.

There would be some additional costs associated with joining TPP that could be seen as operational costs for the New Zealand Government – the most significant of which would be NZ\$20 million in foregone tariff revenue (on imports from new FTA partners). Other costs include additional administration costs for PHARMAC (NZ\$4.5 million in one-off costs, with an on-going annual cost of NZ\$2.2 million), and associated with the possibility of granting patent term extension (estimated to average NZ\$1 million annually). Many of the other costs associated with TPP would be considered an investment in realising the full benefits of the Agreement, for example funding New Zealand's participation in the institutional arrangements (such as Committees) that will oversee the trade and economic framework envisaged under TPP. These fiscal costs are estimated to total a maximum of NZ\$24 million annually.

1.5.2 Social, cultural and environmental Effects

The net economic benefit of TPP for New Zealand would be expected to translate into a corresponding net benefit to New Zealand society, for example through improved employment and wages, and greater resource to spend on health, welfare and cultural outcomes. Nevertheless, there would be some costs for the health sector that would need to be managed (noting that those costs associated with new administrative requirements for PHARMAC would met by increased funding from the Crown).

TPP would have few implications for New Zealand's ability to develop social policy. As noted in the preamble to the Agreement, TPP Parties resolve to "maintain each Party's right to regulate to meet domestic public policy objectives, including to safeguard public welfare". TPP's labour and environment commitments are the strongest contained in any of New Zealand's FTAs, and are consistent with New Zealand's existing domestic approach. TPP would have minimal impact on immigration. While closer economic ties with other TPP members may result in new patterns of movement of people, TPP would not affect New Zealand's immigration policy framework. TPP would have no effect on human rights in New Zealand.

All of New Zealand's FTAs have ensured that the unique relationship between the Crown and Māori is observed. This outcome has been achieved by ensuring the obligations in New Zealand's FTAs do not impede the Crown's ability to fulfil its obligations under the Treaty of Waitangi, through including a Treaty of Waitangi exception in all FTAs since 2001.

The Treaty of Waitangi exception in New Zealand's FTAs provides additional clarity that the Crown would be able to continue to meet its obligations to Māori, including under the Treaty of Waitangi. It is designed to ensure that successive governments retain flexibility to implement domestic policies that favour Māori without being obliged to offer equivalent treatment to overseas entities. New Zealand's approach of including the Treaty of Waitangi exception in its FTAs is unique, and reflects the constitutional significance of the Treaty of Waitangi to New Zealand.

New Zealand continued this approach with TPP, securing the same outcome as with previous FTAs. TPP countries also secured provisions on traditional knowledge that have not been included in any previous New Zealand FTAs as well as a New Zealand-specific outcome on plant variety rights. The plant variety rights outcome would give the Government sufficient time to undertake consultations on implementation of this obligation and sufficient flexibility to adopt any measures it deems necessary to protect indigenous plant species in fulfilment of any related obligations under the Treaty of Waitangi.

As a result of these outcomes, nothing in the TPP prevents the Crown from meeting its obligations to Māori, including under the Treaty of Waitangi. These outcomes reflect New Zealand's established practice in FTAs, and were obtained after consultations with Māori and other stakeholders.

TPP is not expected to have a significant effect on the Government's ability to pursue cultural policy objectives, such as supporting the creative arts, and in relation to cultural activities. The only significant cultural impact of TPP would be potentially due to the extension of copyright terms, delaying the point at which creative works would enter the public domain from 50 to 70 years. This would have two key cultural effects: consumers and second-generation creators would need to wait longer before works were freely available (i.e. in the public domain),¹¹ while copyright holders would be able to derive benefit from works for longer. The overall effects are likely to be felt more keenly by institutions that hold large quantities of works that would have entered the public domain without the term extension, such as libraries and universities. (Although TPP would not affect the copyright exceptions that currently exist in New Zealand for these kinds of institutions.)

One of the aims of New Zealand's trade agreements is to ensure that the outcomes contribute to sustainable development and environmental objectives. TPP includes provisions that recognise the important role that trade liberalisation can play in supporting environmental improvements and the role that improved environmental performance can play in underpinning economic development. TPP is New Zealand's third trade agreement to include a substantive chapter on the environment (the others being ANZTEC and the Korea FTA), and is the most comprehensive of these. TPP aims to promote sustainable development and higher standards of environmental protection in the TPP region.

¹¹ This would affect projects that use copyright works once that have fallen into the public domain, like the National Library's *Papers Past* project.

TPP contains legally binding commitments on trade and environment, requiring Parties to effectively enforce their environmental laws, and not to derogate from them in order to encourage trade or investment. TPP also contains specific commitments intended to help address global environmental issues such as trade in illegally harvested wild fauna and flora, IUU (illegal, unregulated and unreported) fishing and harmful fisheries subsidies.

TPP would not restrict New Zealand from applying existing or future environmental laws, policies and regulations, provided they are applied to meet a legitimate objective and are not implemented in a manner which would constitute a disguised restriction on trade. TPP is not expected to have any negative effects on the environment in New Zealand that cannot be managed using existing policy frameworks.

1.6 Consultations

The consultation process for TPP has been among the most extensive a New Zealand Government has undertaken for any trade negotiation. Throughout the negotiation process the Ministry of Foreign Affairs and Trade (MFAT), together with other government agencies, has been active in engaging with a wide spectrum of stakeholders on TPP.

The objective of ongoing consultations on the TPP has been to provide the opportunity for stakeholders to seek information and offer their views so that their interests are taken into account. Regular sessions with domestic stakeholders have provided a forum to share information about the progress of negotiations and to seek stakeholder input on negotiating goals and approaches. The “TPP Talk” internet column (on MFAT’s website) encouraged feedback on TPP from the public at any stage.

In undertaking consultations for TPP, the Government drew on an existing foundation of information from engagement with stakeholders over the course of previous FTA negotiations.

1.7 Subsequent changes to TPP

TPP makes provision for the Parties to amend the Agreement. An amendment can only be made if all Parties agree in writing, and would only enter into force after each Party had approved the amendment in accordance with its applicable domestic legal procedures. New Zealand would consider any proposed amendment on a case by case basis, and, as reflected in the text, any decision to accept an amendment would be subject to the usual domestic approvals and procedures for entering into a multilateral treaty.

In addition, the TPP Commission would be able to consider and adopt modifications of:

- The tariff elimination schedules, where this is due to a Party accelerating its tariff elimination.
- The rules of origin established in Annex 3-D (product-specific rules).
- The lists of entities and covered goods and services and thresholds contained in each Party’s Annex to Chapter 15 (Government Procurement).

As with any other amendments, such modifications would only take effect once each Party had completed any applicable domestic legal procedures.

Any Party may withdraw from TPP by providing written notice of withdrawal to the Depositary. The withdrawal takes effect six months after notice is provided unless Parties agree on a different period. If a Party were to withdraw, TPP would remain in force for the remaining Parties.

Any decision by New Zealand to terminate TPP would be subject to the usual domestic approvals and procedures.

1.8 Conclusion

This NIA finds that entering TPP would be in New Zealand's national interest.

2 Nature and timing of proposed treaty action

The Trans-Pacific Partnership (TPP) Agreement is a plurilateral treaty level agreement negotiated between twelve countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, the United States of America (US) and Viet Nam.

The TPP negotiations concluded on 5 October 2015 in Atlanta, Georgia, followed by legal verification and translation into French and Spanish. Signature is expected to take place in February 2016.

Entry-into-force of TPP is subject to the completion of the necessary domestic procedures of Parties. There are various ways in which TPP may enter into force:

- The first option is that if, within two years of the date of signature, all countries that signed TPP (the “signatories”) have notified the Depositary that they have completed their applicable legal procedures then TPP will enter into force 60 days after notification by all countries.
- If all signatories have not notified their readiness within two years, then the second option is that TPP will enter into force 26 months after signature if at least six of the signatories have notified the Depositary that they are ready, provided that those six signatories account for at least 85 percent of the combined GDP (as of 2013) of the original signatories.
- The third option will apply if TPP has not entered into force under either the first or second options. In those circumstances, it will enter into force 60 days after the date on which at least six of the original signatories have notified the Depositary that they have completed their applicable legal procedures. Again, these must be six signatories that together account for at least 85 percent of the combined GDP (as of 2013) of the original signatories.

TPP includes a mechanism that allows signatories who did not notify their readiness under the above options to become a Party to TPP when they are ready to do so.

It is New Zealand’s strong preference that New Zealand notifies its completion of its domestic processes within two years of signature. The Agreement is not expected to enter into force until early 2018.

New Zealand has also concluded a number of separate side letters and instruments with other Parties, alongside TPP. These are separate to TPP, with some being of treaty status. For New Zealand, these instruments cover the following subject areas:

- Letters, both legally binding and less-than-treaty status, that confirm the relationship between TPP and existing New Zealand FTAs: with Australia (also see below), Brunei, Chile, Malaysia, Singapore and Viet Nam.

- A legally binding agreement with Australia covering: the relationship between TPP and New Zealand-Australia Closer Economic Relations (CER) and the Australia-ASEAN-New Zealand Free Trade Area (AANZFTA); agreement that TPP's investor-state dispute settlement and trade remedies provisions would not apply between New Zealand and Australia; and agreement limiting the circumstances in which New Zealand can subsidise an SOE for air services in the Trans-Tasman market.
- Legally binding agreements with Canada, Mexico and the US – at their request – to protect certain 'distinctive products'¹² to the extent already provided for under the Australia New Zealand Food Standards Code.
- A less-than-treaty level understanding with Japan on the interaction between the copyright term provisions of TPP and the concessions it agreed under the World War II peace treaty (Article 15, Treaty of Peace 1951).
- Less-than-treaty level understandings, agreed at their request and appropriately high-level in nature, with Malaysia and Peru on biodiversity and traditional knowledge.
- A legally binding agreement that provides Viet Nam with some flexibility in how it implements a TPP obligation which requires Parties to allow the cross-border provision of electronic payment services (a provision of the financial services chapter). The content reflects flexibility Viet Nam has negotiated with large exporters of financial services exporters (e.g. the US, Australia, Japan). Conditions set out in this letter can be enforced through TPP's dispute settlement provisions.

Article 18 requires that New Zealand accede to or ratify the following treaty level agreements prior to the date of entry into force of TPP for New Zealand:

- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended on September 26, 1980 (the Budapest Treaty).
- WIPO Copyright Treaty, done at Geneva, December 20, 1996 (the WIPO Copyright Treaty, WCT).
- Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, July 24, 1971 (the Berne Convention).¹³
- WIPO Performances and Phonograms Treaty, done at Geneva, December 20, 1996 (the WIPO Performances and Phonograms Treaty, WPPT).

The legal obligations that would be imposed on New Zealand by acceding to or ratifying these treaties will be considered in a separate National Interest Analysis (NIAs) for each treaty, but the impact on New Zealand from joining each of those treaties is considered as part of this NIA. These NIAs will be presented to Parliament at the same time as this NIA.

¹² Canada: Canadian Whisky, Canadian Rye Whisky; Mexico: Mezcal, Tequila, Bacanora, Charanda and Sotol; US: Bourbon Whiskey, and Tennessee Whiskey.

¹³ New Zealand is already a member of a previous version of the Berne convention and is already required to comply with the 1971 version under Article 9 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.

The TPP Intellectual Property Chapter would also require New Zealand to accede to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva, March 19, 1991 (UPOV 91), or alternatively to give effect to UPOV 91 (see Section 4.18 below).

New Zealand would also be required to remove its reservation to Articles 1-12 of the Paris Convention for the Protection of Industrial Property, as revised at Stockholm, July 14, 1967 (the Paris Convention).

TPP and the accompanying side letters would not apply to Tokelau. Consultation is required with Tokelau as to the territorial applicability of the multilateral treaties ratified or acceded to under Article 18 of TPP.

3 Reasons for New Zealand becoming a Party to the Treaty

The reasons for New Zealand becoming a Party to TPP are both economic and strategic. New Zealand is an export dependant country. Trade is critical to continued growth and prosperity, and the Business Growth Agenda (BGA) identifies the high-level goal of growing exports to 40 percent of GDP by 2025. New Zealand's core objective in trade policy, in support of the BGA, is to broaden and deepen the opportunities available to businesses. Key to this is removing and reducing barriers to trade and investment, as well as establishing frameworks through which trade and investment linkages can evolve and expand, thereby driving economic growth. FTAs with key trading partners, such as TPP, are an important means of achieving this. TPP would be New Zealand's first FTA with five countries, including our third and fifth most important trading partners (the US and Japan).

TPP is a 21st Century, comprehensive, living agreement in the Asia Pacific – a region that is a driving force of global economic growth. Roughly half of international trade, and more than 70 percent of New Zealand's trade and investment, flows through the region. New Zealand's future depends on its trading relationships with Asia Pacific countries and TPP provides New Zealand with the opportunity to harness and grow these linkages.

TPP would serve as a platform to support the integration of New Zealand business into regional supply chains and would provide consistency and certainty to traders and investors in TPP markets. TPP will continue to evolve and grow through future expansion. The Agreement provides a platform for wider, regional economic integration, and supports the foundation for a FTA of the Asia Pacific.

The counterfactual scenario – New Zealand standing aside from the opportunities of TPP – risks marginalisation and decline for New Zealand in the region. New Zealand's competitiveness in TPP markets would be eroded, and trade and investment would be diverted away from New Zealand to TPP members. The opportunity to shape future trade liberalisation in the region would also be lost.

3.1 Benefits from enhanced trade and economic links under TPP

The Agreement will deepen economic ties between its diverse members by opening up trade in goods and services, boosting investment flows, and promoting closer links across a range of economic policy and regulatory issues. A greater degree of coherence in the regulations that govern regional supply chains will streamline international trade, providing benefits for businesses and consumers. Over time, TPP will remove unnecessary duplication, reduce costs, and foster greater business opportunities.

Among TPP's central benefits to New Zealand is that it guarantees preferential market access, and improved quality of access, for New Zealand goods, services and investment in the eleven other markets in the TPP region. Taken together, these markets jointly account for approximately US\$28 trillion, equivalent to about 36 percent of global GDP. TPP would open up new market opportunities, and restore a level playing field for our exporters in markets where competitors have enjoyed tariff preference.

TPP also offers the chance to further diversify New Zealand's export profile, giving New Zealand exporters a significantly expanded range of markets where they would be able to do business on the same terms as their competitors. Improved access to such large and dynamic markets provides substantial new export growth opportunities to New Zealand businesses. Strategically, diversification reduces the risk for New Zealand associated with being over-reliant on particular export markets or sectors. A growing export sector will contribute to increased productivity, job creation, higher wages and improved standards of living across New Zealand.

Beyond market access for goods the FTA would provide more opportunities, and greater certainty and transparency, for New Zealand businesses wishing to operate in the region. TPP contains a range of mechanisms which provide a platform for enhanced regulatory cooperation to facilitate trade and reduce associated transactions costs in both goods and services trade and for cooperating on a range of other trade-related issues such as customs procedures.

FTAs have played an important role in building strong trading relationships between New Zealand and our neighbours and have delivered tangible benefits for New Zealand exporters and consumers. The Ministry of Foreign Affairs and Trade and New Zealand Trade and Enterprise surveyed 854 New Zealand export businesses in 2009. Of the 236 respondents, 77 percent perceived a modest or substantial increase in business profit from the removal of barriers to trade and investment in their export markets, while only 16 percent saw no effect or a decrease (7 percent didn't know). Data from Statistics New Zealand show that between 2008 and 2014 New Zealand goods exports to countries with which we have FTAs grew by 10.3 percent on a cumulative compounded annual growth rate ("CAGR") basis, while exports to countries with which we do not have a FTA declined 2.6 percent.

3.1.1 TPP economies

Taken together, New Zealand's trade and investment relationships with TPP countries are crucial to this country's long-term prosperity. Up until now, however, New Zealand has not had FTAs in place with five TPP countries (the US, Japan, Canada, Mexico and Peru). Among other disadvantages, this means New Zealand goods exporters to these countries can be liable for significant tariff payments, with a third of a billion dollars paid on duties on New Zealand exports to TPP countries per year.

- The Asia-Pacific region is a key driver of global economic growth. Roughly half of international trade, and more than 70 percent of New Zealand's trade and investment, flows through the region. New Zealand's future depends on its economic relationships with Asia Pacific countries.
- The twelve TPP Parties collectively constitute approximately 36 percent of world GDP – worth a total of US\$28 trillion.

- The TPP region is the destination for approximately 40 percent of New Zealand's goods exports (worth NZ\$20 billion in 2014) and approximately 47 percent of New Zealand's services exports (worth NZ\$8.3 billion in 2014).
- In 2014, around 73 percent of New Zealand's total overseas direct investment (ODI) was invested in TPP countries, and 75 percent of the total foreign direct investment (FDI) in New Zealand was sourced from TPP countries.
- Five of New Zealand's top ten trading partners are included in TPP (1st – Australia, 4th – US, 5th – Japan, 7th – Singapore, and 9th – Malaysia).
- TPP is New Zealand's first FTA with the US, Japan, Canada, Mexico and Peru. These five countries were the destination for New Zealand goods exports totalling approximately NZ\$8.7 billion, and New Zealand services exports totalling approximately NZ\$3.6 billion in 2014. TPP builds on existing FTAs with the other TPP countries.

The twelve TPP economies are collectively home to 11 percent of the world's population, and represent more than US\$28 trillion in GDP (2014) comprising some of the wealthiest economies in the world. The TPP Parties together account for 44 percent of New Zealand's total trade in goods and services. This would make TPP New Zealand's largest FTA to-date by trade value.

TPP's importance is further reflected in the relatively high rate of growth in trade between New Zealand and the TPP economies. New Zealand goods exports to TPP countries have increased by 24% since 2004, and stood at NZ\$20 billion in 2014. Over the same period, goods imports from the TPP countries have increased by 19% to NZ\$21 billion. Dairy is by far New Zealand's most significant export commodity to TPP members, followed by meat and mineral fuels (mostly crude oil). The main products sourced by New Zealand from TPP members are mineral fuels, vehicles and machinery.

New Zealand's services trade with TPP economies has also expanded in recent years. Nearly half of New Zealand's services exports are to TPP economies, having grown by 11% from NZ\$7.5 billion in 2007 to NZ\$8.3 billion in 2014. In 2014, over 1.6 million tourists from TPP member countries visited New Zealand, about 60% of total tourist arrivals into New Zealand. This number has grown by 21% since 2007. Over 17,000 students from TPP countries studied in New Zealand in 2014.¹⁴ New Zealand also imports a significant amount of services from TPP member economies (mostly commercial services and tourism related travel services). This has grown by 25% over the past seven years, and was valued at NZ\$8.9 billion in 2014.

New Zealand's overseas direct investment (ODI) in TPP members has grown by 27% since 2004 and totalled NZ\$19 billion in 2014. This represents 73% of total New Zealand investment abroad with Australia and the US New Zealand's ranking as first and second largest destinations for New Zealand ODI. Foreign direct investment (FDI) from TPP countries to New Zealand totalled NZ\$73.6 billion, accounting for just over three quarters of total FDI in New Zealand in 2014.

¹⁴ Note that Australians are not counted as international students and are therefore not reflected in New Zealand's international education statistics.

3.1.2 Expanding New Zealand's network of FTAs

The TPP negotiations had their genesis in the Trans Pacific Strategic Economic Partnership Agreement (P4) between Brunei Darussalam, Chile, New Zealand, and Singapore. One of the objectives of the P4 Agreement was to create a model that could potentially attract new Asia Pacific members.

In addition to P4, TPP would build on New Zealand's existing FTAs with ASEAN members Malaysia, Viet Nam, Brunei and Singapore under AANZFTA and further strengthen existing bilateral agreements with Malaysia and Singapore. TPP would also complement our strong bilateral relationship with Australia under AANZCERTA.

TPP would be New Zealand's first FTA with the US, Japan, Peru, Canada and Mexico. This would put New Zealand's relationship with these partners onto a new level of economic and political engagement.

The US is the world's largest economy, with over 300 million consumers. An FTA with the US has been one of New Zealand's top trade policy goals for many years, with the US being New Zealand's fourth largest trading partner. New Zealand goods exports to the US are concentrated in the agriculture and related food sectors. New Zealand would also benefit from enhanced access for services exporters, and increased investment.

Japan, Peru, Canada and Mexico are the other negotiating partners with which New Zealand does not already have an FTA and all represent markets of interest to New Zealand trade and investment.

- Japan is New Zealand's fifth largest individual trading partner. In the year to December 2014 two-way trade stood at NZ\$7.0 billion. New Zealand exports to Japan were NZ\$3.6 billion, accounting for 5.4 percent of total exports. Japan joins as the second largest economy involved in TPP adding nearly US\$4.6 trillion to the combined TPP Gross Domestic Product.
- Canada is New Zealand's nineteenth largest goods trading partner overall, with total trade worth NZ\$1.1 billion in the year ended December 2014.
- Mexico is New Zealand's largest goods trading partner in Latin America and 29th largest trading partner overall, with goods trade worth NZ\$517 million in the year ended December 2014.
- Peru is New Zealand's 48th largest trading partner and second largest export market in Latin America.

3.1.3 Advancement of New Zealand's strategic interests

TPP would advance a number of New Zealand's key strategic interests. As the first of the 'mega-regional trade deals' to conclude, TPP is at forefront of trade and investment integration in the Asia Pacific region – a region that is set to drive global economic growth in the 21st Century.

The TPP will harmonise rules governing trade between its members. Greater coherence in the rules that govern regional supply chains will streamline international trade, with benefits for businesses and consumers. Over time regulatory harmonisation will remove unnecessary duplication and reduce

costs. This will be particularly beneficial for small to medium sized businesses, which can least afford compliance costs.

In the short term, this benefits New Zealand through the elimination of trade barriers, providing for the more efficient flow of goods, services and investment within the TPP region. Into the future, benefits would accrue through the increased productivity and growth that would result from regional liberalisation.

The facilitative trade and investment framework created by TPP is likely to have a significant influence on the form and function of value chains across the Asia Pacific region in the coming years. To a significant extent, these frameworks reflect New Zealand's existing policy and practice. New Zealand firms would therefore be well placed to take advantage of these frameworks, and to extract more value from regional production processes.

TPP promotes the APEC goal of free and open trade and investment in the Asia-Pacific region and has the potential to serve as a building block to a Free Trade Area of the Asia Pacific (FTAAP). As such, TPP is likely to exercise considerable influence on economic integration in the Asia-Pacific region well into the future.

While liberalisation of trade through the WTO still remains New Zealand's most important international trade policy priority, the promotion of increased trade liberalisation through TPP supports continued ambition in the WTO agenda.

3.1.4 Opportunities for new membership

Broadening participation is a core strategic objective for TPP. The Agreement is an important part of the emerging Asian economic and geo-political architecture, offering opportunities for growth in regional trade. TPP is intended to serve as a model within APEC that is open for other economies to join, acting as a key stepping stone towards the objective of free and open trade within the region.

Any future expansion of TPP is expected to increase the benefits of the Agreement to New Zealand, as it would provide even broader opportunities for New Zealand exporters and investors.

3.2 The consequences of New Zealand not becoming a Party to TPP

Against the economic and strategic benefits of the Agreement, it is also important to consider the risks inherent in the counterfactual scenario of New Zealand not joining the Agreement.

Choosing to remain outside the TPP would present several risks for New Zealand. New Zealand exporters and investors would lose the opportunity to benefit from enhanced access to markets that account for 44% of our total goods and services trade. New Zealand exporters would also be placed at substantial disadvantage to their competitors in TPP, as these competitors would now face lower barriers to trade relative to New Zealand businesses. Collectively, this would represent lost economic

growth and opportunities for New Zealand and therefore relatively lower living standards for New Zealanders

Not joining the Agreement would also mean that New Zealand companies operating in TPP countries would not enjoy many of the protections that their competitors from TPP countries would receive, such as the non-discrimination and expropriation protections established by the Investment Chapter. New Zealand would also likely receive less investment from TPP Parties, as investors from these countries may prefer to operate within the frameworks established by the Agreement.

New Zealand would also lose the opportunity to influence the development of the rules that TPP will set for the region. This is both in respect of its present form, and more significantly, in the future as TPP membership increases. These rules, such as those contained in the Technical Barriers to Trade and Rules of Origin Chapters, will have important implications for the way trade is conducted within the region. For example, New Zealand companies would likely find it more difficult to participate in regional value chains (for example, in food and beverage or manufacturing) based on rules that did not reflect New Zealand's interests or trade profile.

TPP aims to serve as the inspiration for a broader Asia-Pacific Free Trade Agreement. By not joining TPP, New Zealand would miss the opportunity to influence the rules that may come to underpin future regional trade deals. New Zealand would instead have to accept rules developed by other countries if we were to decide to accede to these agreements in the future. These factors combined could see New Zealand companies at significant, long-term disadvantage to their competitors across the region. This would likely affect the competitiveness and productivity of the New Zealand economy more generally, with negative flow-on effects to employment, wages and standards of living.

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

This section of the NIA outlines the advantages and disadvantages that would accrue from New Zealand entering into TPP. The counterfactual for comparison is TPP entering into force with all other eleven countries, but without New Zealand.

The sub-sections below reflect different Chapters of TPP, each of which would set rules or frameworks for different areas. (See the final section of this NIA for a list of the chapters in TPP and a guide to the topics they cover.) The net effect of these different factors on New Zealand is assessed in Section 7 of this NIA.

4.1 Trade in Goods

The National Treatment and Market Access for Goods Chapter (Goods and Agriculture Chapter) sets out the rules TPP countries will apply for qualifying imports from other TPP countries, including the elimination of tariffs (“customs duties”).

Each TPP Party has agreed a “schedule” of tariff commitments that is included as an Annex to TPP. This is standard practice in FTAs. Each schedule specifies the full list of national tariff lines of that country¹⁵, specifying the preferential rate that will apply to qualifying imports from other TPP countries. Most TPP Parties apply the same treatment to all other TPP members on each tariff line, but where a Party applies different treatment on the same tariff line dependent on which TPP member is exporting the product, this is set out clearly in that Party’s schedule.

4.1.1 Advantages of entering TPP, Trade in Goods

Market access – exports

Joining TPP would provide immediate economic benefit for New Zealand goods exporters on entry into force of the Agreement, particularly from reduced tariff rates in key markets with which New Zealand does not currently have an FTA.

¹⁵ Each country in TPP follows the Harmonized Commodity Description and Coding System (Harmonised System, HS) to structure its national tariff. The HS system is a near-universal method for classifying international trade.

The twelve members of the TPP constitute 36% of world GDP (approx. US\$28 trillion) and are the destination for approx. 40% of NZ's goods exports (NZ\$20 billion in 2014). New Zealand exporters pay an estimated NZ\$334 million annually in duties for the five TPP partners with which we do not have existing FTAs (the US, Japan, Canada, Mexico and Peru).¹⁶

Table 4.1: Estimated Tariff Savings per annum by Country¹⁷

Country	New Zealand exports	Estimated tariff savings at entry into force		Estimated tariff savings once fully implemented ^B	
	NZ\$, millions	NZ\$, millions	% of exports ^A	NZ\$, millions	% of exports ^A
<i>Parties where New Zealand has no existing FTA</i>					
Japan	3,430	83	75.24%	207	90.63%
US	4,417	45	97.19%	52	99.61%
Mexico	418	3.1	73.70%	6.6	81.42%
Canada	645	4.8	99.16%	5.2	99.89%
Peru	135	0.9	99.65%	0.9	100.00%
<i>Parties with existing FTAs with New Zealand^C</i>					
Malaysia	1,035	0.1		1.6	
Vietnam	468	0.6		0.8	
Overall	10,550	137		274	

^A Percentage of exports that would benefit from tariff elimination. Where New Zealand exports are not subject to elimination, most would benefit from new quota access.

^B Almost all (99.5%) tariff savings would be realised within sixteen years. The remaining tariff savings would be realised over 20 or 30 years.

^C Tariffs that would be eliminated under TPP that were excluded from the ASEAN-Australia-New Zealand and Malaysia-New Zealand FTAs (e.g. wine, liquid milk etc).

While TPP has not delivered the full elimination of tariffs on New Zealand exports that had been sought, it would deliver substantial benefits to exporters from the moment the Agreement enters into force, and the full elimination of tariffs on 95.4% of New Zealand exports to new TPP partners when fully phased in, providing estimated tariff savings in these markets of over NZ\$272 million. In addition, all tariffs on products of trade interest with Viet Nam and Malaysia that were not eliminated in previous FTAs would also be eliminated in TPP, providing additional tariff savings of NZ\$2.4 million when fully implemented. This means that total savings on New Zealand exports to the TPP region, when the Agreement is fully phased in, are estimated at NZ\$274 million. This does not capture dynamic impacts (i.e. the expected increase in exports over time as a result of improved market access, which are considered in Section 7 of this NIA). In addition, TPP would provide new dairy market access into the US, Mexico, Canada and Japan through quotas, an improvement on existing access restricted by small quotas and prohibitive duties.¹⁸

¹⁶ All figures on tariffs and tariff savings in this document are based on average 2012-2014 trade.

¹⁷ The table shows total annual tariff savings from TPP, including the elimination/reduction of in-quota tariffs for trade under existing WTO tariff quotas, as applicable. Values are in NZ\$, representing average exports over the period 2012-2014.

¹⁸ Tariff quotas are where a certain volume of goods can be imported at a low duty, with a higher (and often prohibitive) tariff on trade outside of the quota volume.

Table 4.2: Estimated Tariff Savings per annum by Sector¹⁹

Sector	New Zealand exports ^A	Estimated duties paid	Estimated tariff savings once fully implemented
	NZ\$, millions	NZ\$, millions	NZ\$, millions
Dairy	2,141	132	96
Fisheries	347	9	9
Forestry	773	11	11
Horticulture	694	34	34
Industrials	2,274	9.6	9.6
Meat	1,923	101	84
Other Agriculture	352	19	12
Textiles	96	3.4	3.3
Wine	461	16	16
Overall	9,060	334	274

^A "New Zealand exports" column does not include trade with Malaysia and Viet Nam that benefits from, or would benefit from, duty free access under New Zealand's existing FTAs.

There would also be significant benefits for exporters by ensuring that they are able to compete on a level playing field with their main competitors from Australia, Canada and the US in TPP markets in the future.

Estimated benefits from tariff savings:

- *At entry into force:* tariffs eliminated on NZ\$3.8 billion of New Zealand exports currently subject to tariffs, including many horticultural and forestry goods, a number of dairy products, some wine, many manufactured products, and much fish and seafood. Specific product examples include such items as: the US (bottled still wine, sheepmeat, prepared meats, protein isolates); Japan (kiwifruit, squash); Canada (wine); Mexico (mussels, kiwifruit, milk albumin); and Peru (buttermilk powder). As a result, 87.9% of New Zealand exports to these new FTA markets would enter duty free on the day the Agreement enters into force, with estimated tariff savings of NZ\$137 million.
- *By the 5th year after entry into force:* tariffs eliminated on an additional NZ\$199 million of New Zealand exports currently subject to tariffs, including: the US (beef, fish sticks, asparagus); Canada (beef); Japan (hoki and other frozen fish, carrot juice, sausages and mandarins); Mexico (wine). This constitutes 2.2% of total current New Zealand exports to the US, Japan, Canada, Mexico and Peru. This means that 90.1% of New Zealand exports to these markets would enter duty free within five years after entry into force of the TPP. Estimated total tariff savings in the fifth year after entry into force are NZ\$197 million.
- *By the 10th year after entry into force:* tariffs eliminated on an additional NZ\$184 million of New Zealand exports currently subject to tariffs, including in the US (infant formula, ice-cream, tableware and sugar); Mexico (apples, sheepmeat and beef); Japan (tongues, hides, bluefin tuna and apples) and Viet Nam (wine). This constitutes 2.0% of total current exports to the US, Japan,

¹⁹ The table shows total annual tariff savings from TPP, including the elimination/reduction of in-quota tariffs for trade under existing WTO tariff quotas, as applicable. Values are in NZ\$, representing average exports over the period 2012-2014.

Canada, Mexico and Peru. This means that 92.1% of New Zealand exports to these markets would enter duty free within ten years after entry into force of the TPP. Estimated total tariff savings in the tenth year after entry into force are NZ\$236 million.

- *By the 15th year after entry into force:* tariffs eliminated on an additional NZ\$242 million of New Zealand exports currently subject to tariffs, including in Japan (cheese, sawn wood and offals); and Malaysia (liquid milk and wine). This constitutes 2.7% of total current exports to the US, Japan, Canada, Mexico and Peru. This means that 94.8% of New Zealand exports to these markets would enter duty free within fifteen years after entry into force of the TPP. Estimated total tariff savings in the fifteenth year after entry into force are NZ\$273 million.
- *When fully phased in:* tariffs eliminated on an additional NZ\$57 million of New Zealand exports currently subject to tariffs. Tariffs on one of New Zealand's highest traded cheese tariff lines in the US is eliminated over twenty years (with a transitional safeguard lasting a further five years). Tariffs are also eliminated on milk powder exports to the US, with skim milk powder eliminated over twenty years, and whole milk powder eliminated over 30 years (with a transitional safeguard lasting a further five years). There are estimated total tariff savings of NZ\$274 million per year at full implementation, not taking account of dynamic impacts.

Products receiving less than full tariff liberalisation

For a small number of agricultural products, with New Zealand's key affected export interests being dairy in some countries and beef in Japan, it was not possible to achieve complete tariff elimination. Instead, TPP access would provide improved access through tariff reductions or tariff quota access.

- *Tariff reductions:* Tariffs on an additional NZ\$239 million of goods would be significantly reduced, but not eliminated, allowing for improved market access. Beef exporters would benefit from a 77% reduction in Japan's tariff for beef. This would be reduced from the current 38.5% (with the potential to 'snap-back' to a 50% duty if a WTO volume safeguard level is exceeded) to 9% over sixteen years, with an initial sharp cut at entry into force. There will be a transitional volume-based safeguard applying to all TPP beef imports into Japan, set above current trade levels, with a growth rate.²⁰ The safeguard will be abolished by Year 20 at the earliest. This outcome is the best outcome that Japan has agreed in a FTA to date, and immediately re-establishes a level playing field with Japan's largest beef supplier, Australia, after the Japan-Australia Economic Partnership Agreement entered into force in early 2015. Japan will also reduce the tariff for ice-cream by two-thirds, from 21% today to 7% over six years, opening up new export opportunities given the significantly reduced tariff.
- *Tariff Quota Access:* For dairy, a portion of the overall benefits would come from improved market access through tariff quota access. New quota access for butter, cheese and milk powders (where tariffs are not eliminated) would have a market value (at current world prices as of October 2015) of approximately NZ\$310 million at entry into force of the Agreement, growing to NZ\$670 million over fifteen years. This access, spread across TPP importing countries, would be shared amongst exporters from the TPP countries.

²⁰ Under a volume-based safeguard, a higher duty is applied if the volume of imports exceeds a pre-set level.

- *Peru Price Band*: While Peru will eliminate all tariffs it has not committed to eliminate the price-band mechanism for a range of products including dairy. The Price Band acts as an additional duty if imported prices fall below a reference price.

Benefits of new TPP quota access

Reflecting sensitivities in several TPP Parties, tariffs will not be completely eliminated on all dairy products. Instead, New Zealand would have access to tariff quotas (TQs) for a number of key products in the US, Japan, Mexico and Canada, providing New Zealand with new dairy market access to these important markets.

Total quota access will grow over time and is made up of a mixture of country-specific access and plurilateral access shared with other TPP Parties. Quota access is at a preferential tariff (duty-free in the US, Canada and Mexico, and reduced significantly over eleven years in Japan).

New Zealand exporters would have potential access into quotas in the TPP region of the volumes in Table 4.3 below (including volumes shared regionally with other TPP suppliers). While the total volumes of potential access are relatively modest in terms of New Zealand production (5.6% for butter, 10.9% for cheese and 4.0% for milk powder at year 10) this access is into some of the most protected, high-value markets in the world.

Table 4.3: Estimated Total Volume of TPP Quota Access available to New Zealand Exporters²¹

Product	EIF	Year 5	Year 10	Year 15
Butter	15,500 MT	23,000 MT	29,600 MT	35,300 MT
Cheese	16,800 MT	31,000 MT	39,700 MT	44,300 MT
Powders	39,000 MT	54,000 MT	68,200 MT	73,000 MT
Other Dairy Products of primary trade interest ^A	12,200 MT	17,500 MT	22,500 MT	27,700 MT
Total volume of dairy products of primary trade interest	83,500 MT	125,500 MT	160,000 MT	180,300 MT

^A Includes milk protein concentrates, cream, ice-cream, and buttermilk powder.

New quota access for core dairy products²² would have a market value (at current world prices as of October 2015) of approximately NZ\$310 million at entry into force of the Agreement, growing to NZ\$670 million over fifteen years. This access will be shared amongst exporters from the TPP countries. This new access is spread across the TPP importing countries.

At Year 10:

- The US will provide 57,700 MT of quota access for New Zealand dairy products on a country-specific basis, with 95% of this access being for priority products – including 18,500 MT of new

²¹ In some markets tariffs are being eliminated for core dairy products without quota access being supplied for the transition period (i.e. cheese in Japan).

²² Core dairy products: Butter, milk powders and cheese accounting for 78% of New Zealand's global dairy exports

access for butter/anhydrous milk fat and other milkfat type products. For products not receiving eventual elimination, tariff quotas will grow in perpetuity with compounding growth rates of between 3% and 6% annually.

- Canada will provide 104,000 MT of TPP-wide access (approximately 3.3% of its market). Approximately 25,000 MT is for products which are a priority for New Zealand, including butter, cheese and milk protein concentrates.
- Mexico will provide 55,400 MT of access under a quota for TPP countries without existing FTAs with Mexico (i.e. excluding the US, Peru and Chile). This includes over 40,000 MT of milk powder access – a priority for New Zealand in the Mexican market.
- Japan will provide 40,200 MT of predominately TPP-wide access, with 14,000 MT on priority products for New Zealand including butter and powders. Japan is also eliminating tariffs for most cheese over sixteen years.

The actual share of quotas captured by New Zealand exporters would depend on the relative competitiveness between exporters, consumer demand, and quota conditions.²³

This potential volume of core product access would be equivalent to a market of NZ\$228 million growing to NZ\$445 million in year 15. While this is modest compared to the total size of New Zealand's existing dairy exports (NZ\$13.3 billion for core products) these quotas provide access into some of the world's highest-value consumer markets, with the possibility of earning prices well above the average world price. A key benefit for New Zealand exporters would be the marginal benefit from higher prices earned in these markets, along with any flow-on impact on world prices as a result of increased product shifting off the world market into these protected markets.

There is also new TPP quota access for other dairy products such as cream (primarily the US, but also Canada and Mexico), ice-cream (Canada), milk-protein concentrates (Canada and Mexico) and buttermilk powder (Canada). Total TPP-wide access for these products grows from 12,200MT at entry into force to 27,700MT in year 15, with volumes into Canada and Mexico shared with other TPP Parties.

Elimination of export subsidies in the TPP region

TPP Parties have agreed to eliminate the use of agricultural export subsidies within the TPP region. Taken together with the decision on agricultural export subsidies at the Tenth WTO Ministerial Conference (MC10) in Nairobi in December 2015, this is a significant development in terms of New Zealand's long-standing aim to eliminate agricultural export subsidies globally.

Benefits of improvements for WTO quota access

WTO In-quota reductions: New Zealand would also benefit from the elimination of in-quota tariffs on our existing WTO quota access. In-quota tariffs in the US and Canada are eliminated on entry-into-force. For country-specific access into Japan, tariffs on WTO trade are eliminated over 21 years after

²³ Some of this new trade opportunity will be shared with other TPP dairy exporters.

entry into force, with an 80% reduction in the first 11 years. These benefits are captured in the total tariff savings set out above.

Market access – imports

The phase out of tariffs on New Zealand's imports from TPP countries also has advantages for New Zealand. In 2014, these tariffs totalled NZ\$20 million from the five new FTA Partners. (See also Section 8.2.)

New Zealand's economy is dependent on imports in order to supply a range of goods and services to producers and consumers. Consumers may benefit directly from cheaper imported products – such as machinery and electrical machinery, autos and auto parts, plastics and rubber products, medical apparatuses, agricultural products, textiles and apparel, toys and sports equipment, and boats.

The cost of not entering TPP

If New Zealand were not to enter TPP, New Zealand exporters would face a significant deterioration of comparative access opportunities vis-à-vis our competitors in TPP, who would benefit from the tariff liberalisation in TPP, while New Zealand exporters continued to face the higher standard prevailing tariff rates into TPP markets. New Zealand exporters would also lose the opportunity to catch up to other pre-existing FTA partners already trading at an advantage into TPP markets. Given the scale of some of the tariff benefits from TPP that would, in this scenario, accrue to New Zealand's competitors inside TPP, but not New Zealand – e.g. Japan's reduced beef tariffs, or tariff elimination on key US or Japanese cheese tariffs – New Zealand exporters would likely lose significant market share to other TPP exporters if New Zealand were not part of TPP.

4.1.2 Disadvantages of entering TPP, Trade in Goods

No disadvantages have been identified for New Zealand from entering TPP resulting from the tariff commitments that other TPP Parties would make to New Zealand. Where these tariff commitments have an effect, they would be beneficial (leading to improved competitiveness for New Zealand exporters).

New Zealand's tariff commitments under TPP, as for any trade agreement involving reciprocal tariff adjustments, have the potential to create adjustment effects for domestic producers as a result of increased exposure to foreign suppliers. The effects are mitigated by the fact New Zealand's economy is already largely open, with most goods imported into New Zealand already facing no import tariff. The tariffs New Zealand still has in place are relatively low (mostly five percent, and none more than ten percent). These remaining tariffs have also been largely eliminated for imports from many of New Zealand's largest trading partners, given preferential access under existing FTAs. TPP would eliminate New Zealand's tariffs on imports from the TPP region, for those TPP Parties with which New Zealand does not have an existing FTA.

The removal of these tariffs may, at the margins, expose New Zealand industry to increased competition. In order to help mitigate the potential for any negative adjustment effects, New Zealand's tariff schedule provides longer (5 to 7-year) phased elimination periods for certain items, some of which are more sensitive to imported goods: some clothing/textiles items, some

plastics, some machinery and electric machinery, some processed wood products and wooden furniture, and some steel, iron and aluminium items. Lessening the likely size of this impact is that New Zealand has already agreed to remove tariffs for all previous FTA partners, including China, ASEAN and Korea. Note also that, in the case of any serious injury arising from this tariff liberalisation, New Zealand would be able to apply a transitional safeguard action (see Trade Remedies section below).

4.2 Rules of Origin

The Rules of Origin Chapter of TPP establishes the rules for determining whether goods traded between TPP Parties are considered to “originate” in the TPP region and therefore qualify for relevant tariff preferences (as described in Section 4.1 above). All FTAs include such rules.

Under the TPP goods are originating if they:

- Are wholly obtained in the TPP Parties (such as fruits, plants, animals, etc.);
- Are produced entirely from materials that have been produced by TPP Parties; or
- Use non-originating materials (i.e., non-TPP materials) in the final substantive stage of production but otherwise meet the specific criteria set out for the good in Annex 3-D (Product Specific Rules of Origin, PSR Schedule).

Under the third option, a good will qualify as originating if it meets a specified Change in Tariff Classification (CTC). All products under TPP, except some automobiles and their parts, have an applicable CTC rule. Some products also have an alternative rule based on the value added by producers within the TPP region (primarily industrial products).

For a good to qualify for TPP tariff preferences, it must be consigned directly between Parties. If transported through a non-TPP Party, the good may undergo certain specified operations necessary to preserve it in good condition and/or to transport the good. Goods transiting through a non-TPP Party must remain under customs control.

TPP has separate rules of origin for textiles (see following section).

4.2.1 Advantages of entering TPP, Rules of Origin

Rules of origin, in themselves, do not confer an advantage or disadvantage to New Zealand. They are a recognised part of FTAs, to determine what products are eligible for the preferential tariffs agreed between Parties. Having said that, rules of origin can be a key determinant in how easily exporters are able to access the preferential market access in an FTA. On the whole, New Zealand was able to negotiate a Rules of Origin Chapter in TPP that would align with our exporters needs, and includes several elements that would set a useful precedent for future trade agreements. Key outcomes are set out below. The situation for textiles is set out separately in Section 4.3 below.

The TPP rules of origin accommodate full cumulation – allowing processing undertaken in TPP Parties to be counted towards achieving the origin threshold. This full cumulation principle – applied in the

multi-party setting of TPP – means that New Zealand inputs, whether or not they meet the originating criteria, can be counted as part of the qualifying content for goods produced and traded between all TPP Parties. This would make New Zealand materials more attractive for companies in the TPP region that plan to utilise TPP tariff preferences. This would be expected to improve New Zealand's interaction in supply chains across the Asia-Pacific region more broadly. New Zealand seeks full cumulation in regional FTAs, and TPP would set a useful precedent for further agreements. For a limited number of product lines and for some goods under specific country quota this accumulation would not apply.

For specified goods, exporters can choose to calculate their regional content value based on the traditional build-down or build-up methods or alternatively use a focussed value method with a slightly higher threshold. Under this method only the value of specified non-originating materials will be deemed non-Party content and non-originating generic parts (that is parts that are not classified for specific end use), can be used without prejudicing the ability to reach the threshold. Adjustments may also be made to exclude foreign inland transport costs, thus making it easier to meet the threshold value.

The method for evidencing origin, i.e. the documentation required of a trader seeking preferential tariff treatment, is self-declaration by the producer, exporter or importer. This is New Zealand's preferred approach. New Zealand exporters to TPP markets would not be required to obtain independent certification that their goods are originating, thus reducing compliance costs.

4.2.2 Disadvantages of entering TPP, Rules of Origin

There will be more restrictive rules for some "sensitive" agriculture products under TPP. It is expected that this would have negligible impact on New Zealand's ability to meet the rules but processed food producers (particularly for dairy based products and products containing nuts and certain fruits) will need to be careful to ensure that these materials are sourced from within TPP Parties in order to qualify for preferential TPP tariff rates.

A limited number of the product specific rules in TPP reflect a more complicated approach than New Zealand would prefer. For example, for some goods businesses will have to use the regional value rule if they are using non-TPP parts. Separately, for a limited number of products the added value threshold will be higher than the 40% Regional Value Content New Zealand prefers to see as a maximum. Nevertheless, their expected commercial impact on New Zealand is expected to be minimal, as they are offset by full cumulation provisions, transport cost adjustments, and for New Zealand manufacturers the fact we are highly integrated with Australia.

4.3 Textiles

Rules of origin for textiles in TPP are treated differently from New Zealand's other trade agreements. The majority of textile products (yarns including elastomeric yarn, and sewing thread, fabrics including elastic narrow bands, apparel and other made-up textile articles) will need to be manufactured from materials produced within the TPP in order to qualify for preferential TPP tariff rates.

To mitigate the impact of some of these restrictive rules, and to take account of production gaps within the TPP region, a Short Supply List (SSL) has also been agreed. Products on this list, when used for the specific end use identified, are deemed to be originating and can be sourced from countries outside the TPP. These product lines are largely blended fabrics for use in women's apparel.

4.3.1 Advantages of entering TPP, Textiles

Carpets are exempt from the yarn forward rule. The yarns and backings for carpets will be able to be sourced from outside the TPP, thus allowing New Zealand carpet manufacturers to take full direct benefit from tariff reductions.

While New Zealand is not a significant exporter of apparel, it does have many small and successful textile and related fashion design businesses that utilise manufacturing facilities in other TPP Parties, (particularly Viet Nam and Malaysia). The full cumulation provisions of TPP would open opportunities for these businesses to participate in the TPP supply chain.

4.3.2 Disadvantages of entering TPP, Textiles

The textile rules are technically complex. New Zealand textile exporters looking to access preferential tariff treatment in TPP markets would face greater compliance costs in proving origin compared to other sectors, and companies that source their materials from non-TPP Parties are unlikely to qualify for preferential tariff treatment, unless they are able to shift to TPP suppliers.

Most of New Zealand's apparel exports, however, enter TPP markets through mail order distribution networks and in price bands that are not sensitive to tariff duties. Those looking for opportunities in more generic product lines would be able to utilise the cumulation provisions, either to source TPP originating materials for use in New Zealand manufacture or to provide materials that are further manufactured offshore by TPP partners.

4.4 Customs

The Customs Chapter of TPP builds on the commitments in the recently agreed World Trade Organization Agreement on Trade Facilitation and extends beyond these obligations in some areas. These commitments are aimed at facilitating the flow of goods across borders, including through ensuring customs procedures and practices are transparent and consistent, and expediting certain forms of trade.

4.4.1 Advantages of entering TPP, Customs

The enhanced customs commitments in the TPP region will benefit exporters through increased efficiency at the border and expedited release of goods. This should lead to a lower cost of trade, and simplified customs procedures for traders.

TPP will require Customs agencies to provide advance valuation rulings for imports which would provide certainty and predictability for New Zealand exporters, and would make compliance with

Customs laws, regulations and requirements easier. New Zealand businesses often report that uncertainty about the treatment of their goods can represent a significant cost or barrier to trade. The New Zealand Customs Service would require some additional resources to administer advance rulings on customs valuation²⁴, but the cost of this would be outweighed by the benefit to New Zealand exporters of advance valuations in other TPP countries.

The Customs Chapter would also support the New Zealand Customs service in its mission to protect New Zealand's borders, with mechanisms for closer cooperation between other customs agencies, including information sharing aimed at aiding in the investigation of fraudulent activities by traders.

4.5 Trade Remedies

Trade remedies allow governments to provide temporary relief to domestic industry from unfair competition from abroad or an unexpected surge in imports. World Trade Organization (WTO) rules cover three types of trade remedy:

- Anti-dumping duties. (Applied, in certain circumstances, on an imported product that has been exported at a lower price than its "normal value".)
- Subsidies and countervailing measures. (The WTO rules seek to limit trade-distorting subsidies, and provide for countervailing duties to offset the use of certain subsidies by other countries.)
- Safeguard action. (Temporary measures applied to allow domestic producers to adjust to sudden surges in imports.)

The TPP Trade Remedies Chapter provides that Parties retain their rights and obligations under the relevant WTO agreements, and includes an Annex that identifies a range of practices that promote the goals of transparency and due process in anti-dumping and countervailing duty proceedings. The Chapter also provides that a Party may apply transitional safeguard measures with respect to imported goods from another Party (which involves temporarily raising the tariff applying to the imported goods), if, as a result of the reduction of tariffs under TPP, there is an increase in imports causing or threatening to cause serious injury to the Party's domestic industry. The Chapter sets out the conditions and procedures for such measures. New Zealand's agreement to the inclusion of a transitional safeguard mechanism along the lines of outcomes negotiated in past FTAs was conditional on an appropriately ambitious outcome on goods market access. The outcome meets those requirements.

4.5.1 Advantages to entering TPP, Trade Remedies

The TPP Trade Remedies Chapter would enhance the interests of New Zealand exporters faced with trade remedy actions in TPP jurisdictions. It confirms that WTO rules will apply to the application of global safeguards and to the administration of anti-dumping and countervailing duties on trade between the Parties, while providing additional guidelines on the operation of key measures to enhance transparency and fairness in anti-dumping and countervailing duty proceedings.

²⁴ One-off establishment cost of \$400,000, with on-going costs to be met from baseline funding or cost recovered. See Section 8 of this NIA.

4.5.2 Disadvantages to entering TPP, Trade Remedies

New Zealand would not be disadvantaged by entering TPP with respect to Trade Remedies. New Zealand uses trade remedies sparingly, reflecting our already open economy (with few tariffs remaining), and businesses that are on the whole already internationally competitive. The TPP Trade Remedies Chapter would not require any additional obligations or changes to New Zealand's current practice.

As frequently occurs in FTA negotiations, some TPP countries were only able to agree tariff liberalisation on particular products of key export interest for New Zealand (particularly, some agricultural products) in conjunction with "transitional safeguard mechanisms" that would allow them to remedy any serious injury experienced by their domestic sectors as a result of tariff liberalisation under TPP. If applied, such transitional safeguards can potentially temporarily undermine the agreed market access outcomes granted in the Agreement. The TPP Trade Remedies chapter mitigates this – and hence protects market access outcomes for New Zealand exporters – by establishing clear processes to discipline and limit the ability of Parties to take transitional safeguard actions. As described in the Section 4.1, such transitional safeguard actions would also be available for New Zealand in the case of serious injury arising from tariff liberalisation by New Zealand. (Note that while New Zealand has similar provisions in other FTAs, to date there has not been a need to utilise these.)

4.6 Sanitary and Phytosanitary (SPS) Measures

Imports, particularly primary products, can face measures designed to protect human, animal or plant life or health against pests, diseases and food-borne risks (referred to collectively as SPS measures: *sanitary*, human and animal health; and *phytosanitary*, plant health). For example, imported fruit may require treatments and inspections to ensure absence of pests, and food may be required to have pesticide levels below certain maximum residue limits. All TPP Parties are members of the WTO SPS Agreement, which allows countries to determine their own level of protection for health and safety, but also requires that any restrictions on trade need to be non-discriminatory, transparent and scientifically justified.

TPP provisions build on the WTO SPS Agreement, and provide a solid framework for TPP Parties to practically implement their WTO SPS commitments (in relation to both new and existing SPS measures). TPP encourages better and more consistent SPS regulatory practice, with a view to potentially benefiting exporters and importers across the region. The chapter is focused on establishing frameworks that help address future regulatory issues. TPP equals or exceeds SPS chapters in New Zealand's existing FTAs, building on our experience including the NZ-China FTA.

4.6.1 Advantages of entering TPP, SPS

TPP provides additional mechanisms to minimise negative trade effects of SPS measures on New Zealand exports, for example for Parties to facilitate and record agreements on such issues as equivalence (recognising another Party's systems as "equivalent" and therefore meeting import requirements) and regionalisation (targeting SPS measures to an affected region, rather than applying

to a whole country). These mechanisms are important ways the New Zealand Government negotiates access for our primary products to be exported to markets. In developing SPS measures, TPP Parties will be obligated to undertake transparent decisions, and either conform to internationally agreed SPS standards or provide a documented scientific risk assessment where their requirements do not conform to the standards. TPP will require increased transparency around import checks and restrictions based on adverse results of import checks, as well as requiring the import programme be risk based. These requirements should enable New Zealand exporters to clearly understand the SPS requirements of other TPP countries. (New Zealand already meets such requirements.)

The TPP SPS Chapter contains obligations around best practice when conducting audits of another country's systems and requires that the costs incurred by the auditing Party are borne by the auditing Party (unless otherwise mutually agreed). This should minimise the cost burden for New Zealand exporters, compared with previous FTAs.

The Chapter also provides the ability to take SPS issues to Cooperative Technical Consultations for resolution, for relevant trade and regulatory agencies to aim to resolve within 180 days of the request. This should be an advantage for New Zealand, in providing exporters greater certainty through access to a robust and prompt means of dispute resolution. While it is possible that TPP countries could seek to use the same mechanism to change New Zealand SPS measures that affect their imports, this risk would be low given that New Zealand's SPS regime operates in alignment with the WTO SPS Agreement.

4.6.2 Disadvantages of entering TPP, SPS

Nothing in the TPP SPS Chapter would require New Zealand to change our approach to protecting human health, maintaining food safety, and protecting New Zealand's animal and plant health status from pests and diseases. As a result, there are no disadvantages to New Zealand entering TPP from an SPS perspective.

4.7 Technical Barriers to Trade (TBT)

The Technical Barriers to Trade (TBT) Chapter aims to address the trade barriers and costs associated with standards, technical regulations and conformity assessment procedures. The Chapter builds on the Parties' existing rights and obligations in the World Trade Organization (WTO) TBT Agreement and seeks to eliminate unnecessary technical barriers to trade, enhance transparency and promote regulatory cooperation and good regulatory practice.

The approach taken in the TBT Chapter is broadly aligned with New Zealand's policy settings and the outcomes achieved in the TBT chapters of our previous FTAs, although some obligations would require changes in New Zealand's current practices in certain areas.

4.7.1 Advantages to entering TPP, TBT

The diversity of regulatory measures among TPP Parties can make it difficult and expensive for exporters to understand and comply with the different requirements in each market. These can create

TBTs that significantly increase transaction and compliance costs for exporters, particularly when regulations are more trade-restrictive than necessary to achieve a legitimate objective or are developed in a non-transparent way.

The TBT Chapter aims to address these issues and facilitate trade among TPP members, which would ultimately benefit New Zealand exporters. TPP includes provisions to enhance transparency in the development of TBT measures in the TPP region and promote greater regulatory cooperation and good regulatory practice. In the longer-term, this is expected to lead to regulatory frameworks in TPP markets that would make it easier for New Zealand exporters to determine the requirements for exporting. The TPP TBT Chapter also has provisions to minimise the adverse effects regulations can have on trade by reducing transaction costs for businesses, and to provide mechanisms for Parties to address specific trade issues with an aim of reducing or eliminating unnecessary TBTs.

A feature of the TBT Chapter that differs from our previous approach to TBT chapters is the inclusion of seven sectoral annexes to the chapter (Wine and Distilled Spirits, Pharmaceuticals, Medical Devices, Cosmetics, Proprietary Formulas for Certain Food Products and Additives, Organic Products and Information and Communications Technology Goods) which include sector-specific obligations aimed at reducing unnecessary barriers to trade in these products. The net effect of entering TPP with respect to these annexes is expected to be to New Zealand's overall advantage, as they would provide important benefit for New Zealand exporters. Key outcomes of likely interest for New Zealand exporters are:

- The Wine and Distilled Spirits Annex would simplify the sale and export of New Zealand wines in TPP markets and reduce costs for New Zealand wine producers, for example reducing unnecessary requirements that have previously required specific labels for different markets. The provisions are largely based on the World Wine Trade Group (WWTG) Agreements, which New Zealand is a signatory to.
- The annexes relating to pharmaceuticals, medical devices and cosmetics include provisions aimed at better aligning the respective regulatory regimes of TPP partners and removing unnecessary regulatory requirements for these products. This should reduce unnecessary regulatory divergences and the associated costs to our exporters of complying with a number of different regulatory requirements. The obligations in the annexes are consistent with international good practice and our current regulatory regimes for these products, and provide sufficient flexibility for our regulators to determine their own appropriate level of public health protection.
- The Annex on Information and Communications Technology (ICT) Products commits TPP Parties to accepting a supplier "declaration of conformity" as positive assurance that equipment meets a prescribed electromagnetic compatibility (EMC) standard. This lowers the cost to manufacturers of ICT goods (compared to a full testing and documentation regime) while giving our regulators reasonable assurance of technical compliance with EMC requirements.

The chapter also provides a mechanism to consider the negotiation and conclusion of further sector-specific annexes in the future. This helps ensure TPP is able to adapt to the changing needs of exporters in this area.

4.7.2 Disadvantages to entering TPP, TBT

New Zealand's regulatory regime already fulfils the principles of the TBT Chapters, so TPP is not expected to bring any disadvantage to New Zealand's development of standards and conformance. While New Zealand has a very transparent process for the development of regulations, the TBT chapter contains some prescriptive provisions which go beyond our WTO obligations e.g., broadening the scope of proposed TBT measures that must be notified to the WTO; placing proposals for, and final versions of, TBT measures on a single website; and making publicly available certain regulatory decision-making information. The additional costs to fulfil these would be low, however, and we have sought to minimise those costs where possible, e.g. by agreeing to use the existing WTO TBT Information Management System as the "single website" rather than being required to create a dedicated New Zealand website.

The wine and distilled spirits annex includes a production standard requiring that exports designated 'ice wine' be made from grapes naturally frozen on the vine. As a result, New Zealand wine producers would not be able to export as 'ice wine' wine made from grapes frozen using modern technology. This expands the outcome of the 2007 World Wine Trade Group Labelling Agreement (to which New Zealand is already a member). The commercial impact is likely to be low as few New Zealand companies export products designated 'ice wine' to any market. This would be an export-only production standard, so domestic sales of designated wine would not be affected.

4.8 Investment (including Investor-State Dispute Settlement)

The Investment Chapter of the TPP will establish a high quality yet balanced framework of investment obligations to govern investment relationships in the TPP region. The Investment Chapter is designed to facilitate the flow of investment between New Zealand and other TPP Parties within a stable and transparent framework of rules. The obligations contained in the Chapter, and New Zealand's specific reservations, are similar to those in New Zealand's existing trade and investment agreements (including New Zealand's FTAs with China, ASEAN, Malaysia and Korea).

The manner in which market access commitments are made for services and investment in TPP is through a 'negative list' framework. This format provides exporters and investors a simple way to determine whether the services and investment chapters apply to their area of business in another TPP market. Under a 'negative list' approach, Parties commit to provide market access except in areas where restrictions are listed in individual Parties' services and investment schedules. These restrictions are known as 'non-conforming measures' or 'reservations'. Each country's 'negative list' has two parts: Annex I and Annex II:

- Annex I sets out existing measures (laws, regulations, decisions, practices and procedures) that TPP Parties retain the right to maintain in their present form. Such measures may restrict the access of foreign service suppliers or investors, or may discriminate in favour of domestic service suppliers or investors. These existing measures are subject to a 'ratchet' clause. This means that TPP Parties commit to automatically extend the benefits of any future autonomous

liberalisation of these measures to all other TPP countries. Measures in Annex I reflect the current level of openness provided in a market and cannot be made more restrictive in the future.

- Annex II lists reservations for sectors and activities where TPP Parties reserve the right to maintain existing discriminatory measures and/or adopt new or more discriminatory measures in the future. The ratchet clause does not apply to any measure covered by Annex II.

If a TPP Party does not list any restrictions for a particular industry sector it means that Party is committed to not applying any measures that would be inconsistent with certain Investment Chapter obligations, such as, discriminatory practices that favour local investors or service suppliers, and is committing to keep that market open for TPP investors.

4.8.1 Advantages of entering TPP, Investment

Joining TPP would benefit New Zealand investors, providing improved conditions when making investments and doing business in other TPP Parties for many sectors, including our agricultural, manufacturing and natural resource industries. Improved conditions for investment are also important for many New Zealand goods and services exporters, who increasingly look to undertake activities to support their international business (such as establishing an in-market presence, forming commercial partnerships and providing after-sales service).

New Zealand's outward foreign direct investment (ODI) in TPP countries represents about 73% of total investment abroad, and TPP will reduce barriers to investment and facilitate the navigation of complex regulatory systems. If New Zealand was not part of TPP, the investment among TPP members would benefit from a consistent framework but New Zealand investors would operate under different rules.

TPP would be the first time New Zealand has entered into FTA investment commitments with Canada, Japan, Mexico, Peru and the US, and would also improve on the partial investment commitments New Zealand has with several other TPP Parties through existing FTAs.

Foreign Direct Investment (FDI) from TPP countries already amounts to 75% of all FDI into New Zealand, and is an important source of capital to keep building New Zealand's competitive and productive economy. Membership in TPP would also send a signal to investors in TPP Parties about the investment environment into New Zealand by generating increased confidence and knowledge in New Zealand's stable and transparent investment regime, which would be expected to encourage inward investment flows into New Zealand.

Investment protections

The specific advantages provided by the Investment Chapter to New Zealand investors in other TPP countries and TPP country investors in New Zealand include:

- *Non-discrimination:* The Investment Chapter provides that New Zealand investors and investments cannot be discriminated against by a TPP government, compared to its own domestic investors in like circumstances, or against other foreign investors from any other country. Without these obligations, which are subject to limited exceptions, New Zealand

investors could be treated less favourably than other investors (for example, they could face more onerous investment authorisation requirements) at any stage of their investment's lifecycle.

- *Standard of treatment:* The Investment Chapter confirms that investors and investments are to be treated in accordance with the minimum standard of treatment under customary international law, including fair and equitable treatment and full protection and security.
- *Control over investments:* The Investment Chapter would enable New Zealand investors to retain greater control of their investments in other TPP countries, as it includes restrictions on the imposition or enforcement of performance requirements, such as a requirement to achieve a percentage of domestic content or to transfer technology to a person in that TPP country. These types of requirements can be particularly onerous on small and medium size enterprises. The Investment Chapter also provides certainty that transfers relating to a covered investment will be able to be made freely and without delay, though an exception has been agreed that allows the imposition of certain restrictions (including on transfers) in a balance of payments crisis, or threat thereof. TPP would also allow investors to appoint their own experts to governance and senior management positions.

Investor-State Dispute Settlement

As with many of New Zealand's existing FTAs (including with China, ASEAN, Malaysia and Korea), the provisions of the TPP Investment Chapter are supported by recourse to investor-State dispute settlement (ISDS).

ISDS is a dispute resolution mechanism that allows foreign investors to pursue remedies directly against a TPP Party in relation to breaches of TPP's investment provisions. 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. In respect of investment agreements and investment authorisations, the scope of application of ISDS has been deliberately narrowed:

- Investment agreements are defined in TPP as a narrow set of agreements entered into by New Zealand's government departments and ministries. Agreements relating to matters such as land, water or the delivery of correctional, healthcare or other social services are not covered investment agreements and are not subject to ISDS under the investment agreements provision.
- 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 is relevant for investment authorisations under the Act and protects the Government's ability to control approval of foreign investment in significant business assets, sensitive land and fishing quota.

ISDS only applies to the investment obligations in TPP – it cannot be used to challenge any other provisions in the Agreement.

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 in relation to countries whose investment policies and legal systems have historically not been as robust as in New Zealand.

The Investment Chapter's protections apply to all phases of an investment's lifecycle. This increases the level of protection afforded by the TPP Investment Chapter, including the possibility for an investor to bring an ISDS claim in relation to the "pre-establishment" phase of an investment (i.e. the period before an actual investment is made, where an investor is taking concrete steps to make an investment). This is different to New Zealand's existing FTAs that include ISDS, but this difference is mitigated by a New Zealand-specific exclusion for decisions to grant consent, or decisions to decline to grant consent, under the Overseas Investment Act 2005 from ISDS and Dispute Settlement under Chapter 28.

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. The transparency requirements of the Investment Chapter, such as the requirement for hearings to be open to the public and for ISDS decisions to be publicly available, will also help ensure integrity of the ISDS process.

4.8.2 Disadvantages to New Zealand of entering TPP, Investment

The obligations of the Investment Chapter, as designed to facilitate and protect investment flows between TPP countries, would on the whole not create additional obligations for New Zealand. This is because existing agreements and customary international law are already reflected in New Zealand's investment policy and regime. While on the whole there is benefit to New Zealand from other countries taking on TPP's Investment Chapter obligations, there are two areas that could generate potential costs. These are the implications of the ISDS mechanism and changes to New Zealand's investment screening thresholds for significant business asset. In both areas, New Zealand was able to address these risks through specific reservations (non-conforming measures), exceptions and safeguards. The legal operation of these mechanisms is explained in more detail below (see also the Legal Obligations section below on the Investment Chapter).

Investor-State Dispute Settlement

The ISDS mechanism, while providing positive recourse for New Zealand investors in TPP countries, has the reciprocal potential consequence of an increased exposure of the New Zealand Government to ISDS claims. Even though ISDS has been included in many of New Zealand's existing trade and investment agreements, it has never been utilised. However, the size of the TPP region and the potential number of new investors in New Zealand could increase the risk that New Zealand may face an ISDS claim (and the actual cost of responding to such a claim) in the future. This increased risk has been suggested by some commentators as potentially preventing future governments from taking regulatory action in areas of importance to New Zealand, such as for environmental objectives.

There are several aspects of ISDS in TPP that are considered to provide sufficient mitigation to balance the advantages and disadvantages of ISDS as acceptable for the New Zealand Government. For example, consistent with ANZCERTA and the Australia-ASEAN-New Zealand FTA, TPP's ISDS provisions

would not apply between New Zealand and Australia. Australia is responsible for three-quarters of the total foreign direct investment from TPP countries into New Zealand. In other words, under the TPP Agreement, ISDS would not be available to three-quarters of all FDI from TPP countries in New Zealand.

TPP's safeguards, reservations (non-conforming measures) and exceptions that ensure New Zealand retains the ability to regulate for public health, the environment and other important regulatory objectives. 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. Despite this, there are several important features that would affect the likelihood of a claim successfully being brought, or that place upper limits on the possible cost of claims. For example:

- If the claim is outside of jurisdiction, the New Zealand Government would have the opportunity to seek to resolve it through the compulsory consultation and negotiations procedures²⁵, which would consequently not cost a large amount to resolve. Additionally, where multiple cases are separately submitted with commonalities, the Investment Chapter provides for a tribunal to hear consolidated claims which would also reduce costs. 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 Investment Chapter does not allow punitive damages to be awarded. This means any costs New Zealand might be required to pay would be limited to the actual damage suffered by an investor, and their legal fees.
- In addition, it is important to note that ISDS does not change New Zealand's obligations under TPP, it simply provides an avenue for TPP investors to pursue a claim in the case a government has not met certain obligations. 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).

The TPP Investment Chapter deliberately includes certain safeguards to preserve the New Zealand Government's right to regulate and which seek to prevent unwarranted ISDS claims, including:

- Exceptions to the Investment chapter's rules to limit the scope of the chapter and therefore limit the scope of ISDS. For New Zealand, these exceptions cover important policy areas such as health and other public services, and the ongoing screening of foreign investment.
- A provision that allows the Government to rule out ISDS challenges over tobacco control measures. The Government intends to exercise this provision.

²⁵ The consultation and negotiations processes are compulsory for any potential ISDS case. This provides an opportunity for any case to be resolved prior to it reaching a full arbitral hearing.

- 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.
- The 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 investor has the burden of proving all elements of its claims under TPP.
- 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, even if there is loss or damage to the covered investment.
- Government decisions not to issue, renew or maintain or decisions to modify or reduce subsidies or grants will not in and of itself constitute a breach of expropriation, or the minimum standard of treatment obligations leading to potential ISDS.
- As noted above, limiting the types of monetary awards and damages that can be made against the Government. The New Zealand Government cannot face claims for punitive damages and costs can also be awarded against an investor if their claim is ultimately unsuccessful.
- In addition to existing arbitration procedures, the Government is expressly permitted to make a counterclaim and obtain damages when the investor is in the wrong under a covered investment agreement.
- A number of provisions that allow TPP governments to issue binding interpretations on ISDS tribunals.
- Provisions that mean hearings will be open to the public, and which allow tribunals to accept submissions from experts and the public.
- Procedures and rules that limit the possibility of an ISDS claim being made in the first place. Claims must be submitted before three and a half years have passed, and 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.

More fundamentally, however, the ISDS mechanism does not change the obligations of the TPP Investment Chapter. Ultimately it is these obligations, not the existence of an ISDS mechanism, that determine any constraints on regulation or policy. In this respect, the TPP Investment Chapter would not limit New Zealand's fundamental investment and public policy settings.

New Zealand screening thresholds

As part of a negotiated outcome on improved investment opportunities in other TPP Parties, New Zealand made some improved market access commitments. Under TPP, the threshold above which a non-government investor must get approval to invest significant business assets in

New Zealand would increase from NZ\$100 million to NZ\$200 million for investors from TPP Parties.²⁶ (Note that non-government investors from Australia are already screened at a higher threshold, currently NZ\$497 million, under ANZCERTA.) New Zealand would be unable to reduce this threshold in the future for TPP Parties. The increased threshold requires an amendment to the Overseas Investment Act 2005. Other than this specific threshold, TPP would not have any further implications or required amendments for the investments currently screened under the Overseas Investment Act 2005. No changes would be required to the way New Zealand currently approves foreign investment in sensitive land (including farm land over five hectares) or fishing quotas. TPP rules do not provide the ability for a government to ban TPP nationals from buying property in New Zealand. Under TPP, however, New Zealand would be able to impose some types of new, discriminatory taxes on property and, as noted above, continue to require approval to require approval for foreign investments in sensitive land. New Zealand would also retain the flexibility to make the approval criteria under the Overseas Investment Act more or less restrictive.

This new TPP threshold was judged to be acceptable for New Zealand's investment policy because of the benefits for the perception of New Zealand's investment environment due to the reduction in compliance costs for some investment entering New Zealand, and the fact that Overseas Investment Office statistics indicate that no application relating solely to significant business assets (i.e. no sensitive land involved) has been declined for a number of decades.

Beyond the Overseas Investment Act, New Zealand commitments under TPP are on the whole consistent with current law and practice, but could potentially limit New Zealand's future policy flexibility. For example, New Zealand would make commitments not to impose performance requirements and in relation to senior management and boards of directors except in areas covered by specific Annex I and II reservations in New Zealand's negative list to TPP (although New Zealand sees such obligations as a net advantage, and seeks such outcomes in FTAs). These Annex I and II reservations relate to sensitive areas of policy (including health, public education and social security), reflect the same types of exceptions New Zealand has included in previous FTAs, and on the whole are deemed to preserve appropriate future policy space.

4.9 Cross-Border Trade in Services

The Cross-Border Trade in Services Chapter seeks to facilitate the expansion of cross-border trade in services, including in sectors such as accountancy, construction, engineering and architecture services. Like a number of New Zealand's existing FTAs, TPP takes a broad approach to cross-border trade in services, with services covered unless specifically excluded or listed in a country's schedule of non-conforming measures. The areas of government procurement, financial services and telecommunications are also covered by separate chapters under TPP.

²⁶ Increasing the threshold on entry into force of TPP will also engage MFN commitments that New Zealand has under certain existing FTAs. The \$200 million screening threshold for significant business assets would also have to be applied under relevant MFN provisions in existing agreements with China, Hong Kong, Chinese Taipei and Korea. This will need to be addressed in implementing legislation for TPP.

The manner in which market access commitments are made for services and investment in TPP is through a 'negative list' framework. This format provides exporters and investors a simple way to determine whether the services and investment chapters apply to their area of business in another TPP market. Under a 'negative list' approach, Parties commit to provide market access except in areas where restrictions are listed in individual Parties' services and investment schedules. These restrictions are known as 'non-conforming measures' or 'reservations'. Each country's 'negative list' has two parts: Annex I and Annex II:

- Annex I sets out existing measures (laws, regulations, decisions, practices and procedures) that TPP Parties retain the right to maintain in their present form. Such measures may restrict the access of foreign service suppliers or investors, or may discriminate in favour of domestic service suppliers or investors. These existing measures are subject to a 'ratchet' clause. This means that TPP Parties commit to automatically extend the benefits of any future autonomous liberalisation of these measures to all other TPP countries. Measures in Annex I capture the current level of access provided in a market and cannot be made more restrictive in the future.
- Annex II lists reservations for sectors and activities where TPP Parties reserve the right to maintain existing discriminatory measures and/or adopt new or more discriminatory measures in the future. The ratchet clause does not apply to any measure covered by Annex II.

In other words, if a TPP Party does not list any restrictions for a particular industry sector it means that Party is committed to not applying any measures that would be inconsistent with certain Chapter obligations, such as, discriminatory practices that favour local investors or service suppliers, and is committing to keep that market open for TPP exporters and investors.

4.9.1 Advantages of entering TPP, Services

Services are critical to New Zealand's international competitiveness, accounting for 64 percent of GDP (NZ\$140 billion in 2014), with exports worth NZ\$17.7 billion (around a quarter of total exports). Nearly half these exports go to TPP countries. Commercial services, including knowledge intensive services such as ICT, audio visual and consultancy services, are valued at NZ\$4.6 billion (or 7% of exports). According to the New Zealand Productivity Commission²⁷, the service sector contributes to over 52% of the value of our exports (some NZ\$35 billion), reflecting the contribution of embedded services such as logistics, software, finance and design to the final value of our exports (goods included).

Entering TPP would make it easier for New Zealand service exporters – such as providers of professional, business, education, environmental, transportation and distribution services – to exploit new opportunities and increase their competitiveness and profitability. Improved commitments for services (and investment) are also important for many New Zealand goods exporters, which increasingly look to undertake services related activities to support their international business (such as establishing an in-market presence, forming commercial partnerships and providing after-sales service). Increased services trade can increase productivity through greater specialisation and agglomeration and by increasing the level of competition in the domestic market. Exporters gain from

²⁷ Productivity Commission, *Boosting productivity in the services sector*, May 2014.

improved access to larger markets in the TPP region, while consumers gain access to a wider variety of services.

On the import side, TPP would help to integrate New Zealand into regional supply chains and to overcome the distance that currently acts as a barrier to information flows. This would increase opportunities for knowledge and technology transfer and reduce the deterrent effect that New Zealand's small market may currently have on expansion of services imports.

The cost to New Zealand services exporters of not entering TPP would be being placed at a competitive disadvantage against other TPP exporters that enjoy preferential advantage in TPP markets.

Regulatory framework

The Cross Border Trade in Services Chapter would support growth for New Zealand's services sectors by including provisions relating to non-discrimination and market access. Other than where exceptions apply or countries have specific restrictions, New Zealand services and service suppliers would be entitled to equal treatment in "like circumstances" and TPP countries cannot impose quantitative restrictions that would lock out service suppliers from their markets. The inclusion of "most-favoured-nation" (MFN – requiring a TPP country to extend to TPP Parties the best level of access it might offer in the future to any non-TPP country) would help to ensure that the competitive position in the TPP region of New Zealand exports is not eroded over time. These core obligations are supported by other disciplines such as a prohibition on requiring a local presence, and provisions to enable the free transfer of payments. In combination, the Chapter aims to reduce barriers to entry into TPP markets.

The Chapter's commitments on domestic regulation are designed to complement market access commitments by ensuring that domestic regulation in TPP countries related to the authorisation, licensing and qualification procedures does not operate as a barrier to services trade.

These obligations are supported by improved market access commitments over and above existing GATS and FTA commitments, made by a number of TPP countries, including for commercial services and in the education sector. Examples of these market access commitments that are expected to provide direct benefit to these sectors include, for example:

- *Global supply chain related services:* transportation, warehousing, distribution and retail are important services when getting goods to market. TPP Parties have agreed not to restrict foreign participation in warehousing, distribution and retail services (with limited exceptions), while access to transportation related sectors (land, sea, air related services and rail) will also be significantly improved.
- *Education services:* New Zealand providers would have improved access to the private education service markets of new FTA partners (Canada, Japan, Mexico, Peru and the US) and business and second-language training services in Chile and Viet Nam. These provide further opportunities for New Zealand's growing international education sector.

Education is one of the New Zealand's most important services export sectors. The TPP region has not traditionally been a strong source of New Zealand's education services exports,

accounting for less than 20% of New Zealand's NZ\$2.3 billion global 2014 education services exports.²⁸ This presents a potential growth opportunity, in particular for large purchasers of New Zealand education services in the TPP region that do not have existing FTAs with New Zealand: in 2014, New Zealand exported NZ\$278 million of education services to Japan, and around NZ\$50 million to the US.

- *Accountancy services:* New Zealand accountants and accounting firms would have greater access to provide services in TPP countries. Some limited exceptions do exist, such as a requirement to have a local commercial presence in Viet Nam.
- *Other professional services:* New Zealand professionals would benefit from improved commitments in a wide range of sectors such as engineering, architecture, management consultancy and foreign legal services. While the provision of services across TPP countries is subject to certain local professional standards and licensing requirements, New Zealand would benefit from TPP commitments not to discriminate or impose quantitative restrictions in these sectors.
- *Agriculture services:* New commitments would support the commercial opportunities that exist in the region for New Zealand agriculture, hunting and forestry service suppliers. Together with gains on goods, investment and visa access, this paves the way for regional expansion in an area of New Zealand expertise.
- *Environmental services:* Improved commitments for environmental services, particularly in the US where significant improvements to existing WTO commitments have been made.

4.9.2 Disadvantages of entering TPP, Services

The Chapter's rules are designed to facilitate the expansion of the services trade, and in doing so impose certain obligations on Parties. Some countries may face adjustment costs and the need for reform to meet the level of services trade liberalisation under TPP. For New Zealand, these obligations would be relatively low-cost to fulfil, as our domestic regulatory regime already operates in an open and non-trade restrictive way.

New Zealand's lists of non-conforming measures preserve the ability of New Zealand to maintain monopoly service provision in certain areas, for example, with respect to the promotion of film and television production in New Zealand.

Public services provided in the exercise of governmental authority, and social services such as healthcare and public education, are also excluded from the scope of New Zealand's market access commitments in TPP.

²⁸ Note that Australia is not counted in New Zealand's education services export statistics, as students from the two countries pay domestic fees.

4.10 Financial Services

The Financial Services Chapter of TPP will establish a framework of rules governing the cross-border trade in financial services among TPP Parties. The TPP is the first time that New Zealand has included a separate chapter of commitments on financial services in an FTA. The Chapter is closely connected to the Cross-Border Trade in Services and Investment Chapters. Financial services are an important underlying service that is essential for all international trade and investment.

Investment-related provisions in the Financial Services Chapter will apply to each TPP Party according to its negative list schedule of “non-conforming measures”. This is New Zealand’s preferred format, as it provides a simple outcome for businesses: each TPP country will apply Chapter commitments to every area, except those in the “negative list” of non-conforming measures. Under TPP, the list of non-conforming measures under the Cross-Border Trade in Services and Investment Chapters applies to the Financial Services Chapter where relevant, reflecting the close relationship between financial services, general trade in services and investment. The separate financial services non-conforming measures are listed in two sections:

- *Section A:* sets out existing measures (laws, regulations, decisions, practices and procedures) that the TPP Party retains the right to maintain in their present form (but not make more restrictive). Such measures may restrict the access of foreign financial service suppliers or investors, or may discriminate in favour of domestic service suppliers or investors. These existing measures are also subject to a ‘ratchet’ clause, requiring the TPP Party to automatically extend the benefits of any future liberalisation of these measures to all other TPP countries.
- *Section B:* lists reservations for sectors and activities where the TPP Party has reserved the right to maintain existing discriminatory measures and/or adopt new or more discriminatory measures in the future. The ratchet clause does not apply to any measure covered by Section B.

Commitments to allow the provision of financial services from one TPP country into another (cross-border supply) are limited to a prescribed set of activities, set out in a separate annex of country-specific commitments.

4.10.1 Advantages to entering TPP, Financial Services

New Zealand sold NZ\$136 million of financial services to the TPP region in 2014, the majority of which was NZ\$99 million to Australia. (Total imports of financial services from TPP were NZ\$132 million.) These exports were a relatively small proportion of the total NZ\$670 million of financial services New Zealand exported in 2014, indicating potential for increased exports to other TPP markets. The framework of rules provided by the Financial Services Chapter would help grow our exporters’ activity in the TPP region.

The Chapter includes a market access commitment requiring TPP countries ensure access to their markets for New Zealand financial service suppliers by, among other things, not imposing quantitative restrictions on the number of financial institutions; the value of transactions; or by requiring a particular type of legal entity or joint venture to provide the service. The Chapter’s commitments also

ensures that once established as a financial service provider, a New Zealand exporter would not be disadvantaged compared to other providers of the same or similar services under TPP, subject to limited exceptions. New obligations relating to portfolio management and electronic card payment services, which reflect existing New Zealand policy, will also reduce barriers to trade for New Zealand suppliers in TPP markets.

Specific commitments are also included in the Chapter that will promote transparency, which is particularly important in the financial services sector given that regulation is often highly technical.

Opportunities to grow New Zealand exports in a number of TPP markets that have high-growth potential, particularly in South East Asia, would be undermined if New Zealand did not enter TPP. New Zealand firms would have to rely on existing FTAs or the WTO framework where New Zealand's liberal commitments are not in all cases matched by the TPP Parties.

4.10.2 Disadvantages to entering TPP, Financial Services

New Zealand already has an open and transparent financial services policy regime. This, together with the policy space preserved under TPP to regulate for prudential reasons, means there would be little policy risk and minimal disadvantage for New Zealand to enter TPP with respect to Financial Services. Like the WTO and all New Zealand FTAs, TPP preserves policy space to apply any form of prudential regulation, such as laws or regulations to protect investors and depositors, or to ensure the integrity and stability of the financial system more broadly. Further exceptions are included in New Zealand's non-conforming measures schedule (as outlined in the legal obligations section of this NIA). This includes New Zealand-specific exceptions that apply to new commitments in TPP, such as a requirement to provide subsidies to all financial institutions incorporated in New Zealand on a non-discriminatory basis.²⁹

The Financial Services Chapter applies the Investment Chapter's investor-State dispute settlement (ISDS) mechanism to certain investment-related obligations that are incorporated into the Financial Services Chapter. However, in a number of ways, the application of ISDS to financial services is more limited in TPP than existing New Zealand FTAs with ISDS. In addition, the Financial Services Chapter includes a special procedure which countries can invoke for any claims involving regulation subject to financial services exceptions (Article 11.11), including the exception for prudential regulation. In such cases, a government can require that a determination of whether or not the financial services exceptions apply be decided by a state-to-state dispute settlement process, not ISDS. The procedural and substantive safeguards built into the TPP ISDS mechanism also apply to any ISDS claims involving financial services. (See Investment and ISDS legal obligations sections of this NIA.)

²⁹ In respect to subsidies, these exceptions mean that New Zealand retains the ability to maintain or implement new subsidies that discriminate on prudential grounds, or discriminatory subsidies to government-owned or controlled financial service providers, or any entity that is systemically important to the financial market in New Zealand.

4.11 Temporary Entry

The Temporary Entry Chapter will enhance access into TPP countries for business persons engaged in trade in goods, the supply of services, and the conduct of investment activities. It is designed to assist individuals and businesses taking up the commercial opportunities offered by various aspects of TPP. Importantly, the Chapter does not apply to people seeking employment in New Zealand or to immigration matters, such as citizenship or permanent residency applications.

The Temporary Entry Chapter operates based on country-specific commitments set out in Annex 12-A. Each country's Annex specifies the conditions and limitations for entry and temporary stay provided to TPP countries (a 'positive list' of commitments).

4.11.1 Advantages of entering TPP, Temporary Entry

The Chapter commits all TPP Parties to provide streamlined and transparent procedures for temporary entry applications, including a requirement to publish explanatory information on the requirements for temporary entry and the typical timeframes for application in each country. This type of increased information should assist New Zealand business people when doing business in all TPP countries. A majority of TPP countries have made additional positive commitments on temporary entry, beyond existing commitments made in GATS and some of New Zealand's existing FTAs (particularly AANZFTA, which covers Brunei, Singapore, Viet Nam and Malaysia).

The US has not made positive list commitments on temporary entry under TPP, consistent with its approach to most international agreements. New Zealand sought improved temporary entry access from the US under TPP, given current preferential levels of access already offered to several of our key competitors under US policy (New Zealand is one of only four OECD countries without this). TPP leaves open the opportunity for the US to make commitments in the future. The Committee on Temporary Entry will meet to consider opportunities for the TPP Parties to further facilitate temporary entry of business persons.

This means conditions for entry into the US are not altered by TPP. Conditions are also not altered for entry into Australia because New Zealanders enjoy separate preferential access under ANZCERTA.

The commitments are particularly important for providers of professional services, such as accountants and architects, where services are provided predominantly by travelling to meet clients. Some TPP Parties, including New Zealand, require reciprocal access or impose conditions and limitations on access granted under TPP. If New Zealand was not a member of TPP, New Zealand businesses would not get the benefit of these trade-facilitating outcomes, and would remain subject to existing rules in each TPP country.

4.11.2 Disadvantages of entering TPP, Temporary Entry

No net disadvantages for New Zealand would stem from this Chapter. New Zealand's country-specific temporary entry commitments in TPP are based on existing commitments in New Zealand's FTAs with ASEAN and Malaysia, and are consistent with current policy settings related to business visitors, intra-

corporate transferees, installers of services and independent professionals. New Zealand's market access commitments under TPP would not affect New Zealand's specific licensing and other requirements (i.e. professional codes of conduct) for business people from TPP countries. The Chapter specifically provides that there is no recourse to dispute settlement under TPP for refusal to grant temporary entry.

4.12 Telecommunications

Further to other Chapters that would apply to the provision of telecommunication services (for example the Cross-Border Trade in Services and Investment Chapters), the TPP Telecommunications Chapter sets out regulatory disciplines to underpin effective market access and competitive markets in telecommunications services in the TPP area.

The Chapter builds on the disciplines developed in the GATS Telecommunications Annex and Basic Telecommunications Reference Paper and the Annex on telecommunications regulatory disciplines in AANZFTA. The Chapter recognises that the telecommunications sector is both an important infrastructure enabler for trade in other goods and services, as well as a distinct services sector in its own right. The TPP Telecommunications Chapter extends and updates these regulatory disciplines to reflect the developments in approaches to the regulation of markets since the conclusion of the GATS in the 1990s.

All the disciplines in the Chapter are assessed as consistent with current New Zealand regulatory settings. In particular, the Chapter acknowledges that regulatory needs and approaches will differ market to market and that each TPP Party may determine how best to implement its obligations under the Chapter. This reaffirms the flexibility for New Zealand to apply its competition-based approach to regulatory intervention in the market, where intervention is considered on a case-by-case basis.

The chapter contains commitments providing for:

- Access to and use of public telecommunications services (in recognition of the importance public telecommunication services play as vital infrastructure for business enterprises). These provisions are based on the GATS Telecommunications Annex;
- Inter-connection and access to technical equipment or facilities required to provide telecommunications services (including access to numbers, number portability, re-sale, unbundling of network elements, leased circuits, co-location of equipment and access to poles, ducts, conduits, rights of way and international submarine cable landing stations). These provisions build on and update the GATS Basic Telecommunications Reference Paper to provide the conditions for effective market entry for telecommunications suppliers;
- Transparency - the chapter sets out expectations regarding transparency in the formulation and implementation of regulatory measures in the telecommunications sector, as well as with respect to any licensing requirements applied to telecommunications suppliers.

4.12.1 Advantages of entering TPP, Telecommunications

Joining TPP would provide a clear indication to international service suppliers and investors that New Zealand has in place a pro-competitive regulatory framework in the telecommunications sector that is consistent with international practice and focussed on the long-term benefits to end-users of telecommunications services. This forms part of the environment that supports the attraction of leading technology, capable of generating wider economic development in New Zealand.

The Telecommunications Chapter would also benefit New Zealand services suppliers interested in providing services in TPP markets by providing a common set of expectations regarding the regulatory issues capable of affecting market access in the telecommunications sector.

The Chapter includes provisions to assist TPP Parties to address the issue of the high cost of international mobile roaming. This is a significant practical issue for business and consumers in today's globally inter-connected world. New Zealand worked actively with TPP Parties to highlight the issue and seek suitable arrangements to enable Parties to pursue options to deal with the issue.

The Chapter also includes an explicit recognition that different jurisdictions take different approaches to regulation, including that some have a tradition of using ex-ante regulation, while others – including New Zealand – adopt a combination of approaches aimed at maximising efficiency in relation to the size and competitive conditions of our market.

While in a few areas, a limited number of TPP Parties – Viet Nam, Brunei, Malaysia, Peru and Chile – have taken out transition periods or indicated modifications to the way in which they will apply certain provisions, these are not extensive and have been assessed as not having a significant commercial impact. Similarly the annexes attached by the US and Peru that exempt certain small scale rural telecommunications suppliers from particular provisions in the chapter were also determined not to be commercially significant. (New Zealand's rural supply obligations are placed on the companies Chorus and Spark under a Universal Service Obligation, and both suppliers comply with the relevant provisions of this chapter, so a comparable exemption is not required.)

4.12.2 Disadvantages of entering TPP, Telecommunications

Though joining the TPP would entail undertaking regulatory disciplines that go beyond current New Zealand commitments under the GATS and AANZFTA, these are assessed as consistent with current New Zealand regulatory settings governing the telecommunications sector. In particular, as noted above, the Chapter acknowledges that regulatory needs and approaches will differ market to market and that each TPP Party may determine how best to implement its obligations under the Chapter.

4.13 Electronic-Commerce

New Zealand recognises the potential of electronic commerce to generate opportunities for economic growth and development, and has included e-commerce chapters in four previous FTAs. The TPP Electronic Commerce Chapter aims to promote the adoption of domestic frameworks capable of

building confidence among e-commerce users, as well as avoiding the imposition of unnecessary barriers to the use and development of e-commerce.

TPP provisions concerning the establishment of domestic legal frameworks governing electronic transactions are consistent with internationally developed model frameworks and support consumer confidence in e-commerce. The Chapter also contains provisions covering electronic authentication and signatures, online consumer protection, the protection of personal information of the users of e-commerce, unauthorised commercial electronic messages, and which recognise the value of cooperation on cybersecurity matters. A second group of provisions aims to minimise unnecessary barriers to e-commerce: encouraging the adoption of paperless trading, prohibiting customs duties on electronic transmissions between the Parties, requiring non-discriminatory treatment of digital products and minimising unnecessary barriers relating to the cross-border transfer of information by electronic means, the location of computing facilities, and access to source code.

The Chapter also contains a set of principles recognising the importance of access to and use of the internet for e-commerce, as well as a cooperation section enjoining the Parties to work together to assist SMEs to utilise e-commerce, to encourage the private sector to develop methods of self-regulation capable of fostering e-commerce, and exchanging information on e-commerce issues covered under the chapter.

4.13.1 Advantages to entering TPP, E-commerce

Connectivity is a crucial driver of New Zealand's economic growth. As a small, open economy highly dependent on trade, information and communications technology (ICT) has helped us connect economically and socially to the world. The ICT sector (which is one part of the broader area of electronic commerce) plays a significant role in our economy. Valued at NZ\$23.5 billion, it represented roughly 11% of New Zealand's GDP in 2014. ICT sector exports (goods and services) were worth NZ\$1.7 billion in 2014, an 8 percent increase from 2012. More importantly, the ICT sector is an enabler, underpinning the development and profitability of New Zealand's services sector more broadly.

New Zealand has consistently advocated the extension of the WTO moratorium covering Customs Duties on Electronic Transactions, and has agreed to make the non-imposition of customs duties on electronic transactions permanent with several of its trading partners to date, including Thailand and Chinese Taipei. Entering into TPP would provide certainty for New Zealand users of e-commerce, including New Zealand exporters who conduct their business online, that TPP Parties would not move to impose customs duties on electronic transactions. This represents a significant step towards the realisation of a permanent commitment by all WTO members not to impose customs duties on electronic transactions.

The Chapter includes clear acknowledgement of the importance of consumer protection, the protection of personal information of users of electronic commerce, and ensures Parties will have measures in place to deal with unsolicited commercial electronic messages (SPAM). In New Zealand's case, we already meet these obligations through our broader regulatory framework covering privacy, consumer protection and problems associated with SPAM. New Zealand would benefit from joining

TPP in this area through the signalling effect of the importance placed on key principles in these areas, as some of the other TPP Parties have different approaches to these issues. These provisions also benefit New Zealand exporters through helping to build public confidence in the use of e-commerce.

There are new provisions in the Chapter on cross-border transfer of information by electronic means and on location of computing facilities that contain important principles recognising the value of information flows and the development of new technologies and services such as cloud computing, for the growth of innovative and cost-effective approaches to the delivery of business services. This is of benefit to New Zealand companies engaged in a wide range of innovative industries that rely on the transfer of information and on computing facilities and services. At the same time, these provisions uphold the Government's ability to take measures affecting the cross-border transfer of information by electronic means, or the location of computing facilities in the event that public policy issues arise (e.g. from new uses of technology). These enable TPP Parties to adopt measures needed to achieve a legitimate public policy objective, provided such measures are not applied in an arbitrary or unjustifiably discriminatory way; are not required to achieve the public policy objective and do not constitute a disguised restriction on trade.

4.13.2 Disadvantages to entering TPP, E-Commerce

The Chapter includes provisions on the non-discriminatory treatment of digital products. These are new for New Zealand and have not been extensively tested in other agreements. New Zealand has ensured that the Chapter would permit the continuation of current policy settings to encourage creativity and cultural expression, in particular through an exception that enables continued targeted use of government subsidies or grants to encourage New Zealand creative content. These new commitments sit alongside New Zealand's existing commitments in respect of production, distribution, exhibition and broadcasting of audio-visual works made during the WTO Uruguay Round. These provide non-discriminatory treatment to the service suppliers of other WTO members, apart from the general exceptions and the specific reservations that were taken out in New Zealand's GATS schedule.

The Chapter covers a range of newer areas that go beyond the focus that New Zealand has usually taken in previous electronic commerce chapters, which concentrated particularly on the specific trade issues that arise in the distinctive e-commerce environment, such as the promotion of paperless trading and provisions for the recognition of electronic signatures. TPP would extend this coverage, for example to digital products, internet interconnection charge sharing, cooperation on cybersecurity, provisions on source code and the location of computing facilities. These provisions have been negotiated to sit within New Zealand's current policy settings and to reflect a balanced approach to addressing the interests of New Zealand business and consumers in taking full advantage of the opportunities available in the digital age, as well as incorporating any safeguards required to protect the interests of users of e-commerce in areas such as privacy, security and confidentiality.

4.14 Government Procurement

The TPP Government Procurement³⁰ Chapter sets out rules by which companies can compete for government contracts. Its aim is to provide open, transparent and competitive procurement whereby companies from other TPP countries are afforded treatment equal to the treatment given to domestic suppliers in bidding for government procurement contracts covered by the chapter.

Each TPP country has negotiated a “Schedule of Commitments” that sets out government entities, procurement activities, and minimum value thresholds that together determine what contracts are subject to the commitments in the Chapter. This is the “covered procurement”. Coverage of Government Procurement under the Schedules of Commitments includes central government (typically ministries and departments) and other government entities (such as state-owned enterprises), with some countries including also sub-central government. Some TPP Parties will also have transitional and delayed implementation provisions in certain areas.

TPP includes a commitment to undertake further negotiation three years after the Agreement comes into force with a view to achieving expanded coverage. Under this commitment, TPP Parties may agree that these future negotiations include sub-central coverage³¹ (although it is possible that for Parties that administer the kinds of procurement at the central level of government that other Parties may administer by sub-central entities, these negotiations may involve commitments at the central level of government rather than at the sub-central level).

4.14.1 Advantages to entering TPP, Government Procurement

The Government Procurement Chapter would provide New Zealand businesses significant new business opportunities, in the form of guaranteed access to covered government contracting opportunities in TPP countries. These markets are substantial – in most developed countries government procurement typically represents 14-20 percent of GDP (OECD estimates). (The New Zealand State sector spends approximately NZ\$30 billion on goods and services, including infrastructure, each year – around 13% of GDP.) Covered government contracts include a wide range of goods and services in a variety of sectors including health, education, housing, transport, public utilities and construction. This would provide opportunities for New Zealand to further diversify its exports.

The most significant new opportunities for New Zealand exporters would be in the four countries with which we do not have existing government procurement commitments³²: Malaysia, Mexico, Peru and Viet Nam. Malaysia and Viet Nam have typically not included government procurement in their FTAs, so TPP would allow New Zealand companies to be amongst the first international suppliers to secure preferential access to these markets. (With the exception of “Other Covered Entities” in Section C of

³⁰ Government procurement is the acquisition of goods and services by government entities from third parties to fulfil their public functions.

³¹ Australia, Canada, Chile, Japan and Peru have already included sub-central coverage in their TPP schedules.

³² Other TPP countries are covered by Government Procurement Chapters in New Zealand’s existing FTAs, and the WTO Agreement on Government Procurement (GPA).

Mexico's schedule, which would not be offered to New Zealand. This is reciprocal; Section C of New Zealand's schedule would not be offered to Mexico.) TPP also builds on the opportunities New Zealand businesses secured under the WTO Agreement on Government Procurement (GPA), with some modest improvements to access in Canada, Japan, Singapore and the US (e.g. additional entities and coverage of private-public-partnerships). With respect to Australia, the GP Chapter would give New Zealand suppliers clearly defined access to covered procurement and rights of challenge that are not spelled out in the existing non-treaty level arrangement, the Australia New Zealand Government Procurement Agreement.

The chapter also includes a specific provision aimed at ensuring small and medium enterprises (SMEs) would be better placed to access procurement opportunities, for example by seeking to ensure tender information is readily accessible online and tender responses able to be made electronically; to endeavour to make all tender documentation available free of charge; and for procurement projects to take into account the participation of SMEs. This is particularly important for New Zealand exporters given our large proportion of small businesses.

The TPP Government Procurement Chapter establishes certain procedures that provide for transparent and competitive tendering that TPP Parties must follow for covered procurement activities. Collectively, these make bidding for government contracts in TPP Parties more accessible and transparent, and key elements include:

- Non-discrimination, so that Parties must treat suppliers from other countries which are Party to the Agreement no less favourably than domestic suppliers.
- A prohibition against offsets (i.e. requirements for local content) as a condition of contract.
- Requirements in respect of the nature and detail required in tender notices and documentation.
- Minimum time frames for responding to tenders, to give businesses sufficient time to bid.
- Requirements relating to the treatment of tenders and awarding of contracts, including to publish post-award information and provide reasons to unsuccessful suppliers why their tender was not successful.

New Zealand's schedule excludes procurement related to national treasures and the storage or hosting of government data, and makes it clear that some activities, such as commercial sponsorship arrangements and unsolicited unique proposals are not covered by the chapter. More generally, the right of TPP Parties to take appropriate actions to protect essential security interests is preserved under Article 19.2 of the Exceptions chapter. The Chapter preserves the right to take measures for certain legitimate public policy purposes, such as public health, safety and protection of the environment.

4.14.2 Disadvantages to entering TPP, Government Procurement

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*. New Zealand's schedule does not include any additional commitments beyond those already made in other agreements, in particular the World Trade Organization

Agreement on Government Procurement (GPA). In other words, New Zealand would simply extend the commitments that are already in place for many other countries, including a number of TPP Parties.

TPP would place the same restrictions on certain policy options as several of New Zealand's existing trade agreements (including the GPA), for example the ability to compel government agencies to "buy local" under preferential procurement policies. In addition to the fact such obligations are reciprocal and therefore bring net benefit to New Zealand businesses and the economy, TPP would not constrain the Government's ability to support local suppliers in other ways than through preferential procurement policy. As an example the Ministry of Business, Innovation and Employment (MBIE) and New Zealand Trade and Enterprise (NZTE) have been working closely to help support New Zealand businesses to develop their tendering capability so that they can be competitive both domestically and in foreign markets. These and other initiatives to support local businesses, such as through access to research grants or other incentives, are not precluded by the Government Procurement Chapter.

TPP includes an agreement to undertake negotiation of further commitments on coverage under the Chapter three years after the Agreement comes into force. At that point New Zealand would have the opportunity to pursue new market access priorities and continue to reflect the domestic context. Negotiations on sub-central coverage would be shaped by the fact a relatively low proportion of procurement in New Zealand that is undertaken at the local government level (approximately 20% of total procurement expenditure) compared to other countries.

Under TPP, Parties must provide access to national remedies to suppliers having an interest in a particular procurement covered by the TPP, where they believe that the commitments in the chapter have not been applied by the procuring entity. In theory, this means New Zealand procuring entities covered by the chapter would be subject to new challenge proceedings. The actual effect of this for New Zealand is likely to be minimal, as New Zealand government agencies already accept tenders from foreign suppliers and provide rights of redress through the New Zealand courts, so the risk of any increase in legal proceedings is considered minimal.

4.15 Competition

The objective of the Competition Policy Chapter is to facilitate economic efficiency and consumer welfare through promoting open and competitive markets. The TPP requires Parties to have in place competition laws that prohibit anti-competitive conduct, and authorities responsible for enforcing competition laws. Parties will be required to endeavour to apply their national competition law to all commercial activities. However, each Party may create exemptions based on public policy or public interest grounds.

4.15.1 Advantages to entering TPP, Competition

Should New Zealand enter TPP, the benefits to New Zealand of increased flows of goods and services under the TPP could potentially be compromised by cross-border anti-competitive practices in other TPP countries. Competitive distortions, such as anti-competitive conduct, have the potential to restrict

trade and investment, and negate the benefits that might otherwise accrue to New Zealand. The TPP Competition Chapter mandates the establishment of strong competition regimes in all TPP Parties (including those that may not have had them previously), which would provide New Zealand businesses operating in these countries with an increasingly stable and predictable business environment as these regimes are developed. The cooperation provisions of the chapter should also assist in the development of these regimes.

The Competition Policy Chapter also provides for procedural fairness and private rights of action. These provisions would allow New Zealand businesses to take actions in TPP Parties if they encounter anti-competitive behaviour. (New Zealand law already provides this mechanism, so entering TPP would not create an additional obligation for New Zealand.) Where these provisions do not provide adequate recourse against anti-competitive behaviour, there is the ability under the chapter to enter into consultations on a government-to-government level.

Over time, the development of robust competition policy and law in the TPP region should contribute to higher economic growth rates in TPP members, particularly developing country members.³³ In the long term, improved growth rates in TPP countries would also provide improved opportunities for New Zealand firms operating in these markets.

4.15.2 Disadvantages to entering TPP, Competition

No significant disadvantages would arise from this chapter for New Zealand. New Zealand has had well-developed and well-functioning competition law for a number of years. As such, New Zealand would not need to amend its competition laws or policy to meet these requirements. The Commerce Act 1986 prohibits anti-competitive conduct, and the Commerce Commission is primarily responsible for enforcing the Act.

Note that the Chapter provides the ability to exempt certain commercial activities from laws prohibiting anti-competitive conduct. This would give flexibility for New Zealand to carve out specific areas of interest where there may be public policy or public interest circumstances to do so.

4.16 State-Owned Enterprises

The TPP Chapter on State-Owned Enterprises (SOEs) and Designated Monopolies recognises each Party's right to establish and maintain SOEs and monopolies, while aiming to establish a level playing field between state-owned or controlled companies and their competitors. There are exceptions to preserve each TPP Party's ability to pursue policy objectives through SOEs and monopolies.

The SOE provisions apply to companies more than 50 percent owned or controlled by the Government and which have a commercial focus – not those which operate principally on a not-for-profit or cost-recovery basis. For New Zealand, this would include some of the companies subject to the

³³ See "OECD Factsheet on How Competition Policy Affects Macro-Economic Outcomes" (2014) for an extensive list of empirical studies on how the adoption of competition policy and law improves rates of growth both in individual sectors and for economies as a whole.

New Zealand *State-Owned Enterprises Act 1986* and other commercially focused companies in which the Government owns a majority share (e.g. Air New Zealand).

The monopoly provisions of the Chapter will apply to the trading activities of entities granted the exclusive right to buy or sell a good or service. This would cover the monopoly functions of a small number of New Zealand government-owned entities in New Zealand, such as Kiwirail's functions related to the administration of New Zealand's rail network and Transpower's operation of the National Grid. It excludes existing privately-held monopolies but would include future private and government-owned entities that the Government designates as monopolies (Zespri, for example, would be excluded). PHARMAC is not covered by these provisions.

An exception to the Chapter excludes SOEs and monopolies with annual revenues below SDR 200 million³⁴ (currently around NZ\$400 million). TPP Parties will adjust this threshold every three years. In New Zealand, the entities defined as SOEs for the purposes of TPP above this threshold³⁵ would be Air New Zealand, KiwiRail, New Zealand Post, Genesis Energy, the Lotteries Commission, Meridian Energy, Mighty River Power, Solid Energy, and Transpower. (Of these, only KiwiRail, New Zealand Post, Solid Energy and Transpower are covered by New Zealand's SOE Act 1986.)

4.16.1 Advantages to entering TPP, State Owned Enterprises and Designated Monopolies

The Chapter would support New Zealand exporters and investors operating in TPP markets, achieving what New Zealand assesses to be an appropriate balance between ensuring the commercial activities of SOEs and monopolies do not negatively impact on trade, while preserving the ability of governments to deliver policy objectives through SOEs and monopolies. Taken together, these obligations would help establish a level playing field for New Zealand businesses competing with SOEs from TPP countries.

New Zealand exporters operating in TPP markets would benefit from the following key obligations:

- New Zealand businesses are entitled to be treated according to the same standards as domestic businesses and those from other TPP countries, when buying goods or services from an SOE, or selling goods or services to an SOE. The same obligations apply when a monopoly is buying or selling a monopoly good or service. This is an important element in ensuring certainty and a level playing field for New Zealand businesses when they are trading with SOEs and monopolies from TPP countries.
- New Zealand businesses trading with monopolies from TPP countries also would benefit from an obligation to ensure that a monopoly does not use its monopoly position to engage in anti-competitive practices (practices which restrict or distort competition, for example anti-

³⁴ The threshold is expressed in International Monetary Fund Special Drawing Rights (SDRs), a unit of account used by the International Monetary Fund and based on a basket of international currencies. The conversion from SDRs to New Zealand dollars changes periodically with currency fluctuations.

³⁵ Based on New Zealand's 2014 financial statements, <http://www.treasury.govt.nz/government/financialstatements/>

competitive agreements and abuse of dominant position) in markets where the monopoly has not been granted monopoly rights.

- Each TPP country will need to make a list of its SOEs and monopolies publicly available, and provide on request further information about its policies or programmes which allow for non-commercial assistance to an SOE, which could affect trade and investment between the TPP Parties. Greater access to information would enable New Zealand exporters, especially smaller businesses, to make more informed decisions about operating in TPP markets.
- A provision on Government 'non-commercial assistance' to SOEs builds on existing WTO obligations related to government subsidies by focusing specifically on advantages given to SOEs because of their government ownership, and by covering services which an SOE provides outside its own country. The obligation prevents a TPP Party from causing adverse effects or injury to the interests of another TPP Party through non-commercial assistance that it provides to an SOE. This could be financing or loan guarantees on better than commercially-available terms or equity capital inconsistent with usual investment practice, provided either directly by the government or through another entity. This provision provides a remedy where New Zealand businesses which compete with SOEs from other TPP countries are negatively affected because of the subsidies the SOEs receive.
- Importantly for New Zealand, government support provided to an SOE for services that the SOE supplies in its own territory is excluded. This means that the obligation does not apply with respect to the most of the activities of New Zealand's SOEs, since they tend to be focused on supplying services to the domestic market. For example, SOEs such as Meridian and Genesis supply electricity to New Zealand consumers and Kiwirail provides rail services for passengers and freight in New Zealand. The exclusion from this obligation for services supplied domestically also ensures there is policy space for future governments to establish new SOEs to provide services in New Zealand.
- TPP countries would also need to ensure that administrative bodies which regulate SOEs do so impartially.

Should New Zealand not enter TPP, New Zealand businesses operating in areas of TPP markets affected by the operations of local SOEs or monopolies could face a competitive disadvantage compared to both local competitors and exporters from other TPP Parties that would enjoy coverage of the SOEs Chapter. Some further obligations of the Chapter would benefit New Zealand exporters regardless of whether New Zealand entered TPP, for example that each TPP country publicly list its SOEs and monopolies (a practice New Zealand already undertakes).

The Chapter includes exceptions that are specifically tailored to the obligations of the Chapter. The following are examples of areas in which flexibility has been retained:

- Government procurement is excluded from the scope of the SOEs chapter (which will ensure flexibility around government purchases involving SOEs, including procurement through public-private partnerships).

- Sovereign wealth funds (such as the New Zealand Superannuation Fund) and independent pension funds are excluded from scope.
- Other exclusions will provide flexibility for future policies a New Zealand Government might want to pursue, including for monetary policy, the resolution of failed financial institutions, export credits and temporary government ownership as a result of foreclosure.
- New Zealand would also be able to take temporary action to respond to a national or global economic emergency. The TPP-wide general and security exceptions would also apply.

New Zealand has specific exceptions allowing government support for SOEs for the following:

- The supply of construction, operation, maintenance or repair services of physical infrastructure supporting communications between New Zealand and other TPP Parties.
- The supply of air transport services and maritime transport services to the extent that they provide a connection for New Zealand to the rest of the world, and for air services, where the assistance is provided in order to maintain ongoing operations, and does not cause a significant loss in a competitor's market share or significantly undercut a competitor's prices. (This exception is referred to in a separate side letter New Zealand agreed with Australia alongside TPP. See Sections 2 and 5.31 of this NIA.)
- To Solid Energy (to take into account a Crown indemnity for environmental remediation and any future assistance the Government may provide to Solid Energy).

4.16.2 Disadvantages to entering TPP, State Owned Enterprises and designated monopolies

There would be no significant disadvantages for New Zealand arising from this Chapter, primarily because New Zealand is already well placed to comply with its obligations for SOEs and designated monopolies. The Chapter's approach is broadly in line with current practices and the principles behind the New Zealand's *State-Owned Enterprises Act 1986* – and New Zealand state-owned commercial companies are set up to operate on a level playing field with privately-owned companies and are subject to competition laws. In addition, New Zealand has obtained flexibilities to allow future policies which may not be in compliance with aspects of the obligations in the future. The obligations also have less impact on New Zealand SOEs and monopolies given the majority of New Zealand entities are below the size threshold set out in the SOEs Chapter.

Some SOEs obligations would, however, be additional for New Zealand. TPP would extend existing WTO obligations to include subsidies provided to SOEs for services they provide outside New Zealand and subsidies provided to SOEs which produce and sell goods in New Zealand in competition with companies from TPP countries established in New Zealand. As noted above, it is significant for New Zealand that the subsidies obligation does not cover government support for services an SOE supplies within New Zealand (and most of New Zealand's SOEs are focused on providing services domestically).

4.17 Intellectual Property

The TPP Intellectual Property (IP) Chapter sets out a number of obligations for TPP countries. These obligations cover copyright, patents, data protection for pharmaceutical products, plant variety rights, trade marks, geographical indications, industrial designs, domain names, enforcement of intellectual property rights and internet service provider liability. The Chapter also contains provisions on traditional knowledge, traditional cultural expressions and genetic resources.

The Chapter contains the most extensive set of intellectual property obligations in a FTA negotiated by New Zealand. Many of the obligations go further than the obligations New Zealand has under multilateral treaties like the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) or under New Zealand's previous FTAs.

Most provisions of the chapter are consistent with New Zealand's existing intellectual property regime. But some provisions require New Zealand to make changes to law or practice before we can ratify the Agreement, most notably in the areas of copyright and related rights, patents and plant variety rights. These are discussed below. In many cases New Zealand has negotiated flexible approaches to these obligations, as well as exceptions and limitations.

Overall, the obligations in the IP Chapter would involve a net cost to New Zealand. These disadvantages must be considered in the context of the benefits provided in other Chapters.

4.17.1 Advantages of entering TPP, Intellectual Property

Geographical indications

TPP requires Parties to adopt or maintain due process requirements in respect of any regime they provide for the protection of geographical indications (GIs). (A GI is a sign or name used in relation to goods that have a specific geographical origin and qualities essentially attributable to that origin, for example Champagne.) There would be advantages for New Zealand in a number of these due process requirements:

- New Zealand exporters would be able to dispute the protection of a GI in another TPP Party through that Party's domestic legal or administrative processes if that protection conflicted with a prior trade mark right they have in that market, or if the proposed GI was a common name for a product in that market that should remain available for use by all traders.
- Where a TPP country entered into an international agreement with a third party that included obligations to protect GIs, exporters would have reasonable time and opportunity to provide comments on whether those GIs should be protected.
- There would be increased transparency by TPP countries on their processes for the protection of GIs both domestically and through international agreements, making it easier for exporters to participate in relevant processes.
- The transparency requirements include an obligation for a TPP country to tell other TPP countries when proposed GIs in international agreements will be open for comment, including

whether parts of those terms, or their translations or transliterations, are proposed to be protected.

Taken together, these obligations would benefit New Zealand exporters who use common names to market their goods overseas. TPP would help them guard against the risk that a GI receives protection when they consider that the protection would be unwarranted, which could limit their use of a trade mark or a generic term in a TPP market. There are currently no international law obligations on GIs that require this type of due process.

Consistent enforcement procedures

TPP requires Parties to provide greater uniformity in civil and criminal procedures for the enforcement of intellectual property rights.

Greater uniformity of enforcement procedures throughout TPP countries can reduce the regulatory and business compliance cost for New Zealand businesses when enforcing their intellectual property rights in other TPP Parties.³⁶ The Chapter would require New Zealand to make only minor changes to its enforcement procedures. These are described in Section 5 of this NIA.

Traditional knowledge

The TPP IP Chapter contains a number of provisions on traditional knowledge. In the Agreement, Parties recognise the relevance of traditional knowledge to intellectual property systems, commit to work together on traditional knowledge issues and preserve their ability to take measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.

The Parties also agree to pursue quality patent examination, which may include taking into account information related to traditional knowledge, providing an opportunity to inform patent offices of each Party that a claimed invention is not new and therefore not patentable, using databases or digital libraries containing information on traditional knowledge and cooperating in the training of patent examiners on how to deal with applications related to traditional knowledge.

This is the first time provisions on the interface between traditional knowledge and the intellectual property system (in particular the patent system) have been included in an FTA New Zealand is Party to. This is an important step forward for the protection of traditional knowledge.

Grace period for patent filing

TPP will require Parties to provide that public disclosures of an invention by or with the consent of the inventor, in the twelve months before a patent application is filed, will be disregarded when determining whether the invention is novel or inventive (known as a grace period). Under current New Zealand law, such disclosures would mean that the invention would not be considered novel and therefore a patent would not be granted.

³⁶ In this context, greater uniformity of enforcement procedures should not be taken to mean greater uniformity of substantive remedies or penalties. TPP provides countries with flexibility in many cases to tailor the level of penalties and remedies in a way that takes into account countries' unique domestic circumstances.

TPP would require Parties to provide a 12-month grace period to New Zealand nationals seeking patent protection in that Party. This may be of benefit to New Zealand inventors seeking to market their inventions.³⁷ It would allow them to make their invention known to others without first seeking confidentiality agreements. This can be useful to determine the commercial viability of an invention or seek investment capital before incurring the expense of a patent application. Academics could also benefit. It could allow them to publish their research without needing to wait for a decision on whether to file a patent application based on that research. These benefits will accrue mainly to inventors and researchers. It has not been possible to quantify the benefits of this provision.

A grace period provision can lead to uncertainty for inventors and people seeking to use their inventions about whether a disclosure of an invention means the invention is in the public domain (and available for use by anyone) or may lead to a patent application in the future (so that use of the invention would infringe the patent).

The effect of the TPP grace period obligation is difficult to quantify but it is not expected to provide more than a minor advantage to New Zealand. The US, Australia, Japan, Singapore, Canada, Mexico, Peru and Chile already provide grace periods, so joining TPP would not provide additional benefits in most of New Zealand's key TPP markets.

4.17.2 Disadvantages of entering TPP, Intellectual Property

Loss of policy flexibility

Many obligations in the IP Chapter would constitute new obligations for New Zealand but would not require any changes to our law or practice. These new obligations would not therefore directly disadvantage New Zealand. The new obligations would, however, place new limitations on the Government's ability to modify New Zealand's intellectual property settings to ensure they are appropriate for our domestic circumstances. Intellectual property regulation needs to be able to respond to new circumstances and technological change. 'Locking in' settings could have future implications for innovation that flow on to the wider economy, as well as implications for the Government's ability to meet other social, cultural and economic objectives.

The implication of this loss of policy flexibility is difficult to predict. The extent to which it restricted New Zealand's intellectual property policy settings from being modified to meet future Government objectives would only become known in the future. Whether locking in current policy settings materially disadvantages New Zealand depends principally on how prescriptive the relevant obligation is and the availability of other policy tools to achieve the relevant future policy objectives.

Data protection for pharmaceuticals

Pharmaceuticals cannot be marketed unless they have received regulatory approval to do so. In New Zealand, obtaining this approval involves providing the New Zealand Medicines and Medical

³⁷ It should be noted, however, that inventors would need to consider whether this disclosure might also prevent them from obtaining patent protection in other countries that do not have grace period provisions, like the EU, China and India.

Devices Safety Authority (Medsafe) with data concerning the safety, quality and efficacy of the pharmaceutical. As this data can be costly to produce, generic pharmaceutical manufacturers wanting approval to market generic versions of pharmaceuticals already approved by Medsafe generally seek to rely on the data submitted by the original manufacturer of the pharmaceutical. Under the Medicines Act 1981, Medsafe does not consider applications relying on this data until five years after the date of approval of the new pharmaceutical. This is the ‘data protection’ period, which is provided independently of patent protection and applies to all pharmaceuticals, including biological pharmaceuticals (‘biologics’).

Data protection provides a period of protection against competition from generics³⁸. If no data protection was provided, the manufacturer of a generic version of a pharmaceutical could obtain approval and (assuming there was no patent, or the patent had expired³⁹) market the generic soon after the new pharmaceutical entered the market. Under these circumstances, manufacturers of new pharmaceuticals may be unwilling to invest resources in bringing a new pharmaceutical to the New Zealand market. New Zealand’s current practice meets an existing obligation under the TRIPS Agreement to protect the data submitted with the new pharmaceutical from disclosure or unfair commercial use.

TPP would require New Zealand to continue to provide the current five years of data protection for small molecule pharmaceuticals. The obligation for biologic data protection provides two options. The first requires at least eight years’ data protection to achieve “effective market protection” for biologics. The second option requires at least five years’ data protection, along with other measures to provide effective market protection. The second option can be met by current New Zealand policy settings and practice. New Zealand already provides five years’ data protection for biologics. This, together with measures like patent protection for biologics and the time for Medsafe’s regulatory approval process, as well as other market circumstances, provide effective market protection for biologics in New Zealand.

Although the data protection obligations in TPP would be new obligations for New Zealand, as they can be met without changes to policy settings or practice they will not result in any additional costs for consumers or the medicines budget. TPP would, however, prevent New Zealand from shortening the current five year data protection period for both small molecule and biologic pharmaceuticals in the future.

TPP Parties would be required to review the period of market exclusivity provided for biologic pharmaceuticals after ten years.

³⁸ A reference to “generic” in this section of the National Interest Analysis generally includes both a generic version of a small molecule pharmaceutical and a biosimilar for a biologic pharmaceutical.

³⁹ While the patent term of 20 years is significantly longer than the period of five years of data protection, regulatory approval can be granted many years after the patent application has been granted. In some cases, data protection will continue to apply after the patent has expired.

TPP would also require New Zealand to provide five years' data protection to new small molecule (but not biologic) pharmaceutical products that contain a both new and a previously approved active ingredient. This would not require a change to New Zealand law but entails a loss of policy flexibility in the future for small molecule pharmaceuticals.

Patent term extensions

A patent for an invention provides the patent owner with the right to prevent others from commercially exploiting the invention for the term of the patent. This provides an incentive for new inventions to be produced. Patents are of particular importance to industries in which the costs of developing new products are much higher than the cost of copying them (for example, the pharmaceutical industry). The patent term in New Zealand is twenty years from the filing date of the patent application.

TPP would require New Zealand to extend the term of individual patents in two cases:

- If there were unreasonable delays in the Intellectual Property Office of New Zealand's (IPONZ) granting of the patent.
- If there was an "unreasonable curtailment" of the effective patent term as a result of Medsafe's marketing approval process.⁴⁰

The first obligation (IPONZ delays) applies to all patents, including those for pharmaceuticals. The second obligation (Medsafe delays) only applies to pharmaceutical patents. In either case, only unreasonable delays caused by the regulator would need to be counted in calculating the length of the delay (i.e., delays caused by the applicant or third parties would not need to be counted).

Complying with each of these obligations would likely involve providing a procedure for patent owners to apply for an extension, and developing criteria to decide when an extension must be granted, and how long it should be.

It is unlikely that New Zealand businesses seeking patents in other Parties would benefit from access to patent extensions as a result of New Zealand joining TPP. Patent term extensions are already required to be provided in the US, Australia, Japan, Singapore and Chile, so joining TPP would not provide additional benefits in most of New Zealand's key TPP markets.⁴¹

Patent term extension for delays in granting a patent: For IPONZ delays, patent extensions would only be necessary if the patent was granted after a delay of more than five years after its filing date or more than three years from the time the patent applicant requested its examination (whichever was later).

⁴⁰ The effective patent term is the period between the date a pharmaceutical receives marketing approval and the expiry of the patent term.

⁴¹ Even in the other TPP Parties, benefit would only arise if the commercial life of the patented invention in that market extended beyond the 20 year patent term (which is unusual for non-pharmaceutical patents).

There are two ways this obligation could impose costs on New Zealand. It could impose new administrative costs on IPONZ in monitoring the time an application was taking to keep track of when an extension would be required to be granted.⁴² It could also impose costs if any extensions were in fact required to be granted as New Zealand businesses and consumers would face higher costs for access to the technology protected by the patent.

If an extension was required to be granted for a non-pharmaceutical patent, people using the patented invention would face higher costs for longer. This would include innovators seeking to use the patented invention to develop new products or services. If the invention was still being commercialised in New Zealand on the expiry of its twenty year patent term, consumers may also face higher costs. This is unlikely, however, as most patents lapse before the patent term expires, as the patent owner decides not to pay the renewal fee. Only around 42% of all patents granted in New Zealand whose protection ended since 2005 ran their full twenty year term.⁴³ A large number of these are likely to have been pharmaceutical patents.

It is unlikely that any patent term extensions would need to be given for delays at IPONZ. IPONZ is one of the most efficient intellectual property offices in the TPP region. Under the Patents Act 2013, patent applications are only examined if the patent applicant requests examination. On current IPONZ timelines, patents would be granted well within the three year time limit required to avoid the need to grant an extension. This would be the case even if there was a significant increase in IPONZ processing times.

There are many factors that contribute to IPONZ's efficient processing – including the number of applications, their level of complexity and the availability of expert patent examiners to process them. If any of these factors changed, the efficiency of IPONZ's processing could be reduced, increasing the risk that extensions need to be granted in the future. The obligation to compensate for delays would, however, provide additional incentive to maintain efficient processes. Assuming that IPONZ's current efficiency is maintained, the Government does not anticipate that any extensions would need to be provided.

Patent term extension for delays in granting marketing approval for pharmaceutical products: As with IPONZ, Medsafe's processing times for marketing approval for pharmaceutical products are among the most efficient in the TPP region. Accordingly, very few patent term extensions are expected to be required as a result of Medsafe's approval process leading to an 'unreasonable curtailment' of the effective patent term, and only in exceptional circumstances. What constituted an 'unreasonable curtailment' is not defined in the TPP so would be determined domestically.

If an extension was required to be granted in relation to a patent covering a pharmaceutical product (for either a Medsafe or IPONZ processing delay) there could be significant costs. This is because access to generic versions of pharmaceuticals in New Zealand provides cost savings to both consumers and

⁴² These costs would be incurred regardless of whether any extensions were granted.

⁴³ The percentage of patents that run their full term is expected to decrease. The renewal fee required to maintain a patent must be paid more frequently under the new Patents Act (the Patents Act 2013). If the fee is not paid, the patent will lapse.

the medicines budget. When patents on a pharmaceutical expire, PHARMAC (a government agency that decides which pharmaceuticals would be publicly funded in New Zealand) typically negotiates significant price discounts for the generic equivalent of small molecule medicines. While the percentage price drops in biologic markets on biosimilar entry (the generic equivalent of a biologic pharmaceutical) may be more modest than for small molecule pharmaceuticals, PHARMAC would still be expected to achieve significant cost savings in this area.⁴⁴ Additionally, a PHARMAC decision on a pharmaceutical product can also result in significant price decreases for those products in the private market (e.g. antihistamines), so there is a direct benefit to consumers in that market too.

The actual cost of an extension would depend on the nature of the pharmaceutical product (for example, how expensive it was), the extent to which it was in widespread use, and whether alternatives were available. The annual cost is estimated at NZ\$1 million, averaged over many years.⁴⁵

Although Medsafe's processing times are currently very efficient, this could change in the future – for example, following changes in resourcing or the complexity of the evaluations. The obligation in the Agreement would, however, provide an incentive to maintain Medsafe's existing efficiency, including access to technological assessment capability. If Medsafe became less efficient or faced capability constraints, there would be a higher risk that term extensions would need to be granted. This risk could be managed by providing additional resources to ensure Medsafe maintains its current efficiency and capability.

There would be likely to be some additional administrative costs to Medsafe in monitoring the time an application is taking to keep track of when an extension would be required to be granted.⁴⁶ Some of these costs would be likely to be able to be managed through additional information technology.

Patent linkage for Pharmaceuticals

TPP would require New Zealand to provide a form of patent linkage for pharmaceutical products. This would involve:

- Providing a system for patent owners to be notified when a person is seeking approval to market a generic version of a pharmaceutical previously approved by Medsafe.
- Making available remedies like interim injunctions to enable the resolution of disputes about the validity or infringement of a pharmaceutical patent.
- Providing patent owners with enough time to enable them to seek remedies like interim injunctions before the pharmaceutical product is marketed.

New Zealand's current law and practice already satisfies these requirements. Very little, if any, disadvantage is therefore expected for New Zealand due to patent linkage.

⁴⁴ Biologic pharmaceuticals often carry high costs, in some cases well over NZ\$100,000 for a year of treatment.

⁴⁵ See section 8 of this National Interest Analysis (The costs to New Zealand of compliance with the treaty) for more details.

⁴⁶ These costs would be incurred regardless of whether any extensions were granted.

Medsafe publishes the details of new generic applications on its website within a few days of being received. This information initially includes the trade name of the product, the active ingredient, strength, dose form and the applicant. This practice would meet the notification requirement.

The obligation to make remedies available would be met under current law by the availability of injunctive relief in New Zealand. If a patent owner considers that a generic version of the patented pharmaceutical will infringe its patent, the patent owner can seek an interim injunction to prevent the generic entering the market while the patent infringement proceedings are determined by the courts. (Conversely, a generic pharmaceutical manufacturer can seek a court order to declare a patent invalid.) TPP would not require New Zealand to change the legal tests for patent infringement or the requirements for obtaining an interim injunction under the High Court Rules and common law.

The obligation to provide enough time to seek remedies before pharmaceutical products are marketed would be met through the time Medsafe takes to process the application.

It is not, therefore, anticipated that taking these measures would result in extended market exclusivity for patent owners. New Zealand would not be required, as is the case under some countries' patent linkage systems, to apply an automatic stay on the marketing approval for a generic until any disputes involving the patent were resolved.⁴⁷ In other words, Medsafe would not have to "police" patents on behalf of patent owners.

Increased data protection for agricultural chemical products

TPP would require New Zealand to provide data protection of ten years before allowing marketing approval for a generic agricultural chemical product to rely on data submitted in respect of the original innovator. This period would be counted from the granting of approval for the original product.

Agricultural chemicals cannot be marketed unless they have been approved by the relevant regulatory authority, which requires the manufacturer of a new chemical to submit data concerning the safety and efficacy of the chemical. This data can be costly to produce. Generic chemical manufacturers seeking approval to market a generic version of an agricultural chemical already approved usually choose to rely on the safety and efficacy data submitted by the manufacturer of the new chemical, rather than incur the cost of developing their own data.

Under the Agricultural and Veterinary Medicines Act 1997, the data submitted in relation to a previously approved chemical cannot be used to approve a generic version of that chemical until five years after the date of approval of the new chemical. This five year period is the 'data protection' period, and implements an existing obligation for New Zealand under the TRIPS Agreement to protect the data submitted with the new chemical from unfair commercial use. If there were no data protection, it would be possible for a generic chemical to be approved and placed on the market soon after the new chemical entered the market (assuming that any patents on the new chemical had

⁴⁷ Stays can result in high costs by delaying the entry of all generic versions of patented pharmaceutical products onto the market. They can also incentivise patent owners to initiate patent infringement proceedings, even if they are likely to lose, if they think the proceedings will delay the generic entry onto the market. New Zealand law does not provide for stays.

expired). This may discourage manufacturers of new chemicals from entering the New Zealand market at all.

Extending the data protection period for new agricultural chemical products from five to ten years may provide an incentive for more new products to be brought to the New Zealand market or the registration of new uses for existing products.⁴⁸ However, it also has the potential to raise the long-term costs of such products to users by delaying market entry of cheaper generic copies. This potential is increased if the extension of data protection pushes the data protection period beyond the term of any patent protection for the relevant product or if the product never received patent protection. The increased protection could therefore result in a longer period of monopoly pricing for new agricultural chemicals, if other suppliers held off registering competing products because of the extended data protection. This could increase costs to farmers and growers, which could be passed on to domestic and overseas consumers. It could also impact on local producers of generic products and innovators seeking to develop new products.

However, data protection is unlikely to constitute a significant barrier for entry into the New Zealand market. Unlike pharmaceuticals, developing data for marketing approval for agricultural chemicals is not prohibitively expensive. Extending the data protection period from five to ten years is therefore unlikely to impose a significant net cost on New Zealand.

Copyright term extension

New Zealand law currently protects copyright for 50 years⁴⁹. Under TPP, New Zealand would be required to extend the copyright term to 70 years. The extension only applies to works that are still within their current 50 year term of protection. Works that have already fallen into the public domain would remain in the public domain.

New Zealand has negotiated a transition for the copyright term extension. Under this transition the term would be extended initially to 60 years then extended to 70 years eight years later. The practical effect of this is that a number of works would fall into the public domain during the transition period that would otherwise have had to wait twenty years if New Zealand moved straight to 70 years protection.

Some New Zealand copyright owners would benefit from a 70 year copyright term in TPP countries. Works protected by copyright are generally priced higher than works not protected by copyright to

⁴⁸ A 2009 review of data protection found no evidence that the current 5-year period was inhibiting the entry of products into New Zealand in respect of new agricultural chemicals generally. However, anecdotal evidence suggested that New Zealand's data protection rules were likely to have resulted in fewer new products based on already-known technology and fewer new registrations of new uses for existing products. The Bill to amend the Agricultural Chemicals and Veterinary Medicines Act 1997, introduced on 11 August 2015, is intended to incentivise the development of new products based on previously approved chemicals and the registration of new uses for existing products. The Bill would extend data protection for new agricultural chemical products for an extra year (up to a maximum of eight years) for each new use the product is registered for in the first three years after it receives marketing approval.

⁴⁹ The copyright term for films and sound recordings (including recorded music) currently expires 50 years after the end of the calendar year in which they were made or published. The copyright term for books, screenplays, music, lyrics and artistic works currently expires 50 years after the end of the calendar year in which the author died.

allow for royalty payments to the creator. Extending the term therefore increases the time consumers must pay – and copyright owners can benefit from – this higher price.

In addition to the fact that New Zealand copyright owners already enjoy at least a 70 year term in most TPP markets,⁵⁰ New Zealand is unlikely to benefit significantly from the TPP obligation to have a 70 year term because:

- The obligation to have a 70 year term would benefit New Zealand copyright owners whose works are still in demand when the current 50 year term expires in the TPP countries that are required to move to a 70 year term.⁵¹ Only a small fraction of New Zealand works are likely to be still in demand even when the current term expires in these markets.
- Any benefits from increased incentives to produce new works is likely to be negligible.⁵²

The benefits to New Zealand copyright owners from copyright term extensions in other TPP countries resulting from transfers from foreign consumers to New Zealand copyright owners have been estimated at NZ\$36 million in present value terms over a 2009 to 2118 timeframe in respect of books and NZ\$31.4 million in present value terms over a 2009 to 2078 timeframe in respect of recorded music.⁵³ The benefits of extension for the other types of copyright works have not been modelled.

The costs to New Zealand from transfers from New Zealand consumers to foreign copyright owners have been conservatively estimated at NZ\$300 million in present value terms over a 2009-2018 timeframe for books, and at NZ\$240 million in present value terms over a 2009 to 2078 timeframe for recorded music.⁵⁴ This is because extending the copyright term would mean New Zealand consumers would forego savings they otherwise would have made if the books and music they purchase had fallen into the public domain earlier. Only transfers from New Zealand consumers to foreign rights holders have been included in these estimated costs.⁵⁵ New Zealand consumers in this context include personal and business end-users, organisations like libraries, universities, schools and museums and people who use copyright-protected works to create new products and services, including new copyright-protected works.

The cost of a term extension for other types of copyright works has not been modelled. It has been assumed that the cost in respect of audio-visual works like films and television productions would be similar to the cost in respect of music.

⁵⁰ Including the USA, Australia Chile, Mexico, Peru and Singapore. Note that extending copyright term would mean some New Zealand copyright owners would also benefit in some non-TPP countries that have a term longer term than 50 years, given existing international obligations that would require those countries to now provide the term they provide to their own nationals.

⁵¹ Brunei Darusalaam, Canada, Japan, Malaysia, and Vietnam.

⁵² Jennifer Orr, Jason Soon, Henry Ergas. "Economic Impact of Potential Changes to New Zealand's IP Laws as a Result of Trade Negotiations", September 2009 (copyright term extension results available at www.tpp.mfat.govt.nz).

⁵³ Ergas et al, p 7. It should be noted that estimating the costs and benefits of a copyright term extension with precision is difficult given the large number of variables, the limited data available and the effect of changing technology and consumer trends over the very long time frames involved.

⁵⁴ Ergas et al, p 9. The assumptions used in the report are set out in Section 7 of this NIA.

⁵⁵ I.e., it does not include domestic transfers from New Zealand consumers to New Zealand rights holders.

Extending the copyright term would also extend the time that second generation creators and innovators must identify and locate the copyright owner and negotiate their authorisation to use the copyright term-extended works. This would impose additional administrative costs (e.g., search costs, royalties, and bargaining costs) on these second generation creators and innovators. The lengthened term would also be likely to increase the “orphan works” problem.⁵⁶ Cumulatively, this may impede second generation creators from producing some new works that would have reused previous copyright works as inputs at all. Organisations like libraries, universities, schools and museums, would incur licence fees additional to what they would otherwise need to pay under a 50 year term to access copyright term-extended works, as well as additional transactional costs, including bargaining to negotiate the licences. These costs have not been modelled separately.

The net cost of extending New Zealand’s copyright term from 50 to 70 years would be small to begin with and increase gradually over twenty years, reaching a relatively constant level after that. Over the very long term, including the initial 20-year period, the average annual cost is conservatively estimated to be NZ\$51-59 million. This is based on taking the net present value of the overall cost of extending the copyright term (NZ\$208-239 million for music and NZ\$263-300 million for books), assuming film and television would incur the same net cost as music, and finding the average annual cost (real value in today’s dollars). (See also Section 8). Note that creative markets have changed since these estimates were made, including as a result of digitisation and consumer trends.

Increased protection for technological protection measures

TPP would require Parties to prohibit the circumvention of technological protection measures (TPMs)⁵⁷, and the manufacture, importation, distribution or offering of products, components or services promoted or intended to circumvent TPMs, without permission of the rights owner.⁵⁸

New Zealand law is already consistent with many of the obligations in respect of TPMs. The main changes the Agreement would require are new civil and criminal sanctions against a person who circumvents a TPM directly. (New Zealand’s Copyright Act currently only prohibits providing a device, service or information to *enable* circumvention.) Some minor changes would also be required to current prohibitions on providing devices and services to enable circumvention.

The TPM provisions would not require New Zealand to prohibit uses of copyright works that are currently legitimate under New Zealand law. This is because New Zealand has negotiated an exceptions provision to ensure people can continue to break TPMs for legitimate purposes. These exceptions are not set out in TPP – the Government will determine what they are during implementation.

Under TPP, Parties are able to provide exceptions and limitations only if:

⁵⁶ Orphan works are works whose copyright owner is not able to be identified or located.

⁵⁷ TPMs include digital locks on copyright works or services that distribute copyright works.

⁵⁸ See Section 5.18 for specific detail on the TPMs obligations.

- A legislative, regulatory or administrative process has determined that the rule against circumvention has an actual or likely negative impact on a non-infringing use.
- The process has considered any evidence presented on whether rights holders have already taken any steps to enable people to use current copyright exceptions.
- The exception or limitation enables the non-infringing use.

Non-profit libraries, museums, archives, educational institutions, and public non-commercial broadcasters can also be exempted from criminal liability, and from civil liability if the relevant act was done in good faith without knowing the conduct was prohibited.

The Government intends to provide exceptions for situations where use of a copyright work either does not infringe copyright in the first place, or is otherwise permitted because there is a copyright exception under New Zealand law. Examples might include breaking a region-code on a DVD legitimately purchased overseas in order to enable it to be viewed on a New Zealand DVD player, breaking a TPM to allow reverse engineering of software or interoperability of devices, breaking a TPM to reformat a work to enable access by the print disabled, or breaking a TPM to protect privacy.

The exact form of these TPM exceptions has yet to be decided. The Government will determine these during the implementation of the Agreement. The Government will also consider the extent to which the approaches other countries have taken on TPMs exceptions would be appropriate for New Zealand.

Questions have been raised publicly about the implications of TPP on accessing foreign content services and on the general use of Virtual Private Networks (VPNs). The TPP will not ban the use of VPNs. Under current New Zealand law, the legality of accessing foreign content services (whether through a VPN or otherwise) depends on whether the person accessing such content breaches copyright in New Zealand. The Government will utilise exceptions under the Agreement to ensure that people can continue to access content where it would be legitimate to do so under New Zealand copyright law.

The enhanced TPM protections will enable copyright owners to better enforce digital locks or usage restrictions put on copyright works, to the extent that a civil or criminal prohibition is a deterrent to circumvention. This may have some advantages for New Zealand copyright owners whose works are protected by TPMs in other TPP Parties:

- TPMs that protect against infringement of copyright works (like copying or distribution) will be able to be better enforced, particularly where a Party currently has limited or no protections against TPM circumvention.
- TPMs that limit certain uses of copyright works will not be able to be circumvented by the purchaser unless a domestic exception applies, which may increase the capacity of owners to seek licenses for these uses.

The enhanced protections may also provide benefits for New Zealand businesses whose business model depends on using TPMs. Many online services providing access to copyright works, for example, use TPMs to ensure consumers are paying for access to those works.

If the new protections led to less copyright infringement or greater business certainty around the development and introduction of new distribution services they could stimulate greater digital dissemination of copyright works. However, the lack of TPM circumvention rules in New Zealand does not appear to have inhibited the development of a competitive online market for content. Any additional incentive provided by enhanced TPMs protections would therefore be likely to be small.

On the whole, enhanced TPMs protections would be unlikely to bring significant benefit to New Zealand. New Zealand is not a notable exporter of TPM-protected works or exporter of online services providing access to copyright works. Furthermore, the extent to which there are benefits would depend on the extent to which New Zealand exporters of TPM-protected works can successfully enforce their rights in other TPP Parties.

There are, however, disadvantages for New Zealand in providing enhanced protections for TPMs. New Zealand is a significant net-importer of TPM-protected copyright works. If the new rules lead to better enforcement of TPMs that facilitate geographic market segmentation or price differentiation, they will limit the ability of consumers to put competitive pressure on rights holders through parallel importation, resulting in higher prices for access to the relevant copyright works. If the enhanced TPMs protections prevent use of copyright works or public domain content in a way that is currently lawful, users may face additional costs in obtaining permission to get around the TPM to maintain their current use.⁵⁹

These costs would be mitigated by creating exceptions to TPM protections for circumvention of TPMs for uses that would not infringe copyright or are covered by a copyright exception, as outlined above. However, even if New Zealand creates exceptions enabling TPMs to be circumvented for purposes that do not infringe copyright, consumers may prefer not to circumvent TPMs rather than risk relying on an exception to avoid civil or criminal liability.

Internet Service Provider liability

TPP would not require New Zealand to introduce any major changes to internet service provider (ISP) liability provisions relating to internet copyright infringement. For example, the provisions will not require ISPs to terminate internet accounts or adopt a “three strikes” - style graduated response regime.

Parallel importing

The Agreement would not require any changes to New Zealand’s laws on parallel importing. TPP permits Parties to freely determine international exhaustion of intellectual property rights.

⁵⁹ Users could include businesses, libraries, museums, archives, educational institutions and similar organisations and end users.

Performers' rights

The TPP obligations on performers' rights consist of the obligations in the IP Chapter itself and of those set out in the WIPO Performers and Phonograms Treaty (WPPT), of which TPP requires Parties to be members.

Currently in New Zealand, if performers consent to the making of a sound recording, only the producer of the sound recording has rights over the copying and distribution of the sound recording. The WPPT would require that performers also be given exclusive rights in performances recorded in sound recordings or communicated to the public. These include the right to authorise any copying of the sound recording of a performance, the selling of sound recordings and the communication of their performance to the public. This would effectively mean performers would become co-owners of sound recordings with the sound recording producers. Unless the performers assigned the rights to the sound recording producers, any person wanting to copy or distribute the sound recording would need authorisation not only from the producer but from the performers as well. For example, if a band consisting of four members makes a record with a record company, each of the members would hold rights in the sound recording as well as the record company.

While performers would be given new rights over the copying and distribution of recordings of their performances, the potential impact of these new rights may be limited in practice. This is because performers would be able to assign their rights to third parties. In the above example of the band, the band members would be able to assign their rights to the record company. If this occurs, any person wanting to copy or distribute the sound recording of the band would only need the authorisation of the record company to do so.

In practice New Zealand performers already receive royalties for rights connected to their performance through contractual arrangements and it is not clear that the flow of royalties would be likely to increase to any significant degree.

The new rights for performers may benefit some New Zealand performers. It could give some better bargaining power when entering into recording contracts. However, this is unlikely to significantly change the bargaining dynamics or substantive outcomes of contracts between performers and the producers of sound recordings in most cases. If this did occur, it would generate a benefit to New Zealand if the outcome involved a greater flow of royalties, investment or other similar benefit to New Zealand from overseas.

Joining the WPPT would also require performers to be given moral rights over their performances and sound recordings of those performances, including the right to be identified as the performer and to object to derogatory treatment of their performances. Currently only the producers of sound recordings and the authors of copyright works are given moral rights over sound recording and copyright works.

Giving performers new rights is unlikely to incentivise an increase in the number of performances, an increase in the number of sound recordings created from performances, or in the distribution and sale

of sound recordings in the New Zealand market. The New Zealand market is a small market by world standards. Most performers are therefore likely to base their production and distribution decisions on the conditions in large overseas markets like the US and Europe rather than on the regulatory conditions in the New Zealand market.

There may also be one off transaction costs for the recording industry in negotiating new contracts to cover the new performers' rights. This may have a flow through impact to the price of music and music services for consumers, although we would expect this to be minimal given contractual relationships would already exist in most cases.

If new rights for performers created greater uncertainty or transaction costs for the producers or owners of sound recordings, that could have a negative effect on distribution of their sound recordings in the New Zealand market. Additional performers' rights could also impose additional transaction and compliance costs on second generation creators, businesses and organisations like libraries, galleries and museums. Where performers have not assigned their performance rights to the producers of sound recordings, such businesses and organisations would be required to negotiate multiple licences, or bargain with more parties, to use the sound recordings. The higher the number of performers, and the higher the number of performers who decide to retain their rights, the higher the transaction costs are likely to become. If higher transaction costs did result, they could mean that new products or services dependent on using sound recordings as inputs (including online products and services) are either not provided, or are provided at a higher price. Either scenario would be likely to result in foregone consumption of those products and services.

4.17.3 Intellectual Property: Other Treaties

The IP Chapter would also require New Zealand to accede to the:

- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended on September 26, 1980 (the Budapest Treaty).
- WIPO Copyright Treaty, done at Geneva, December 20, 1996 (the WIPO Copyright Treaty, WCT)
- Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, July 24, 1971 (the Berne Convention).⁶⁰
- WIPO Performances and Phonograms Treaty, done at Geneva, December 20, 1996 (the WIPO Performances and Phonograms Treaty, WPPT).

The IP Chapter would also require New Zealand to accede to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva, March 19, 1991 (UPOV 91), or alternatively to give effect to UPOV 91 (see Section 4.18 below).

⁶⁰ New Zealand is already a member of a previous version of the Berne convention and is already required to comply with the 1971 version under Article 9 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.

New Zealand would also be required to remove its reservation to Articles 1-12 of the Paris Convention for the Protection of Industrial Property, as revised at Stockholm, July 14, 1967 (the Paris Convention).

The advantages and disadvantages to each of these are considered in the following sections.

4.18 Intellectual Property: UPOV 91

TPP includes a requirement for Parties to accede to the most recent 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91). A specific alternative (instead of accession) is available for New Zealand only. Annex 18-A to the IP Chapter requires New Zealand either to accede to UPOV 91 or adopt a plant variety rights system that gives effect to UPOV 91 under a New Zealand-specific approach. When implementing this obligation, New Zealand would have the right to adopt any measures that it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi. That right is not subject to the dispute settlement provisions in TPP. Annex 18-A gives the Government the flexibility to decide, in consultation with the relevant partners and stakeholders, how best to meet New Zealand's obligations in respect of UPOV 91, while taking into account the recommendations in Waitangi Tribunal report Ko Aotearoa Tēnei (WAI 262). New Zealand would have approximately five years to meet this obligation from the date New Zealand signs the Agreement (within three years of the date of entry into force of the Agreement for New Zealand).

The UPOV Convention was concluded in 1961, and revised in 1972, 1978, and 1991. New Zealand has acceded to the 1978 revision of the UPOV Convention (UPOV 78), and has signed, but not ratified, UPOV 91.

Membership of the UPOV Convention requires member states to establish a system for protecting new varieties of plants. In New Zealand this is done through the Plant Variety Rights Act 1987 (PVR Act). The PVR Act provides for a system of plant variety rights (PVR) providing the breeders of new varieties of plants with limited rights to control the commercial exploitation of their new varieties.

If a new plant variety is granted a PVR under the PVR Act, the breeder of the variety protected by the PVR ('protected variety') has the exclusive right to produce for sale, and to sell seed or reproductive material of their protected varieties for the term of the PVR.

The PVR ACT is based on the 1978 Revision of the UPOV Convention (UPOV 78). Many of the provisions of UPOV 78 are also contained in UPOV 91. The analysis below focuses on the provisions of UPOV 91 that differ from UPOV 78.

4.18.1 Advantages of accession to, or alignment with, UPOV 91

The justification behind the grant of PVRs is that they give plant breeders an opportunity to make a return on the investment in developing a new plant variety. This provides an incentive for the development of new varieties that might not otherwise be developed. Without PVR, any new variety

could easily be copied by anyone who could gain access to propagating material of the variety (seeds, tubers, etc), and breeders would earn little revenue.

Under UPOV 78 and the PVR Act, the owner of PVR in a protected variety has the exclusive right to produce for sale, and to sell seed or reproductive material of their protected varieties for the term of the PVR.

The exclusive rights provided to PVR owners under the PVR ACT are relatively limited compared with the enhanced rights required to be provided under UPOV 91. Plant breeders argue that this reduces the incentive for local plant breeders to develop new varieties for the New Zealand market, or for foreign breeders to allow their new varieties to be exploited in New Zealand. Local plant breeders argue that because of the relatively limited protection provided for new plant varieties in New Zealand there is a possibility that some would reduce or cease their breeding activities in New Zealand, or move offshore to jurisdictions where greater protection is provided.

The enhanced rights provided by UPOV 91 for PVR owners over their protected varieties may provide increased revenue for plant breeders, and, at least for local plant breeders may encourage them to increase (or at least continue) their plant breeding activities. They may also provide foreign plant breeders with a greater incentive to release their new varieties in New Zealand.

As a result New Zealand growers may gain access to a greater range of new varieties than would otherwise be the case. This may assist in retaining New Zealand's competitive position in world agricultural markets and contribute to New Zealand's economic development. Consumers may benefit from a greater availability of improved varieties of fruit and vegetables. Home gardeners may also benefit from the availability of a wider range of ornamental plants.

UPOV 91 allows Parties to provide an exception for experimental use of protected varieties. Providing for this exception would ensure that researchers making use of protected varieties in their research would not be liable for infringement of the PVR in those varieties.

Under the PVR Act, experiments involving propagation of a protected variety, where the experiments involve propagation of the protected variety, might be considered as infringing the PVR in that variety. The adoption of an experimental use exception may lead to an increase in research involving protected varieties.

4.18.2 Disadvantages of accession or alignment with UPOV 91

UPOV 91 is more prescriptive than UPOV 78. Accession to UPOV 91 may reduce some of the options available to the Government when deciding how respond to the recommendations of the Waitangi Tribunal's report on the WAI 262 claim in respect of indigenous plant varieties. As outlined above, Annex 18-A ensures that these options are preserved.

The enhanced exclusive rights provided for PVR owners under UPOV 91 may result in some increased costs for growers as they may have to pay higher license fees than is currently the case in order to use

protected varieties, which may be passed on to consumers. These additional costs are unlikely to be large, though, as protected varieties would be competing with other protected varieties, as well as varieties that are no longer protected.

The extension of PVR owners' exclusive rights under UPOV 91 to varieties 'essentially derived' from a protected variety may impose some additional costs on plant breeders and may discourage some plant breeding activities. This is because many new varieties are developed from existing protected varieties. Under the extended rights, where a new variety is developed from an existing protected variety, the breeder of the new variety may have to pay a license fee to the owner of the PVR in the protected variety if the new variety is commercialised. This is not required under UPOV 78, or the PVR ACT.

One of the mandatory exceptions to PVR required by UPOV 91 is an exception that means that private and non-commercial use of a protected variety would not infringe PVR in that variety (Art.15(1)(i)). The PVR Act contains a similar exception, for 'non-commercial' uses. This is broader than the exception in UPOV91 which limits the exception to uses that are private and non-commercial.

The narrower UPOV91 exception may mean that some existing non-commercial uses of protected varieties that do not infringe PVR under the PVR Act may infringe under the UPOV91 exception, as the uses may not meet the requirement of being 'private'. Examples of this could be the use of protected varieties in community gardens, botanic gardens, or on road median strips. Even though these uses may be non-commercial, if they were considered 'public', royalties may need to be paid for the use of the protected varieties.

Many growers currently save seed from one year's crop (farm saved seed) which is then used to sow the next year's crop rather than buying fresh seed. Under UPOV 78 and the PVR Act, growers may use farm saved seed of a protected variety for this purpose, and sell the seed harvested from the crop for purposes other than growing another crop (for example, for human or animal consumption) without paying a license fee to the PVR owner.

While UPOV 91 provides enhanced rights for PVR owners, it allows a country to create an optional exception to allow growers to use farm saved seed "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder".

Some UPOV91 member states (for example, the EU) have implemented this by limiting the exception to 'small farmers', or requiring growers to pay a license fee that is significantly lower than the license fee that would be paid on seed sold by the PVR owner. Other member states (for example, Australia) have implemented Art 15(2) by allowing growers to use saved seed without any requirement to pay a license fee. New Zealand would therefore have the option of retaining our current approach, when implementing the necessary changes to the PVR regime.

4.19 Intellectual Property: Other IP Treaties

4.19.1 Advantages and Disadvantages to becoming a Party to the Budapest Treaty

The main obligation imposed on Contracting Parties by the Budapest Treaty is that they recognise, for the purposes of patent procedure, the deposit of micro-organisms in 'International Depositary Authorities' (IDAs) established under the Treaty. There is no obligation for Contracting Parties to establish an IDA in their Territory.

Most, if not all, applicants for New Zealand patents for inventions involving micro-organisms will have also applied to patent the same inventions in Budapest Treaty Contracting States. These applicants will therefore have had to make a deposit of the micro-organism involved in an IDA. As there are few, if any, other depositary institutions that patent applicants could use, the Patents Act 2013 recognises deposits in IDAs. No amendment to the Patents Act 2013 is therefore required for New Zealand to accede to the Budapest Treaty.

Accession to the Budapest Treaty would impose no additional costs on patent applicants, businesses in general or on government or the public. The prime benefit from accession is that it would enable an IDA to be established in New Zealand and be recognised by the patent granting authorities in other Budapest Treaty Contracting Parties. If an IDA was established in New Zealand this may benefit local researchers who would otherwise have to use an IDA in another Budapest Contracting Party. This could reduce costs for New Zealand resident patent applicants, which could encourage more research involving micro-organisms to be carried out in New Zealand. However, there is no certainty that a depositary would be established in New Zealand if New Zealand were to accede to the Budapest Treaty.

In addition, if New Zealand is a Contracting Party to the Budapest Treaty, New Zealand would have a voice in any future amendments or revisions of the Treaty. Such amendments or revisions could affect the interests of New Zealand researchers who apply for patents in Budapest Treaty Contracting States.

No disadvantages have been identified.

4.19.2 Advantages and Disadvantages to Becoming a Party to the WIPO Copyright Treaty

The World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) would require all WCT Parties to provide New Zealand creators and distributors of copyright content with the rights set out in the WCT when they distribute the content over the Internet. These include the right to authorise or prohibit any distribution to the public of their works over the internet and protect against the circumvention of technological protection measures.

WCT Parties that are also members of the WTO already have obligations to provide most of the rights under the WCT to New Zealand creators and distributors under the Agreement on Trade-Related

Aspects of Intellectual Property Rights (TRIPS).⁶¹ New Zealand creators and distributors also enjoy these rights in most key markets as a matter of practice. Acceding to the WCT would, however, provide additional assurance that the rights New Zealand creators and distributors of content currently enjoy would not be removed.

New Zealand already substantially complies with the WCT so the new obligations it would place on New Zealand would not create direct disadvantages. The new obligations would, however, place new limitations on the Government's ability to modify New Zealand's copyright settings to ensure they are appropriate for our domestic circumstances.

4.19.3 Advantages and Disadvantages to Removing New Zealand's reservations to Article 1-12 of the Paris Convention

There are no material advantages in removing New Zealand's reservations to Articles 1-12 of the Paris Convention. New Zealand rights holders already enjoy the benefits of Articles 1-12 of the Paris Convention in WTO Members through Article 2 of the TRIPS Agreement.

No disadvantages have been identified. New Zealand is already required to comply with Articles 1-12 of the Paris Convention through Article 2 of the TRIPS Agreement.

4.19.4 Advantages and Disadvantages to Becoming a Party to the Paris revision of the Berne Convention

There are no material advantages in acceding to the Paris revision of the Berne Convention. New Zealand rights holders already enjoy the benefits of the Paris revision of the Berne Convention through Article 9 of the TRIPS Agreement.

No disadvantages have been identified. New Zealand is already required to comply with the Paris revision of the Berne Convention.⁶²

4.19.5 Advantages and Disadvantages to Becoming a party to the WIPO Performances and Phonograms Treaty

Becoming a Party to the WIPO Performances Phonograms Treaty would largely involve modifying New Zealand's performers' rights regime. This has been discussed under "Performers' rights" in Section 4.17 above.

Joining the WIPO Performances Phonograms Treaty would also ensure that New Zealand performers enjoy the benefits of the same rights as performers who are nationals of those countries who are already Party to the WPPT are provided with. Currently there are 87 Parties to the WPPT, including Australia, Canada, Chile, China, European Union, Malaysia, Japan, Korea, Mexico, Peru, Singapore, and the US.

⁶¹ See Article 3(1) of the TRIPS Agreement.

⁶² New Zealand will, however, need to ensure that the benefits of the Paris revision of the Berne Convention are extended to all current members of the WTO and Berne Union.

4.20 Labour

The Labour Chapter of TPP constitutes 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. Key commitments given by the Parties in the Chapter include their agreement to adopt and maintain the internationally-recognized labour rights stated in the 1998 *International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work* in their laws and practice⁶³, as well as to adopt and maintain laws governing 'acceptable conditions of work' with respect to minimum wages, hours of work, and occupational safety and health, as determined by each Party.

The Chapter also records the Parties' recognition that labour standards should not be used for protectionist trade purposes and that it is inappropriate to encourage trade or investment by weakening or reducing labour laws. Accordingly, the Parties agree not to derogate from their laws (or offer to do so) in a manner affecting trade or investment between them. The Chapter also contains provisions requiring the effective enforcement of labour laws.

In addition, each Party commits to discourage, through initiatives it considers appropriate, the importation of goods produced by forced or compulsory labour from other sources, and to encourage enterprises in its jurisdiction to adopt voluntarily corporate social responsibility initiatives on labour issues.

4.20.1 Advantages of entering TPP, Labour

The Chapter's obligations are intended to protect and enforce labour rights, improve working conditions and living standards, strengthen cooperation on labour issues and enhance labour capacity and capability of the TPP Parties. They help level the playing field for New Zealand companies and employees by setting minimum labour obligations for all TPP Parties. This helps ensure that TPP Parties' competitive advantage in trade is not underpinned by laws that are not effectively enforced or which do not reflect internationally recognised labour rights.

A further advantage to New Zealand is that of providing a platform for cooperation on labour policy issues of interest and potential benefit to New Zealand with a wide range of countries, including some of the world's most advanced economies.

4.20.2 Disadvantages of entering TPP, Labour

All obligations in the Chapter are subject to the TPP dispute settlement mechanism (see Section 4.28), however the Labour Chapter has specific procedures for labour consultation that must be used before the dispute settlement provisions of TPP are employed. In addition, the Disputes Settlement Chapter requires Parties to make every attempt to resolve disputes through cooperation and consultations before resorting to the procedures provided for in the Chapter.

⁶³ These being freedom of association, the promotion of collective bargaining, non-discrimination in employment, the elimination of forced labour and abolition of child labour, and, for the purposes of the TPP, prohibition of the worst forms of child labour.

The inclusion of binding dispute settlement applicable to the labour commitments, with the potential of trade sanctions or monetary compensation for breaches, reduces policy space and creates some risks for the Government in potentially dealing with unfounded actions. The public submissions and procedural matters commitments also provide opportunities for external parties to raise issues concerning domestic implementation issues. However, New Zealand's practice in this area, and the design of the relevant disciplines and dispute settlement mechanism, means these risks are very low.

4.21 Environment

The aim of the TPP Environment Chapter is to promote mutually supportive trade and environment policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues. The commitments in the Chapter are consistent with New Zealand's existing domestic legal settings and international legal commitments.

The Chapter contains obligations and/or undertakings for enhanced cooperation between TPP countries in several areas, including:

- Three multilateral environmental agreements (MEAs) – Montreal Protocol on Substances that Deplete the Ozone Layer; London Protocol to the International Convention for the Prevention of Pollution from Ships; and the Convention on Trade in Endangered Species;
 - The conservation and sustainable use of biodiversity, and sharing the benefits arising from the utilisation of genetic resources;
 - Reducing carbon emissions;
 - The conservation and sustainable management of marine fisheries, including combating illegal, unregulated and unreported fishing, and the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity;
 - Promoting conservation and combating the illegal take of, and illegal trade in, wild flora and fauna;
 - Liberalising trade in environmental goods and services;
- Encouraging the use of voluntary mechanisms (such as auditing and reporting, labelling) to protect natural resources and the environment.

4.21.1 Advantages of entering TPP, Environment

New Zealand's policy in negotiating environment chapters in trade agreements is guided by four objectives: to promote sustainable development; to ensure trade and environment provisions are mutually supportive; to ensure the Government has the flexibility to regulate for the environment in accordance with national circumstances; and to ensure that environmental provisions are not used as a disguised form of protectionism. The TPP Environment Chapter supports and promotes these

objectives and represents the most comprehensive environmental outcome included in any of New Zealand's FTAs.

The inclusion of provisions on the environment in TPP also provides a valuable avenue for New Zealand to advance our environmental and conservation interests internationally by working collaboratively and pooling resources with other TPP countries. In addition to the obligations to promote high levels of environmental protection and effective enforcement of environmental laws, the Chapter includes an obligation that requires each Party to adopt measures to address the trade within its territory of any wild flora and fauna taken or traded in violation of its law or any other relevant and applicable law, subject to the right of each Party to exercise discretion in relation to the investigation of suspected violations and the allocation of enforcement resources. This would support New Zealand in our efforts to combat the illegal trade of protected wildlife.

The Chapter also includes disciplines and transparency requirements in relation to fish subsidies that contribute to overfishing and overcapacity and illegal, unreported and unregulated (IUU) fishing. The protection of threatened fish stocks is a priority area for New Zealand. These provisions have the potential to give impetus and support to related initiatives in the WTO, APEC and elsewhere.

TPP Parties have also agreed to encourage the development and use of flexible voluntary mechanisms to protect natural resources and the environment, recognising that those developing or applying voluntary environmental standards should do so in a transparent way that does not create unnecessary barriers to trade. The aim is to support and guide private sector use of such mechanisms in ways that are consistent with both environmental and trade objectives.

Fulfilment by the Parties of their TPP obligations, particularly in relation to effective enforcement of environmental laws, subsidy reform, and conservation, would give rise to national and regional environmental benefits. It should also promote economic benefits for New Zealand by 'levelling the playing field' i.e. addressing issues that can arise where partner countries have less stringent environmental regulation and enforcement (and therefore lower compliance costs).

A further advantage to New Zealand is that, for the first time, we have a platform for environmental cooperation with some of the world's most advanced economies. TPP opens the way to work with other developed countries on both technical and policy issues that can significantly expand the potential environmental benefits to New Zealand. New Zealand's previous FTAs with related environment provisions were often directed more toward building capacity and capability than policy enhancement.

4.21.2 Disadvantages of entering TPP, Environment

All obligations in the Chapter are subject to the TPP dispute settlement mechanism (see Section 4.28), however the Environment Chapter has specific procedures requiring consultation that must be used before the dispute settlement provisions of TPP are employed. In addition, the Disputes Settlement Chapter requires Parties to make every attempt to resolve disputes through cooperation and consultations before resorting to the procedures provided for in the Chapter.

This carries the potential for application of trade sanctions or monetary compensation for breaches of the Environment Chapter obligations. While this discipline creates a risk of action being taken for alleged breaches, it reinforces the importance of adhering to the commitments to promote high levels of environmental protection and to effectively enforce environmental laws. New Zealand's robust practice in environmental policy, and the careful design of the relevant disciplines and dispute settlement mechanism in TPP means these risks are very low.

4.22 Cooperation and Capacity Building

The purpose of the Cooperation and Capacity Building (CCB) Chapter is to help implement and enhance the benefits of TPP among its members. It does this by establishing new cooperation and capacity building mechanisms (such as dialogues, workshops, conferences, collaborative programmes, technical assistance activities) and leveraging existing mechanisms (such as bilateral partnerships) to help all Parties realise economic growth and development through the TPP. Potential areas where Parties may look to collaborate on CCB activities include (but are not limited to) agriculture, industrial and service sectors, promotion of education, culture and gender issues, and in disaster risk management.

This work would be undertaken by a network of contact points, and Committee on CCB. This Committee would discuss CCB issues such as information sharing, coordination of donors (including TPP Parties, non-TPP Parties and international institutions), and the establishment of public-private partnerships.

4.22.1 Advantages to entering TPP, Cooperation and Capacity Building

Opportunities to work together with other TPP Parties in a coordinated way on CCB activities would fit well with New Zealand's approach to international engagement. The possible areas of focus of the CCB chapter, particularly agriculture and disaster risk management, align with New Zealand's existing strengths.

4.22.2 Disadvantages to entering TPP, Cooperation and Capacity Building

There are no disadvantages to New Zealand expected to arise from the CCB chapter.

4.23 Competitiveness and Business Facilitation

The Competitiveness and Business Facilitation Chapter is a cross-cutting chapter that seeks to support increased economic integration, job creation and competitiveness of TPP Parties' economies. The Chapter is novel to TPP, among trade agreements negotiated globally. It provides a framework for the development and strengthening of supply chains in the free trade area and is a response to the

increased importance that supply chains and regional production networks⁶⁴ play in international trade and investment. The Chapter would establish a Committee to explore opportunities to take advantage of trade and investment opportunities under TPP, and to identify and explore best practices and experiences relevant to the development and strengthening of supply chains. This would include direct engagement with interested business stakeholders.

4.23.1 Advantages of entering TPP, Competitiveness and Business Facilitation

Through the Committee established under this Chapter, TPP would provide a means to improve the environment for New Zealand firms to participate in the regional economy through the improved operation of supply chains for New Zealand goods and services and their integration in regional production networks through trade and investment. This has the potential to reduce the costs of doing business, for example by identifying and addressing specific barriers to trade that can be magnified where multiple borders are crossed as part of regional production networks. There are likely to be more opportunities for increased participation of New Zealand firms in regional production networks for more complex products such as manufactured goods and some food and beverage, than for primary and commodity exports.

As a member of TPP, New Zealand would have the opportunity to seek appropriate consideration of issues important for New Zealand, for example the particular challenges of integrating into value chains faced by small, distant countries, and for primary sector commodity exporters. (These two factors are judged to lie behind OECD Trade in Value Added (TiVA)⁶⁵ data, which indicates New Zealand is less integrated into global value chains, of which supply chains are a key component, than other countries.) The Committee will also consider ways in which micro, small and medium size enterprises can best participate in supply chains and regional production networks. New Zealand firms tend to internationalise at an earlier stage in their development than firms in other countries, and could therefore benefit from the Committee's work to support smaller firms' entry into regional supply chains and production networks. New Zealand firms that participate in international networks have been shown to be more productive (on average) than those that do not, so the Committee's work could help improve productivity among New Zealand's firms, including SMEs. Should New Zealand not enter TPP, we could risk a situation where the longer term integration of regional production networks by TPP members did not adequately take into account factors of importance to New Zealand firms.

⁶⁴ Supply chains – are focused on the movement of an input, product or service from a supplier to a customer and the systems to support this. They cover raw materials, production and delivery to the customer. Supply chains can be local, regional or global depending on the extent of their geographic coverage.

Value chains – include supply chains, but cover the full range of activities for a particular product or service, and on the value added at each stage of development or production. Value chains cover activities from conception, research, development, design, sourcing raw materials and intermediate inputs, production, marketing, distribution, sales and customer support. Production networks – relate to a particular lead firm's network of suppliers across their product lines, and how they organise network(s). Production networks may include multiple value chains.

⁶⁵ <http://stats.oecd.org/>

4.23.2 Disadvantages of entering TPP, Competitiveness and Business Facilitation

No disadvantages to New Zealand have been identified with respect to this Chapter.

4.24 Development

The TPP Development Chapter essentially reaffirms the Parties' commitment to "promote and strengthen an open trade and investment environment" in a manner that helps to address – to the extent possible – TPP Parties' national development objectives e.g., improve welfare, reduce poverty, raise living standards and create employment opportunities. The Chapter also reaffirms the collective commitment of ensuring that all Parties can access and utilise the 'development' benefits of this Chapter and the broader Agreement.⁶⁶

The Development Chapter contains a number of high-level obligations and mechanisms to support and advance TPP Parties' respective national 'development' priorities in the following areas:

- Promotion of Development;
- Broad-based Economic Growth;
- Women and Economic Growth;
- Education, Science and Technology, Research and Innovation, and;
- Joint Development Activities among the Parties.

4.24.1 Advantages to entering TPP, Development

The New Zealand Government agrees a trade agreement of TPP's size and significance can have an important role in helping to set greater policy coherence around trade, investment and sustainable development. Greater coordination between TPP Parties, and joint activities directed towards maximising the development benefits of TPP, would align with New Zealand's approach to trade and development. This includes the recognition and promotion of shared development goals throughout the TPP region, such as enhancing opportunities for women in economic development and inclusive economic growth.

4.24.2 Disadvantages to entering TPP, Development

There are no expected disadvantages from New Zealand agreeing to the high-level obligations and provisions contained in the Development Chapter.

⁶⁶ This is one of four "horizontal" chapters building on work in other international (e.g., ILO & WTO) and regional fora (e.g., APEC). The four horizontal chapters are Regulatory Coherence, Competitiveness and Business Facilitation, Small- and Medium-sized Enterprises, and Development.

4.25 Small and Medium Enterprises

This Chapter requires Parties to share complete information about the Agreement online and include links to other information of relevance to small and medium-sized enterprises (SMEs) doing business within the Parties. The Chapter also establishes a Committee on SME Issues, made up of government representatives of each Party, to help ensure SMEs can take advantage of the benefits offered by the Agreement. These provisions align with the practice in New Zealand of ensuring businesses have good access to information, so they can make the best decisions to manage and grow their business.

4.25.1 Advantages of entering TPP, SMEs

New Zealand SMEs interested in exporting to new markets or participating in global supply chains would benefit from this Chapter in a number of ways. They are more likely to become aware of the opportunities created by the Agreement and would be able to access information on a Party's domestic laws and regulations more easily and faster than at present. Note that any TPP members not yet making this information available are most likely to publicise it fully, so this informational benefit would accrue to New Zealand businesses regardless of whether or not New Zealand enters TPP.

Entering TPP would allow New Zealand to influence the SME Committee's sharing of knowledge and best practices in line with New Zealand's interests. This would assist with the design and implementation of programmes in TPP economies which support the internationalisation of SMEs, including through better equipping them to effectively participate in global supply chains.

Government would incur a small cost in establishing and maintaining online information about the Agreement.

4.26 Regulatory Coherence

The focus of this Chapter is on encouraging the development of domestic systems for assuring that regulation is the minimum necessary to achieve public policy objectives, and that trade and investment liberalisation is taken into account when considering new regulation. It does this through creating obligations on all the TPP Parties to establish regulatory quality management systems of the type already maintained by some Parties, including New Zealand. It is intended to reflect a forward looking view of how best to reduce future barriers to trade and investment, by targeting behind the border barriers to trade.

The Chapter does not alter the sovereign right of the Parties to identify their regulatory priorities and to take regulatory action at the levels they consider appropriate. Regulatory quality management systems involve the use of good regulatory practice by Parties in planning, designing, issuing, implementing, and reviewing regulatory measures. New Zealand is largely already in compliance with the provisions in this Chapter, having one of the most developed regulatory quality management systems in the world.

The obligations generally attach to ‘covered regulatory measures’. Each Party would be able to determine the scope of covered regulatory measures. The scope New Zealand would adopt has not yet been determined, but given the wide scope of New Zealand’s existing regulatory management system, and the focus on trade and investment, it would likely be narrower than the scope of the existing regulatory management system.

4.26.1 Advantages to entering TPP, Regulatory Coherence

Greater transparency of rulemaking in TPP Parties would benefit New Zealand businesses trading with or investing in these countries by providing greater certainty about the regulatory environment in which they are operating. It is difficult to estimate the size of the benefits transparency in rule making brings, but research⁶⁷ indicates that transparency lowers the barriers to enter a market, benefitting businesses wanting to trade with or invest in countries and resulting in benefits to both the exporting and importing economies. The research indicated that if other APEC economies improved the transparency of their trade-related regulation, New Zealand exports could increase by approximately five percent (based on an analysis in 2009).⁶⁸ It should be noted, however, that trade-facilitating regulatory improvements in other TPP countries would for the most part benefit TPP members and non-members alike. This benefit of the Chapter, therefore, would likely accrue whether or not New Zealand entered TPP.

If New Zealand entered TPP, this Chapter would further reinforce to trading partners New Zealand’s existing high levels of regulatory transparency, as part of our attractive business environment.

4.26.2 Disadvantages to entering TPP, Regulatory Coherence

As New Zealand already has a well-developed regulatory management system including many of the obligations under this Chapter only marginal change is required, with the only substantive change being the requirement to publish an annual regulatory agenda for certain regulatory measures. This would be of negligible additional cost, particularly as the New Zealand Government (in its response to the Productivity Commission Inquiry into Regulatory Institutions and Practices) directed that agencies will annually publish their regulatory management strategy, information on the state of their stock and their regulatory priorities for the year ahead.

4.27 Transparency Chapter – Pharmaceuticals Annex

TPP is the first international agreement in which New Zealand has agreed to include specific transparency-related provisions on pharmaceutical and medical device reimbursement (or subsidy) programmes. The provisions, included in an Annex to the Transparency Chapter, are intended to

⁶⁷ For instance: von Lampe, M. and H. Jeong (2013), “Design and Implementation of Food-Import Related Regulations: Experiences from Some Regional Trade Agreements”, *OECD Food, Agriculture and Fisheries Papers*, No. 62, OECD Publishing; Helble, M., Shepherd, B. and Wilson, J. S. (2009), Transparency and Regional Integration in the Asia Pacific. *World Economy*, 32: 479–508; van Tongeren, F., J. Beghin and S. Marette (2009), “A Cost-Benefit Framework for the Assessment of Non-Tariff Measures in Agro-Food Trade”, *OECD Food, Agriculture and Fisheries Papers*, No. 21, OECD Publishing.

⁶⁸ Helble, M., Shepherd, B. and Wilson, J. S. (2009), Transparency and Regional Integration in the Asia Pacific. *World Economy*, 32: 479–508 at 502.

promote transparency and due process in decisions to list pharmaceuticals and medical devices for reimbursement.

For New Zealand, the Annex would apply to some activities of the Pharmaceutical Management Agency (PHARMAC). PHARMAC would need to follow the provisions for all formal applications seeking listing and reimbursement (subsidisation) on its *Pharmaceutical Schedule*. But a range of other PHARMAC activities are *not* covered by the Annex, including:

- Any government procurement-related decisions, including current PHARMAC processes for hospital medicines and hospital cancer treatments.
- Other PHARMAC programmes such as Named Patient Pharmaceutical Assessment.
- Any decisions on medical device reimbursement. While some other countries have agreed to apply the provisions of the Annex to both pharmaceuticals and medical devices, New Zealand's commitments under the Annex are limited to "medicines" as defined by the Medicines Act 1981.

While it was not New Zealand's preference to have these transparency expectations included in TPP, most provisions reflect existing PHARMAC practices. Where PHARMAC would be required to implement some new processes, these are limited, and some flexibilities have been included that take into account its current way of operating. Most significantly, the PHARMAC model would not need to be changed. PHARMAC's ability to prioritise and decide what pharmaceuticals get listed for reimbursement (subsidisation), and the negotiating model it uses to achieve the best health outcomes from the funding available, remain unchanged.

The Annex is legally binding. 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.

4.27.1 Advantages of entering TPP, Pharmaceuticals Annex

Advantages flowing to New Zealand from this Annex are expected to be limited.

To the extent that New Zealand manufacturers and exporters sell pharmaceuticals or medical devices to covered reimbursement programmes in Australia, Japan and the US, they may benefit from transparency and process obligations included in the Annex. These benefits would potentially apply in other markets if other TPP members were to adopt reimbursement programmes.

4.27.2 Disadvantages of entering TPP, Pharmaceuticals Annex

While most provisions in the Annex reflect existing New Zealand practice or include flexibilities, PHARMAC would be required to implement some new processes it would not have otherwise considered. These would involve small costs as noted below.

Commitment to consider applications within a specified period of time

Currently, PHARMAC is under no obligation (to suppliers) to make decisions within any timeframe. TPP would require PHARMAC to consider formal applications within a "specified period of time". Importantly, PHARMAC would be able to determine this timeframe, and an exception to this obligation

has been included that allows this timeframe to be extended provided the reason for the extension is disclosed. This exception is noteworthy given PHARMAC may assess applications over multiple budget cycles or defer a final decision until funding is available.

Consultation and provision of information to suppliers and the public

The Annex includes a number of provisions that promote transparency and consultation. These reflect existing PHARMAC processes, such as the publication of significant amounts of material on PHARMAC's website, the processes it uses to engage suppliers throughout the application process, and the information published on decisions. The provisions do not require new specific processes to be put in place.

TPP Parties have also agreed to a government-to-government mechanism to facilitate dialogue and mutual understanding on the issues covered by the Annex.

Review mechanism

While PHARMAC already has a review process in place for *Named Patient Pharmaceutical Assessment* applications, it does not currently offer a specific review process for other decisions. Under TPP, PHARMAC would be required to make available a new review mechanism.

The mechanism may be independent (from the decision-maker) or internal (run by the decision-maker). The review process is limited in scope, and the Government would have broad freedom to design and implement the review process, including drawing from existing practice and design principles used internationally such as cost-recovery. Importantly, when reviewing an application, the reviewer does not need to consider assessments related to other proposals for listing and the review cannot challenge the prioritisation decision.

These parameters mean that the impact of implementing a review mechanism in the PHARMAC context is significantly lessened. PHARMAC's authority is preserved through its ability to act as both decision-maker and reviewer and PHARMAC's prioritisation decisions are not subject to review. However, there would be administrative costs in establishing the mechanism.

These requirements would impose additional costs on PHARMAC. These are estimated to be relatively small (compared to the significant opportunities presented by TPP) and operational in nature. The costs relate to PHARMAC's operating budget, and are not expected to impact in any way on New Zealand's pharmaceutical budget or PHARMAC's effectiveness in securing the best possible health outcomes from money the Government spends on medicines.

The total estimated impact of implementing the Annex is:

- NZ\$4.5 million one-off establishment costs, made up mostly of legal costs but also some personnel resource involved in developing and considering implementation options.
- NZ\$2.2 million ongoing per year costs, comprised of additional personnel costs involved in considering applications within a specified period of time, any supplementary consultation and

notification processes needed, and operating a review mechanism (if such costs were not charged to applicants on a cost-recovery basis).

4.28 Legal and Institutional Issues

FTAs include legal and institutional provisions that cover such things as how and when the Agreement will enter into force, how it will relate to other international agreements already in place, how Parties should resolve issues in the case of a dispute, and what exceptions are allowed. In TPP, these are covered by the Initial Provisions, Administrative & Institutional, Dispute Settlement, Transparency and Anti-corruption, Exceptions, and Final Provisions Chapters.

TPP includes a number of legal and institutional provisions that touch upon new areas not previously addressed in New Zealand's existing FTAs. In part, this reflects the size, scope and complexity of the Agreement as a whole. For example, TPP includes some novel transparency provisions intended to assist businesses operating in other TPP markets, and to combat bribery and corruption.

The TPP Chapter on Dispute Settlement (which applies to the majority of other chapters) includes some mechanisms that vary from New Zealand's previous FTA practice and WTO procedures, but achieves the same overall outcome of providing effective, efficient, fair, and transparent processes for the resolution of disputes between governments. The Chapter requires Parties to make every attempt to resolve disputes through cooperation and consultations before resorting to the procedures provided for in the Chapter. However, if resolution cannot be reached, Parties may invoke the provisions of the Chapter which provide for compulsory dispute settlement procedures.

4.28.1 Advantages of entering TPP, Legal and Institutional Issues

Under the Dispute Settlement Chapter, the New Zealand Government would be able to pursue a matter to formal dispute resolution should one or more of its TPP partners fail to act consistently with its obligations under the Agreement. This would help ensure the advantages gained across the Agreement were accessible to New Zealand goods and services exporters. For example, if New Zealand brought a successful claim against another TPP Party, and that Party did not bring the relevant measure into compliance with TPP, then New Zealand could impose increased tariffs on products from that Party in order to induce them to bring their measure into compliance. This form of robust, transparent dispute settlement procedure is considered to be to New Zealand's advantage, particularly as a strong rules-based system has historically proved to the advantage of smaller trading nations like New Zealand. Note that New Zealand would have preferred full application of Dispute Settlement to the Sanitary and Phytosanitary Measures (SPS) Chapter, an area of importance for New Zealand exporters of primary products. This did not prove possible, and certain carve outs and phase-in periods would apply for SPS disputes.

TPP's Initial Provisions would mean the advantages from TPP for New Zealand exporters would be in addition to existing trade agreements. Where New Zealand has another FTA with one of the TPP Parties, the provision in the Initial Provisions Chapter on relation to other agreements clarifies that exporters are entitled to take advantage of the Agreement which provides the most favourable

treatment for goods, services, investment, and persons. Furthermore, TPP would not undermine any of New Zealand's rights under the WTO Agreements.

The Final Provisions Chapter of the TPP states that New Zealand would act as "Depositary" for the Agreement. This role carries some symbolic value, placing New Zealand at the centre of the most comprehensive trade agreement ever agreed outside the WTO, and the first in what may prove to be the next generation of trade agreements. This would support New Zealand's long-standing position, particularly relative to our size, as a leader in global trade liberalisation.

The Exceptions Chapter of TPP sets out a number of exceptions which provide a backstop to ensure that TPP does not impair a government's ability to make policy and undertake measures to further that policy. These exceptions should be seen in addition to the specific flexibilities negotiated in different areas of TPP. The obligations in TPP have been drafted so as not to impair the ability of countries to regulate and take other measures in the public interest, but should there be a situation where such government action (or inaction) would breach an obligation, then the Exceptions Chapter provides a safety net. If a situation arises in which a country is shown to have violated an obligation, it is then up to that country to prove that a relevant exception applies.

Taken together and as a whole, the exceptions would allow New Zealand to benefit from the negotiated outcomes of the Agreement (for example, as outlined in Section 7), while being assured the Government could continue to implement policies through measures that would otherwise constitute violations of TPP's obligations. This 'advantage' is broad-ranging in its application as the exceptions cover a wide variety of policy areas that are critical for government, including health, environment, security, taxation, and the Treaty of Waitangi. Key aspects of the Chapter text are as follows:

- The TPP General Exceptions Chapter adopts in part the WTO approach to preserving public policy space, which is consistent with the obligations New Zealand and most other countries already have in place. It does so by incorporating the GATT and GATS general exceptions, including for example, that provided a measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, nothing in the Agreement shall be construed to prevent countries from adopting measures necessary to protect public morals, human, animal or plant life or health; those related to the conservation of exhaustible natural resources, and a number of other areas;⁶⁹
- The Security Exception would allow a TPP member to take any action which it considered necessary for the protection of its essential security interests;

⁶⁹ Article XX of the General Agreement on Tariffs and Trade (GATT) provides for exceptions to what is broadly characterised as trade in goods, and would apply to Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Textile and Apparel Goods), Chapter 5 (Customs Administration and Trade Facilitation), Chapter 7 (Sanitary and Phytosanitary Measures), Chapter 8 (Technical Barriers to Trade) and Chapter 17 (State-Owned Enterprises and Designated Monopolies). The exceptions in paragraphs (a), (b) and (c) of Article XIV of the General Agreement on Trade in Services (GATS) would similarly apply to Chapter 10 (Cross-Border Trade in Services), Chapter 12 (Temporary Entry for Business Persons), Chapter 13 (Telecommunications), Chapter 14 (Electronic Commerce) and Chapter 17 (State-Owned Enterprises and Designated Monopolies).

- The Temporary Safeguard Measures exception provides policy flexibility in the case of serious balance of payments and external financial difficulties. The policy flexibility provided is, however, more limited than in New Zealand's previous FTAs. It places limitations on when New Zealand could put in place restrictive measures on transfers or payments for current account transactions, and on payments or transfers relating to the movements of capital. Under TPP, such measures cannot be applied to payments or transfers relating to foreign direct investment, must not exceed what is necessary to deal with the circumstances, must not be used to avoid necessary macroeconomic adjustments, and in the case of capital outflows, must not interfere with an investor's ability to earn a market rate of return on any restricted assets in New Zealand. Further, a measure should be phased out after eighteen months, except in exceptional circumstances, and absent objections from more than half of the Parties. The Taxation Exception sets out the scope of application of the Agreement's obligations to taxation measures and provides various exceptions and policy space for governments in this area;
- A provision relating to Tobacco gives New Zealand certainty that it would not face arbitration under the investor state dispute settlement mechanism with respect to "tobacco control measures". The provision would allow any Party to elect to deny the benefits of the investor state dispute settlement section of the Investment Chapter with respect to claims challenging a "tobacco control measure". If a Party elected to do so, then no claim could be submitted to arbitration under the investor state dispute settlement mechanism (or if a claim had already been submitted, then it would have to be dismissed). The Government intends to make such an election.
- TPP includes a Treaty of Waitangi Exception that would allow New Zealand to take measures it deemed necessary to accord more favourable treatment to Māori in respect of matters covered by TPP, including in fulfilment of its obligations under the Treaty of Waitangi. It also states that the interpretation of the Treaty of Waitangi is not subject to TPP Dispute Settlement. (See Section 7.3.)

In previous FTAs, New Zealand has negotiated language which clarifies that the exception in GATT Article XX(f) (which allows measures necessary for the protection of national treasures of artistic, historic or archaeological value) allows the Government to take measures to protect specific sites of historical or archaeological value, or to support creative arts of national value. It was not possible to negotiate such language as part of TPP. While this was not a preferred outcome for New Zealand, it does not impact the policy space available in practice.

4.28.2 Disadvantages of entering TPP, Legal and Institutional Provisions

The legal and institutional provisions do not present any disadvantages to New Zealand. As noted with respect to the Dispute Settlement chapter, legal and institutional procedures are by their nature reciprocal, and measures taken by the New Zealand Government would be subject to the same dispute settlement procedures as are available for New Zealand. Historically, New Zealand has been subject to only one complaint by a trading partner. This was under the General Agreement on Tariffs and Trade (GATT). New Zealand has not been subject to any complaints under our FTAs, reflecting our transparent and rules-abiding approach.

The Transparency and Anticorruption Chapter contains provisions that would be novel for New Zealand in the context of FTAs, but are consistent with existing policy and practice, and are based on international obligations we have under the OECD Convention on Bribery of Foreign Officials and which we will also have under the United Nations Convention Against Corruption (UNCAC) following its imminent ratification. As a result, there would be no disadvantage to New Zealand committing to these provisions.

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

This section sets out, chapter by chapter, the legal obligations that would be imposed on New Zealand under TPP. It also outlines the two dispute settlement mechanisms found in TPP –the investor state dispute settlement (ISDS) mechanism in the section on the Investment Chapter, and the state to state dispute settlement mechanism in the section on the Dispute Settlement Chapter. The reservations to the treaty are discussed in the respective Chapters where they are found in the Agreement.

5.1 Initial Provisions and General Definitions

The Initial Provisions and General Definitions Chapter sets out how TPP will interact with other international agreements. Article 1.2 states that the Parties intend TPP to co-exist with their existing international agreements, and records the Parties' affirmation of their rights and obligations to each other under existing international agreements to which more than one of them are Party. In situations where a provision of TPP is inconsistent with a provision of another agreement to which at least two TPP countries are Party, then, on request, the TPP Parties in question are required to consult with a view to reaching a mutually satisfactory solution.

Article 1.2 clarifies that there will not be an inconsistency simply because one agreement provides more favourable treatment for goods, services, investments, or persons than another agreement. This means, for example, that if an earlier bilateral or regional FTA provided for lower preferential tariff rates than TPP, then a trader could choose to access the lower rates under the other agreement rather than having to use the TPP rates.

5.2 National Treatment and Market Access for Goods

5.2.1 Section A: Definitions and Scope

Article 2.2 states that except as otherwise provided in the Agreement, this Chapter applies to trade in goods of a Party.

5.2.2 Section B: National Treatment and Market Access for Goods

National Treatment and customs duties

The National Treatment obligation in Article 2.3 requires each Party to afford national treatment to the goods of the other Parties in accordance with Article III of the General Agreement on Tariffs and Trade (GATT) 1994.

Unless the Agreement states otherwise, Parties are prohibited from increasing any customs duty on an originating good that is in effect at the date of entry into force of the Agreement (Article 2.4.1). In addition to this, and unless the Agreement states otherwise, each Party is required to progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 2-D (Article 2.4.2).

A Party may request consultations to consider accelerating the elimination of customs duties set out in the Schedules to Annex 2-D. Consultations must be held between the requesting Party and one or more other Parties following such a request (Article 2.4.3).

The acceleration of elimination of a customs duty on an originating good set out in a Party's Schedule to Annex 2-D can either be agreed between that Party and at least one other Party (Article 2.4.4) or be decided unilaterally by that Party (Article 2.4.5). In these circumstances, the relevant Party or Parties must inform the other Parties as early as practicable before the new rate of customs duty takes effect.

Waivers of customs duties

Article 2.5 applies to waivers of customs duties and prohibits Parties from adopting any new waiver, expanding a waiver already granted or extending an existing waiver to a new recipient. However, this prohibition only applies if the waiver is conditioned on the fulfilment of a performance requirement. In addition, Parties are prohibited from conditioning the continuation of any existing waiver on the fulfilment of a performance requirement.

Application of customs duties

Articles 2.6 and 2.7 set out prohibitions on the application of customs duties in situations where:

- A good re-enters a Party's territory after the good has been temporarily exported to another territory for repair or alteration (Article 2.6.1);
- A good is admitted temporarily into a Party's territory for repair or alteration (Article 2.6.2); and
- The import is of commercial samples of negligible value or printed advertising material (Article 2.7).

Each Party is required to give duty-free temporary admission for the following types of goods (regardless of their origin):

- Professional equipment necessary for carrying out the business activity, trade or profession of a person who qualifies for temporary entry under the laws of the importing Party;

- Goods intended for display or demonstration;
- Commercial samples and advertising films and recordings;
- Goods admitted for sports purposes; and
- Containers and pallets in use or to be used in the shipment of merchandise or goods in international traffic (Article 2.8.1 and 2.8.4).

Each Party is required to, on request and for reasons its customs authority considers valid, extend the limit for temporary admission beyond the period that was initially fixed (Article 2.8.2).

Parties may only impose certain conditions (as set out in Article 2.8.3) on the duty-free temporary admission of goods.

Article 2.8.7 requires each Party to adopt and maintain procedures providing for the expeditious release of goods admitted under Article 2.8.

Where a good is temporarily admitted under Article 2.8, the importing Party must permit the good to be exported through a customs port other than that through which it was admitted (Article 2.8.7). In addition, under Article 2.8.8, each Party is required to provide that the importer or person responsible for a good that is temporarily admitted will not be liable for failure to export the good in a situation where they are able to present satisfactory proof that the good has been destroyed within the original period fixed for temporary admission, or any extension of that period.

Article 2.10 makes provision for *ad hoc* discussions. A Party may request such discussions to address any manner arising under the chapter. In such a case, the Party receiving the request must provide a written reply and the Parties must meet to discuss the matter. *Ad hoc* discussions under this chapter are confidential and without prejudice to the rights of any Party, including under the Dispute Settlement chapter.

Import and export restrictions

Article 2.11.1 states that Parties are not allowed to prohibit or restrict the importation of any good of another Party. Neither are Parties allowed to prohibit or restrict the exportation or sale for export of any good of another Party. The only exception to this is if the prohibition or restriction is in accordance with Article XI of the GATT, which is incorporated into TPP. Notwithstanding this obligation, those Parties that have made entries in Annex 2-A may maintain prohibitions or restrictions consistent with their entries.

Article 2.11.8 prohibits a Party from requiring a person of another Party to establish or maintain a contractual or other relationship with a distributor in its territory as a condition for importing a good.⁷⁰

⁷⁰ This restriction does not apply to the importation or distribution of rice and paddy in Malaysia.

Article 2.12 clarifies that the restrictions on prohibiting or restricting imports in Article 2.11 also extend to remanufactured goods. If a Party adopts or maintains measures prohibiting or restricting the importation of used goods, it cannot apply those measures to remanufactured goods.

Article 2.13 contains a number of obligations relating to import licensing including a prohibition on measures that are inconsistent with the Import Licensing Agreement, and an obligation on Parties to notify the other Parties of any existing import licensing procedures that it has in place, as well as any new or modified import licensing procedures. TPP Parties may enquire about another Party's licensing rules and procedures, and if a Party denies an import license application with respect to the goods of another Party, it must, on request, provide the applicant with a written explanation of the reasons for the denial.

Article 2.14 deals with transparency in export licensing procedures. Each Party is required to notify the other Parties in writing of the publications in which any export licensing procedures that it maintains are set out. Any new export licensing procedures (or modification of existing ones) must also be published in these publications. Paragraph 2 sets out the matters that must be included in the publication, which include the text of the export licensing procedures and the goods subject to each of those procedures.

In Article 2.15, the Chapter requires each Party to ensure that all fees and charges (other than export taxes, customs duties, charges equivalent to an internal tax or other internal charge applied consistently with GATT Article III:2, and antidumping and countervailing duties) imposed on or in connection with importation or exportation are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic goods or a taxation of imports and exports for fiscal purposes. Parties are also prohibited from requiring consular transactions in connection with the importation of any good of the other Parties, and are required to make available online a list of the fees and charges it imposes in connection with importation or exportation. These fees and charges must be periodically reviewed with a view to reducing their number and diversity, where practicable. Finally, Parties are prohibited from levying fees and charges on an *ad valorem* basis on or in connection with importation or exportation.

Article 2.16 prohibits Parties from having a duty, tax or other charge on the export of any good to the territory of another Party, unless the duty, tax or other charge is adopted or maintained on any such good when destined for domestic consumption.

Article 2.17 establishes a Committee on Trade in Goods, comprising representatives of each Party. The Committee shall meet at such times agreed by the Parties to consider any matters arising under this Chapter. Its functions will include promoting trade in goods between the Parties, addressing certain barriers to trade between the Parties and other obligations relating to the Harmonised System. The Committee will consult with other committees established under the Agreement where relevant and appropriate. Within two years after the Agreement enters into force, the Committee will submit an initial report to the Commission regarding certain work it has undertaken.

There is a requirement on Parties to promptly publish certain information in a non-discriminatory and easily accessible manner, in order to enable interested persons to become acquainted with it. The information is listed in Article 2.19 and includes: importation, exportation and transit procedures and required forms and documents; applied rates of duties, and taxes of any kinds imposed on or in connection with importation or exportation; and rules for the classification or valuation of goods for customs purposes.

Article 2.20 requires each Party to participate in the WTO Ministerial Declaration on Trade in Information Technology Products (ITA) and to have completed the procedures for modification and rectification of its Schedule of Tariff Concessions in accordance with the ITA.

5.2.3 Section C: Agriculture

In addition to the rules set out above that apply to trade in all goods, TPP includes further rules that apply to trade in agricultural goods (for these purposes, agricultural goods are those goods referred to in Article 2 of the WTO Agreement on Agriculture). TPP imposes specific obligations on TPP countries in relation to trade in agricultural goods, some of which expand on the obligations set out in the WTO and New Zealand's other FTAs.

Agricultural export subsidies, export credits, State Trading Enterprises and agricultural safeguards

Article 23 requires that Parties must not adopt or maintain an export subsidy on an agricultural good destined for the territory of another TPP country.

As set out in Articles 23, 24 and 25, the Parties have also agreed to work together in the WTO:

- To achieve an agreement to eliminate export subsidies for agricultural goods;
- To develop multilateral disciplines to govern the provision of export credits, export credit guarantees and insurance programs; and
- Toward an agreement on export state trading enterprises that would improve transparency and place some disciplines around actions that are trade distorting.

Article 2.29 provides that originating agricultural goods that are traded preferentially under TPP in accordance with the Chapter 3 (Rules of Origin) must not be subject to any duties applied under any special safeguard taken under the WTO Agreement on Agriculture.

Export restrictions – food security

In Article 2.26, Parties acknowledge that countries may temporarily apply an export prohibition or restriction on foodstuffs where there is risk of a critical shortage as set out in Article XI of the GATT 1994 and Article 2.1 of the Agreement on Agriculture. Further to this, the Parties agree that if a TPP country is a net exporter of a foodstuff and imposes an export prohibition or restriction on the foodstuff from another TPP country in these circumstances, it must notify all of the other Parties before the measure comes into force. Notification must include the reason that the measure was imposed or maintained, how the measure is consistent with the GATT and any alternative measures the Party considered imposing. Any Party that has a substantial interest as an importer of that

foodstuff may request consultations with, or data relating to the critical food shortage from, the Party imposing or maintaining the measure.

Any measure that is notified under this procedure should ordinarily be removed within four to six months. If a Party is considering extending the measure for longer than this, further notification must be provided to the other TPP countries. Measures may only be continued for longer than twelve months if all other Parties that are net importers of the relevant foodstuff have been consulted. A measure must be discontinued immediately if the critical shortage, or threat of critical shortage, no longer exists.

These measures may not be applied to food purchased for non-commercial humanitarian measures.

Committee on Agricultural Trade

Article 2.27 establishes a Committee on Agricultural Trade which is comprised of representatives of each Party. The Committee will be a forum for the promotion of trade in agricultural goods between the Parties, monitoring and promoting the implementation of the agricultural goods section of this Chapter as well as consultation on the same.

Trade in products of modern biotechnology

In Article 2.29, TPP Parties confirm the importance of transparency, cooperation and exchanging information related to the trade of “products of modern biotechnology”, as defined in TPP. The text specifically acknowledges that it does not require any changes to TPP Parties’ existing laws, regulations and policies. All provisions – such as the requirement to make publicly available certain information relating to documentation requirements to apply for authorisation of products of biotechnology – are subject to a Party’s existing laws, regulations and policies.

In addition, when available and subject to domestic laws, regulations and policies, the Parties have agreed to share certain information relating to an occurrence of a low level presence (LLP) of material that is the product of modern biotechnology. A TPP country facing a LLP occurrence must ensure that the measures applied to address the LLP occurrence (with the exception of penalties) are appropriate to achieve compliance with its own laws, regulations and policies.

In order to reduce the likelihood of trade disruptions from LLP occurrences, each exporting Party must also, again consistent with its domestic laws, regulations and policies, endeavour to encourage technology developers to submit applications to TPP Parties for authorisation of plants and plant products of modern biotechnology. Parties that authorise plant and plant products derived from modern biotechnology shall endeavour to allow year-round submission and review of applications for authorisation of the plants and plant products and to increase communications between TPP Parties relating to any new authorisations.

A working group on products of modern biotechnology will also be established under the Committee on Agriculture. This working group, open to those Parties that choose to be part of it, will provide a

forum for information exchange and cooperation on trade-related matters associated with products of modern biotechnology.

5.2.4 Section D: Tariff rate quota administration

Under Section D, the Parties agree rules governing the administration of all tariff rate quotas established under the Agreement. Article 2.30 provides that Parties must implement and administer tariff-rate quotas (TRQs) in accordance with Article XII of the GATT 1994, the Import Licensing Agreement and Article 2.13 (which sets out additional rules in regards to import licensing between TPP countries). All TRQs established by a Party under the Agreement shall be included in its Schedule to Annex 2-D (Tariff Elimination Schedule). Goods imported under TRQs under the Agreement shall not be counted towards, or reduce the quantity of, any other TRQs in a Party's WTO tariff schedules or under any other trade agreement.

Article 2.30 further requires that Parties' procedures for administering TRQs must be fair and equitable, no more administratively burdensome than absolutely necessary, responsive to market conditions and administered in a timely manner. These procedures, and all information concerning the administration of TRQs by a Party, must be made available to the public.

In Article 2.31, Parties have agreed to administer their TRQs in a way that allows importers to fully utilise TRQ quantities. In addition, a Party administering a TRQ cannot require the re-export of a good as a condition for application for, or utilisation of, a quota allocation.

If a Party seeks to introduce a new or additional condition, limit or eligibility requirement on the utilisation of a TRQ for importing a good, it must give prior notification to the other TPP countries of its intention to do so. Any Party with a demonstrable commercial interest in supplying the good may then request consultations with the Party seeking to introduce the new or additional condition, limit or eligibility requirement. Following such consultations, the Party cannot introduce the new or additional condition, limit or eligibility requirement, if a Party that requested consultations objects.

Article 2.32 also imposes a number of specific requirements on Parties in circumstances where access under a TRQ is subject to an allocation mechanism (i.e. where access to the TRQ is not granted on a first-come first-served basis). These requirements ensure that allocation under TRQs is not unduly restrictive and is fair, equitable between Parties. For example, Parties must ensure that allocations are made in commercially viable shipping quantities and that there is a mechanism for any unused allocations to be returned and reallocated in a timely and transparent manner.

Under Article 2.33, each Party must publish all information regarding the amounts allocated, amounts returned and, if available, quota utilisation rates on a designated website on a regular basis. They must also regularly publish online the amounts available for reallocation, and the application deadline, at least two weeks before applications for reallocations will be accepted.

In addition, Article 2.24 provides that each Party must identify the entity or entities responsible for administering its TRQs and provide at least one contact point to the other Parties to facilitate communications on matters relating to the administration of TRQs.

If a TRQ is administered by an allocation mechanism, the names and addresses of allocation holders shall be published online. If a TRQ is administered on a first-come first-served basis, the importing country's administering authority must regularly publish the utilisation rates and remaining available quantities for each TRQ. In either case, when a TRQ fills, the Party shall publish a notice to this effect on its designated publicly available website.

Any TPP Party administering a TRQ must consult with any other exporting TPP country regarding the administration of its TRQ at the request of the exporting TPP country.

5.3 Rules of Origin and Origin Procedures

The Rules of Origin (ROO) Chapter establishes the rules for determining whether goods traded between TPP Parties are considered to 'originate' in the TPP region. Goods must qualify as 'originating' in order to qualify for tariff preferences under the Agreement.

5.3.1 Section A: Rules of Origin

The ROO Chapter provides three avenues through which goods can qualify as being 'originating' and, thereby, qualify for preferential tariff treatment (Article 3.2). A good will qualify as originating if it:

- Is wholly obtained or produced entirely in the territory of one or more of the TPP Parties (such as, fruits, plants or animals);
- Is produced entirely in the territory of one or more of the TPP Parties, exclusively from originating materials; or
- Is produced entirely in the territory of one or more of the TPP Parties using non-originating materials, provided that the good meets the criteria set out in the Product Specific Rules (PSR) Annex.

The two main methods set out in the PSR Annex for determining whether goods qualify as originating under the third option are:

- Change in tariff classification (CTC): under this approach, a good will qualify as originating if all non-TPP materials used in its production have undergone a specified change of tariff classification. All products under the TPP except for certain motor vehicles have an applicable CTC rule.
- Regional value content (RVC): this approach, which is provided as an alternative option primarily for industrial products, is based on the value added by producers within the TPP region.

When a recovered material that is derived in the territory of one or more of the Parties is used in the production of, and incorporated into, a remanufactured good, then that recovered material is required to be treated as originating (Article 3.4). A 'recovered material' is one that results from the

disassembly of a used good into individual parts; and the cleaning, inspecting, testing or other processing of those parts as necessary for improvement to sound working condition.

Article 3.5 sets out the formulas that a Party must use in situations where origin is to be determined by a regional value content requirement.

Articles 3.6 to 3.8 set out how materials that are further worked by a Party to the Agreement are to be treated when calculating what value can be assigned as regional value content. These include the value of processing of the materials, the costs of freight, insurance, and packing incurred to transport the material to the location of a producer of a good; and the cost of duties, taxes, and customs brokerage fees on the material and the value of any originating material used in the production of the non-originating material. The processing or production must take place in the territory of one or more of the Parties.

Article 3.9 sets out additional provisions for calculating regional value content for automotive goods if the Net Cost Method is adopted.

Article 3.10 requires each Party to provide for full cumulation between the TPP Parties. This means that all materials produced by a TPP Party or any processing undertaken in a TPP Party can count towards achieving the rule established for that product.

Under Article 3.11, each Party is required to allow a small tolerance for a good (10 percent of the value of the good) even if it does not meet the applicable change in tariff classification requirement provided the good meets all the other applicable requirements of the Chapter. This *de minimis* rule only applies under a CTC rule, and in the case of textiles or apparel Article 4.2 applies instead. For example, if the CTC rule does not allow manufacture from non-originating parts for a certain good, this provision softens that requirement by allowing the good to still be originating provided the value of the non-originating parts does not exceed 10% of the value of the good.

There are exceptions to the *de minimis* rule set out in Annex C. These exceptions mean that the 10% tolerance provisions do not apply for some dairy products, some fruits and nuts and some vegetable oils. Dairy powders and processed cheese, and any downstream good that is made from these materials are not affected by the exceptions.

Under Article 3.12, each Party is required to provide that a fungible good or material is treated as originating based on either its physical segregation or the use of any inventory management method recognised in the Generally Accepted Accounting Principles, provided that the inventory management method selected is used throughout the fiscal year of the person that selected the inventory management method.

Under Article 3.13, each Party is required to provide that in determining whether a good:

- Is wholly obtained, or satisfies a process or change in tariff classification requirement as set out in the PSR Annex, accessories and other materials normally presented with the goods are disregarded; or
- Meets a regional value content requirement, the value of the accessories and other materials are to be taken into account as originating or non-originating materials, as the case may be, in calculating the regional value content of the good.

Article 3.14 requires that a Party must treat packaging materials and containers for retail sale, if classified with the good, in the following ways:

- If a good is subject to a change in tariff classification requirement set out in the PSR Annex, then they must be disregarded in determining whether all the non-originating materials used in the production of the good have satisfied the applicable process or change in the tariff classification requirement;
- If determining whether the good is wholly obtained or produced, then they must also be disregarded; or
- If a good is subject to a regional value content requirement, then they must be taken into account as originating or non-originating, as the case may be, in calculating the regional value content of the good.

The situation is different for packing materials and containers for shipment. These must be disregarded in determining whether a good is originating (Article 3.15).

Each Party is required to provide that an indirect material is considered to be originating without regard to where it is produced (Article 3.16).

Article 3.17 sets out what is to happen if goods are classified as a set because of rule 3(c) of the General Rules of Interpretation of the Harmonised System. In such a case, a Party must provide that the set is originating only if each good in the set is originating and both the set and the goods meet the other applicable requirements of the Chapter. The set is also originating if the value of all the non-originating goods in the set does not exceed 10 percent of the set's value.

Under Article 3.18 a good must either be transported directly from the exporting Party, or through another TPP Party, to the importing Party, or if the good has been transported through the territory of a non-Party, it does not undergo further processing and has remained under customs control.

5.3.2 Section B: Origin procedures

Section B of the Chapter sets out certain procedures which each Party must apply. These are summarised below.

Each Party must allow an importer to make a claim for preferential tariff treatment based on a 'certification of origin' which may be completed by the exporter, producer or importer (Article 3.20). There are rules that set out the information on which certification may be based, which depend on

whether the certification is completed by the exporter, producer or importer (Article 3.21). Also, Annex B sets out certain elements that must be included in a certification of origin.

An exception is provided in Annex A (Other Arrangements) to allow a Party to continue to issue certificates of origin for their exporters for a limited period. Article 3.20 imposes obligations on Parties that ensure flexibility for how certification of origin is provided. For example, a certification of origin need not follow a prescribed format.

Each Party must allow an importer to submit a certification of origin in English. If it is not in English, the importing Party may require the importer to submit a translation in the language of the importing Party (Article 3.20).

The overall effect of the rules in Article 3.20 is that there is no requirement for certificates of origin, or third-party certification of origin. Instead, exporters simply need to self-certify or self-declare that the exported product meets the TPP rules of origin in order to qualify for tariff preference. A Party is not permitted to reject a certification of origin due to minor errors or discrepancies in the certification (Article 3.22).

In certain situations, a Party is not permitted to require certification of origin. These are when:

- The customs value of the imported goods does not exceed NZ\$US1,000 or the equivalent amount in the importing Party's currency, or any higher amount established by the importing Party; or
- It is a good for which the importing Party has waived the requirement or does not require the importer to present a certification of origin.

This is provided that the importation does not form part of a series of importations carried out or planned for the purpose of evading compliance with the importing Party's laws governing claims for preferential tariff treatment under the Agreement.

Article 3.24 sets out things that each Party has to provide for the importer to do when claiming preferential treatment. These include making a declaration that the good qualifies as an originating good, having a valid certification of origin in its possession when it makes the declaration, and providing a copy of the certification to the importing Party if required by that Party.

Each Party must provide that the importer has to correct the importation documentation if they have reason to believe that the certification is based on incorrect information that could affect its accuracy or validity. There must also be provision for the importer to pay any customs duty and, if applicable, penalties owed.

Article 3.25 imposes an obligation on each Party to provide that an exporter or producer in its territory that completes a certification of origin must:

- Submit a copy of that certification of origin to the exporting Party, on its request; and

- If they have reason to believe that the certification contains or is based on incorrect information, promptly notify in writing, every person and every Party to whom they provided the certification of any change that could affect its accuracy or validity.

Each Party is required to ensure that an importer claiming preferential treatment for a good, and an exporter or producer in its territory who provides a certification of origin, maintains records as set out in Article 3.26. These must be maintained for a period of no less than five years from the date of importation of the good or the date that the certification was issued.

The Chapter gives Parties flexibility in how they choose to verify any claims for preferential treatment. However, it imposes a number of process obligations on an importing Party that conducts a verification, whether this is done through a request for information or an actual verification visit to the premises of the exporter or producer of the good (Article 3.27).

Unless it denies a claim for one of the reasons set out in Article 3.27.2, a Party must grant a claim for preferential tariff treatment made in accordance with the Chapter for a good that arrives in its territory on or after the date of entry into force of the Agreement for that Party.

An importer does not have to miss out on preferential tariff treatment because they did not make a claim for such treatment at the time of importation. Article 3.29 requires each Party to allow an importer in such a situation to apply for preferential tariff treatment and a refund of any excess duties paid. This is provided that the good would have qualified for preferential tariff treatment at the time when it was imported into the territory of the Party, and may also be subject to the importer taking certain steps no later than one year after the date of importation (or other time period specified in the importing Party's domestic law).

Under Article 3.31, each Party must maintain the confidentiality of the information collected in accordance with the Chapter and must protect that information from disclosure that could prejudice the competitive position of the person providing the information.

5.4 Textile and Apparel Goods

Unless specified otherwise, the rules of the Rules of Origin Chapter (Chapter 3) also apply to textile and apparel goods. The Product Specific Rules of Origin for textile and apparel goods are located in Annex 4-A (Textile and Apparel Goods Product-Specific Rules of Origin).

Under Articles 4.2 and 4.3, each Party is required to allow a small tolerance for a good (10 percent of the weight of the good) even if it does not meet the applicable change in tariff classification requirement provided the good meets all the other applicable requirements of the Chapter.

This tolerance is not extended to elastomeric yarns (Article 4.4) or to sewing threads or elastic narrow bands (refer Rules to Chapter 61-63 in Annex 4-A PSR Textiles). These goods must be produced from materials produced within the TPP.

In addition to the general safeguard provisions in Article XIX of the GATT 1994, the *WTO Agreement on Safeguards* and the Trade Remedies Chapter of the Agreement, a Party may take safeguard action under the Textiles Chapter provided that it has published its criteria beforehand. This is an alternative provision and Parties can elect to use the general safeguard provisions if they want to (Article 4.3).

Article 4.7 provides for a Short Supply List to mitigate the impact of restrictive rules of origin. Each Party is required to treat materials on this list as originating, provided the material meets any requirement, including any end use requirement specified in the Short Supply List (Appendix 1 to Annex 4-A).

The Chapter also provides obligations for each Party to cooperate with each other for the purposes of enforcing their respective customs laws and ensuring the accuracy of claims for preferential treatment (Article 4.4).

An importing Party may conduct a verification with respect to a textile or apparel good to verify whether a good qualifies for preferential tariff treatment, through requests for information or through a request for a site visit as described in Article 4.6.

If a Party receives information that is confidential information, it shall maintain the confidentiality of that information (Article 4.9).

5.5 Customs Administration and Trade Facilitation

This Chapter includes a range of obligations in respect of customs administration and trade facilitation, including customs co-operation. These commitments fall within current policy settings and include:

- Ensuring customs procedures and practices are predictable, consistent, and transparent (e.g. providing customs valuations, using internationally accepted tariff classifications, and providing advanced rulings) to ensure efficient administration and the expeditious clearance of goods (Articles 5.1, 5.3, 5.6, 5.7 and 5.10).
- Encouraging the use of international best practice on customs and facilitating the use of automated systems, express consignments and providing for the electronic submission of import requirements in advance of the arrival of the goods, to expedite the procedures for the release of goods (Articles 5.6 and 5.9). In the normal course of events, customs administrations are required to release originating products within 48 hours of arrival (Article 5.10) and in the case of express consignments within six hours of arrival (Article 5.7).
- Encouraging cooperation between customs agencies of the Parties and provide contact points and consultations to discuss any issues which might arise (Article 5.2).
- Providing advice or information on customs related requirements for the importation of goods under the Agreement (Article 5.4).

- Adopting or maintaining penalties for violations of our customs laws, regulations and procedural requirements and ensuring that those procedures avoid conflicts of interest in the assessment and collection of penalties and duties (Article 5.8).

In addition, all TPP Parties have committed to provide written advance rulings on the valuation of a good for customs valuation purposes on receipt of a written application from an importer, or an exporter or producer within the TPP region and before importation of the good (Article 5.3).

5.6 Trade Remedies

Legal obligations in the Trade Remedies Chapter are noted below. These obligations would not apply as between New Zealand and Australia.

Global safeguards

A Party that initiates a safeguard investigatory process under Article XIX of GATT 1994 and the WTO *Safeguards Agreement* must provide the other TPP Parties with an electronic copy of the notification given to the WTO Committee on Safeguards under Article 6.12.1(a).

A Party may not impose any measure under the Trade Remedies Chapter with respect to a product imported under a tariff rate quote established by a Party under TPP. If a Party takes a safeguard measure under Article XIX of GATT 1994 and the *Safeguards Agreement*, it may exclude imports of originating goods under a tariff rate quota established by the Party under TPP if the imports are not a cause of serious injury or threat of serious injury.

Parties may not apply, in respect of the same good and at the same time, two or more of the following:

- A transitional safeguard measure under the Trade Remedies Chapter;
- A safeguard measure under Article XIX of the GATT 1994 and the *Safeguards Agreement*;
- A safeguard measure set out in Appendix B to its Schedule to Annex 2-D; or
- An emergency action under Chapter 4 (Textile and Apparel Goods).

A Party may impose transitional safeguard measures in certain circumstances, so long as these are according to the procedures set out in Article 6.3.

5.7 Sanitary and Phytosanitary Measures

The SPS Chapter preserves and builds on New Zealand's existing rights and obligations under the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) (Article 7.4).

Regional conditions

Article 7.7 sets out understandings and obligations in respect of adaptation to regional conditions (including pest- or disease-free areas and areas of low pest or disease prevalence).

An importing Party must, in addition to recognising the equivalence of an individual measure, to the extent feasible and appropriate, recognise the equivalent of an exporting Party's group of measures

or its measures on a systems-wide basis. Equivalence must be recognised if the exporting Party objectively demonstrates that its measure achieves the same level of protection as the importing Party's measure, or has the same effect in achieving the objective as the importing Party's measure.

When an exporting Party makes a request to an importing Party for a determination of regional conditions, the importing Party must start the relevant assessment within a reasonable period of time, so long as it determines that the information provided by the exporting Party is sufficient.

When an importing Party undertakes a determination of regional conditions, it must promptly, on request of the exporting Party, explain its process for making the determination. It must also provide, on request, the status of the assessment. If the outcome of the determination is positive (i.e. regional conditions are recognised) and the importing Party adopts a measure recognising this, it must communicate that measure to the exporting Party and implement the measure within a reasonable period of time. In a case where there is a determination not to recognise regional conditions, the importing Party must provide the exporting Party with the rationale for its determination.

If the pest or disease status changes, an importing Party may modify or revoke a positive determination of regional conditions. In such a case, if the exporting Party requests it, the Parties involved must cooperate to assess whether the positive determination can be reinstated.

The importing Party must take into account in its determination the relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations, as well as the relevant knowledge, information and experience, and the regulatory competence, of the exporting Party.

Equivalence

Article 7.8 sets out obligations with respect to the concept of equivalence. A Party must apply equivalence to a group of measures or on a systems-wide basis, to the extent feasible and appropriate. In determining the equivalence of a specific sanitary or phytosanitary measure, group of measures or on a systems-wide basis, each Party is required to take into account the relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

As with regional conditions, when an exporting Party makes a request to an importing Party for an assessment of equivalence, the importing Party must start the relevant assessment within a reasonable period of time, so long as it determines that the information provided by the exporting Party is sufficient.

When an importing Party undertakes an assessment of equivalence, it must promptly, on request of the exporting Party, explain its process for making the determination and its plan for enabling trade. If the outcome of the assessment is positive (i.e. equivalence is recognised) and the importing Party adopts a measure that recognises the equivalence, then it must communicate that measure to the exporting Party and implement the measure within a reasonable period of time. In a case where equivalence is not recognised, the importing Party must provide the exporting Party with the rationale

for its assessment and must also, on request of the exporting Party, explain the objective and rationale of its measure and clearly identify the risks that the measure is intended to address.

The importing Party must take into account in its assessment the relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

Science and risk analysis

Under paragraph 1 of Article 7.9, each Party is required to ensure that its sanitary and phytosanitary measures either conform to relevant international standards, guidelines or recommendations or, if they do not so conform, that they are based on documented and objective scientific evidence that is rationally related to the measures, while recognising the Parties' obligations regarding assessment of risk under Article 5 of the *SPS Agreement*. The obligation in paragraph 1 is not subject to dispute settlement.

Article 7.9 also requires each Party to ensure that its sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Parties where identical or similar conditions prevail (including between its own territory and that of other Parties). Each Party must conduct its risk analysis in a manner that is documented and that provides interested persons and other Parties an opportunity to comment.

Each Party must ensure that any risk assessment it conducts is appropriate to the circumstances of the risk at issue, and takes into account reasonably available and relevant scientific data.

If a risk assessment is required to authorise importation of a good, and the exporting Party so requests, the importing Party must provide an explanation of the information required for the risk assessment. Once the importing Party has received the information it requires, it must endeavour to facilitate the authorisation in accordance with its relevant procedures, policies, resources, laws and regulations.

The Article sets out certain requirements that each Party must adhere to when conducting a risk analysis, which include requirements to:

- Take into account relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.
- Consider risk management options that are not more trade restrictive than required to achieve the level of protection that the Party has determined to be appropriate.
- Select a risk management option that is not more trade restrictive than required to achieve the sanitary or phytosanitary objective, taking into account technical and economic feasibility.
- Conduct the analysis in a manner that that is documented and that provides interested persons and other Parties with an opportunity to comment.
- Implement any measure adopted as a result of the risk analysis that allows trade to commence or resume within a reasonable period of time.

- On request of the exporting Party, provide information on the progress of a specific risk analysis request, and of any delay that may occur during the process.

Audits

Article 7.10 provides that any audit must be systems-based and designed to check the effectiveness of the regulatory controls of the exporting Party's competent authorities. When an importing Party undertakes an audit, it must take into account relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

Prior to commencing an audit, there is a requirement for the importing and exporting Party to discuss the rationale and decide on the objectives and scope of the audit, the criteria or requirements against which the exporting Party will be assessed, and the itinerary and procedures for conducting the audit.

There are also various process requirements that an importing Party must follow when conducting an audit, including to give the audited Party an opportunity to comment on the findings of the audit and take any comments into account, and to ensure that any decisions or actions taken as a result of the audit are supported by objective and verifiable evidence and data. Both Parties must ensure that procedures are in place to prevent the disclosure of confidential information acquired during the auditing process.

Import checks

Article 7.11 requires each Party to ensure that its import programmes are based on the risks associated with importations, and that its import checks are carried out without undue delay. It also imposes further obligations, including to:

- Make available to another Party, on request, information regarding its import procedures and its basis for determining the nature and frequency of import checks, as well as the analytical methods, quality controls, sampling procedures and facilities that it uses to test a good.
- Ensure that any testing is conducted using appropriate and validated methods in a facility that operates under a quality assurance programme that is consistent with international laboratory standards.
- Maintain physical or electronic documentation regarding the identification, collection, sampling, transportation and storage of the test sample, and the analytical methods used on the test sample.
- Ensure that its final decision in response to a finding of non-conformity with the importing Party's sanitary or phytosanitary measure is limited to what is reasonable and necessary, and is rationally related to the available science.

If an importing Party prohibits or restricts the importation of a good of another Party on the basis of an adverse result of an import check, then it must provide a notification (that meets the requirements set out in the Article) about the adverse result to at least one of the importer or its agent, the exporter, the manufacturer or the exporting Party. In this situation, an importing Party must also provide an opportunity for review of the decision and consider any relevant information submitted to assist in

the review. An importing Party must provide available information on goods of an exporting Party that were found not to conform to an importing Party's SPS measure, if the exporting Party so requests.

The importing Party must notify the exporting Party if it determines that there is a significant, sustained or recurring pattern of non-conformity with a sanitary or phytosanitary measure.

Certification

Article 7.12 sets out requirements that an importing Party must meet if it requires certification for trade in a good, including that the Party must: ensure that the requirement is applied only to the extent necessary to protect human, animal or plant life or health; take into account relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations; and limit attestations and information it requires on certificates to essential information that is related to its sanitary or phytosanitary objectives.

Parties must promote the implementation of electronic certification and other technologies to facilitate trade.

Transparency

The SPS Chapter sets out transparency requirements that apply in addition to the general transparency obligations in the Transparency and Anti-corruption Chapter. Key obligations in this regard include that each Party must notify any proposed sanitary or phytosanitary measure that may have an effect on the trade of another Party. This includes any measure that conforms to international standards, guidelines or recommendations. Notification is to be achieved by using the WTO SPS notification submission system and must comply with the requirements in Article 7.13. Proposed measures must also be made available to the public by electronic means, along with the legal basis for the measure, and the written comments (or a summary of those comments) that have been received from the public on the measure. Except in cases of urgency, notification is to be followed by a period for interested persons and other Parties to provide written comments on the proposed measure.

A Party is required to discuss with another Party, on request and if appropriate and feasible, any scientific or trade concerns that the other Party may have regarding a proposed measure, and the availability of alternative, less trade-restrictive approaches for achieving the objective of the measure.

In implementing its transparency obligations, each Party must take into account the relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

If a Party proposes an SPS measure that does not conform to an international standard, guideline or recommendation, it must provide, on request by another Party, and to the extent permitted by confidentiality and privacy requirements of its law, the relevant documentation that it considered in developing the proposed measure.

Article 7.13 also sets out obligations for notification of final sanitary or phytosanitary measures, including that such measures must be notified to other Parties through the WTO SPS notification

submission system, and published, preferably electronically, in an official journal or website. The text or notice of the final measure must specify the legal basis for the measure and the date on which it takes effect. If a final measure is substantively altered from the proposed measure, a Party must include in the published notice an explanation of the objective and rationale of the measure and how the measure advances that objective and rationale, as well as any substantive revisions that it made to the proposed measure. Further, if requested by another Party, and to the extent permitted by confidentiality and privacy requirements, a Party must make available any significant written comments and relevant documentation received during the comment period that was considered to support the measure.

Each Party has an obligation to provide to another Party, on request, all SPS measures related to the importation of a good into that Party's territory.

There is a requirement in paragraph 11 for an exporting Party to notify an importing Party in a timely and appropriate manner of the following:

- If it has knowledge of a significant sanitary or phytosanitary risk related to the export of a good from its territory;
- Urgent situations where a change in animal or plant health status in the territory of the exporting Party may affect current trade;
- Significant changes in the status of a regionalised pest or disease;
- New scientific findings of importance that affect the regulatory response with respect to food safety, pests or diseases; and
- Significant changes in food safety, pest or disease management, control or eradication policies or practices that may affect current trade.

Emergency measures

Under Article 7.14, a Party that adopts an emergency measure must promptly notify the other Parties of that measure, and must take into consideration any information provided by other Parties in response to the notification. The Party adopting the measure must review the scientific basis of the measure within six months and make the results of the review available to any Party on request. If the measure is maintained after the review the Party should review it periodically.

Committee

The Chapter establishes an SPS Committee which, in addition to discretionary functions, has mandatory functions that include to provide a forum to enhance mutual understanding of each Party's sanitary and phytosanitary measures and the regulatory processes that relate to those measures; and exchange information on the implementation of the Chapter (Article 7.5).

Cooperation and information exchange

The Parties are required to explore opportunities for further cooperation, collaboration and information exchange between them on sanitary and phytosanitary matters of mutual interest, as well as to cooperate on SPS matters with the goal of eliminating unnecessary obstacles to trade between

them (Article 7.15). Article 7.16 notes that a Party may request information from another Party on a matter arising under the Chapter, and obliges a Party that receives such a request to endeavour to provide available information to the requesting Party within a reasonable period of time, and if possible, by electronic means.

Cooperative technical consultations and dispute settlement

The Chapter sets out a mechanism for Cooperative Technical Consultations (CT Consultations). Use of this mechanism is a prerequisite for having recourse to dispute settlement under Chapter 28 (Dispute Settlement). A Party that has concerns regarding any matter arising under the SPS Chapter with another Party may use the CT Consultations mechanism in situations where it considers that the matter may adversely affect its trade and would not be resolved if they continued to use the other Party's administrative procedures, or bilateral or other mechanisms. If the conditions set out in Article 7.17 are met, the Party that requested CT Consultations may stop those consultations and use the procedures set out in the Dispute Settlement Chapter in order to resolve the matter.

5.8 Technical Barriers to Trade

The TBT Chapter builds on New Zealand's existing rights and obligations under the WTO *Agreement on Technical Barriers to Trade* (TBT Agreement) (Article 8.2).

Certain key provisions of the TBT Agreement are incorporated into the Agreement, which means that those provisions may be relied on for the purposes of dispute settlement (Article 8.3).

International Standards, Guides and Recommendations: When a Party determines whether an international standard, guide or recommendation exists (within the meaning of Articles 2 and 5, and Annex 3 of the TBT Agreement), that Party must apply the *Decision of the TBT Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the [TBT] Agreement* (Article 8.4).

Conformity Assessment: Each Party is required to treat conformity assessment bodies located in the territory of another Party on a non-discriminatory basis. That is, the Party must accord the body with treatment no less favourable than it accords to conformity assessment bodies located in its own territory or in the territory of any other Party (Article 8.5.1).

Each Party must publish any procedures, criteria and other conditions that it uses as the basis for determining whether conformity assessment bodies are competent (Article 8.5.11).

If a Party accredits, approves, licenses or otherwise recognises bodies that assess conformity to a technical regulation or standard in its territory, and then it refuses to accredit, license, or otherwise regulate such a body in another Party's territory (or declines to use a mutual recognition arrangement), then it must, on request, explain the reasons for its refusal (Article 8.5.12).

If a Party does not accept the results of a conformity assessment procedure that has been conducted in another Party's territory, then it must, on request, explain the reasons for its decision (Article 8.5.13).

A Party must also explain the reasons for a decision to decline to enter into negotiations for an agreement for mutual recognition of conformity assessment procedures, or for declining to use an existing mutual recognition arrangement (Article 8.5.14).

The chapter contains other requirements relating to conformity assessment, including that:

- A Party must consider adopting measures to approve conformity assessment bodies that are accredited by a body that is a signatory to an international or regional mutual recognition arrangement (Article 8.5.8).
- A Party must not refuse to accept result from a conformity assessment body because they are accredited by a body that is non-governmental, a non-for profit, does not operate an office in the Party's territory, is domiciled in the territory of a Party that does not maintain a procedure for recognising accreditation bodies, or because it operates in the territory of a Party where there is more than one accreditation body (Article 8.5.9).

Transparency: The TBT Chapter contains some provisions that would go beyond New Zealand's WTO obligations, such as broadening the scope of proposed TBT measures that are notified to the WTO; placing proposals for, and final versions of, TBT measures on a single website; and making publicly available certain regulatory decision-making information (Article 8.6). To avoid duplication, Parties may use the existing WTO TBT Information Management System to comply with this obligation rather than being required to create a dedicated website.

Each Party must allow a person of another Party to participate in the development of technical regulations, standards and conformity assessment procedures by central government bodies, on terms no less favourable than those that it accords to its own persons, and encourage non-governmental bodies to do the same.

Parties are required to publish the following documents (for example, on the WTO website) from central government bodies, and take reasonable measures available to it to ensure that local government publishes:

- All proposals for new technical regulations and conformity assessment procedures.
- Proposals for amendments to existing technical regulations and conformity assessment procedures.
- All final technical regulations and conformity assessment procedures.
- Final amendments to existing technical regulations and conformity assessment procedures.

Each Party must ensure that all local government final technical regulations and conformity assessment procedures as well as final amendments to existing technical regulations and conformity

assessment procedures, and to the extent practicable, proposals for the same, are accessible through official websites or journals, preferably consolidated into a single website.

Parties are also required to notify WTO Members of central government proposals for new technical regulations and conformity assessment procedures that may have a significant effect on trade through the procedures established in Articles 2.9 or 5.6 of the TBT Agreement. Parties must also endeavour to notify local government proposals. In determining whether there may be a “significant effect on trade”, a Party must consider, among other things, the relevant *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995* (G/TBT/1).

Notifications of proposed technical regulations or conformity assessment procedures published or filed in accordance with the TBT Chapter or the TBT Agreement must include an explanation of the objectives of the proposal, and be transmitted electronically to other Parties through their enquiry points established under the TBT Agreement. A Party must normally allow 60 days from the date of notification for written comments from another Party or interested persons from those Parties, and consider any reasonable requests for extending this comment period.

Each Party must endeavour to notify WTO Members of the final text of a technical regulation or conformity assessment procedure at the time the text is adopted or published, as an addendum to the original notification of the proposed measure.

A Party must, no later than the date of publication of a final technical regulation or conformity assessment procedure that may have a significant effect on trade, make publically available certain information, including:

- An explanation of the objectives and how the final technical regulation or conformity assessment procedure achieves them.
- The Party’s responses to significant or substantive issues presented in comments received on the proposal for the technical regulation or conformity assessment procedure.

The following information must be made available if requested by another Party:

- A description of alternative approaches that the Party considered in developing the final technical regulation or conformity assessment procedure, if any, and the merits of the approach that the Party selected.
- A description of significant revisions, if any, that the Party made to the proposal for the technical regulation or conformity assessment procedure, including those made in response to comments.

A Party must make its central government standardising body’s work programme, containing the standards it is currently preparing and the standards it has adopted, available through the central government standardising body’s website.

Parties must endeavour to provide an interval of more than six months between the publication of final technical regulations and conformity assessment procedures and their entry into force, and

provide suppliers with a reasonable period of time in the circumstances to demonstrate that their goods conform with the relevant requirements of the technical regulation or standard, endeavouring to take into account the resources available to suppliers.

Co-operation, trade facilitation, information exchange and technical discussions

The chapter includes a number of provisions relating to cooperation, trade facilitation and information exchange, including:

- The Parties shall strengthen their exchange and collaboration on mechanisms to facilitate the acceptance of conformity assessment results, to support greater regulatory alignment and to eliminate unnecessary technical barriers to trade in the region (Article 8.4).
- A Party shall, upon the request of another Party, explain the reasons why it has not accepted a technical regulation of that Party as equivalent (Article 8.6).
- A Party shall, on request of another Party, give due consideration to any sector specific proposal for cooperation under the chapter.
- The Parties shall encourage cooperation between their respective organisations responsible for standardisation, conformity assessment, accreditation and metrology, whether they be public or private, with a view to addressing issues covered by the chapter (Article 8.7).
- A Party receiving a request to provide information on any matter that arising under the chapter shall provide that information within a reasonable period of time, and where if possible, by electronic means (Article 9).
- A Party may request technical discussions with another Party to resolve any matter that arises under the TBT Chapter. The matter must be discussed within 60 days of the request, and Parties must endeavour to resolve the matter as expeditiously as possible. Unless agreed otherwise, the discussions and information exchanged are to be confidential and without prejudice to the rights and obligations of the Parties under TPP, the WTO Agreement, or any other agreement to which both Parties are a party.

Committee on Technical Barriers to Trade: A Committee on Technical Barriers to Trade shall be established to promote and monitor the implementation and administration of the Chapter (Article 10). Through the Committee, the Parties shall strengthen their joint work in the fields of technical regulations, conformity assessment procedures and standards with a view to facilitating trade among the Parties. Parties must designate and notify a contact point for TBT matters, and promptly notify other Parties of any change of its contact point or relevant officials. Contact points have responsibilities including communicating with other Parties' contact points, facilitating discussions, request and information exchange, and coordinating the involvement of government agencies on relevant matters pertaining to the TBT Chapter.

5.8.1 Sectoral Annexes

A feature of the TBT Chapter that differs from our previous approach to TBT chapters is the inclusion of seven sectoral annexes to the Chapter: Cosmetics, Information and Communications Technology Products, Medical Devices, Organic Products, Pharmaceutical Products, Proprietary Formulas for

Certain Food Products and Additives and Wine and Distilled Spirits. Each annex includes sector-specific obligations aimed at reducing unnecessary barriers to trade in these products.

Wine and Distilled Spirits Annex

The Wine and Distilled Spirits Annex includes a production standard for “ice wine” which limits this designation to wine made from grapes naturally frozen on the vine, as opposed to wine made from grapes frozen using modern technology. For New Zealand, this will be an export-only production standard, so domestic sales of ice wine will not be affected. New Zealand is already bound by this standard when exporting to other WWTG member countries but Wine and Distilled Spirits Annex will extend the standard to all exports.

Under this Annex, Parties are required to make publicly available information about their law and regulations concerning wine and distilled spirits. Mutual recognition of oenological practices is encouraged, and Parties must endeavour to assess other Parties’ laws, regulations and requirements in respect of oenological practices, with the aim of reaching agreements that provide for the Parties acceptance of each other’s mechanisms for regulating oenological practices, if appropriate.

This Annex contains various requirements relating to labelling, which include requirements for Parties to permit suppliers of wine or distilled spirits to:

- Indicate any required information on distilled spirits, or information on wine other than product name, country of origin, net contents and alcohol contents, on a supplementary label that is affixed to the distilled spirits or wine container, and affix the label after importation but prior to offering the product for sale.
- Use “wine” as a product name.
- Indicate the alcoholic content by volume on a wine or distilled spirits label by alc/vol and in percentage terms.
- Place a lot identification code on wine and distilled spirits containers, if the code is clear, specific, truthful, accurate and not misleading.

Parties must not require suppliers to indicate the date of production, manufacture, expiration, minimum durability or the sell by date on wine or distilled spirits containers, labels or packaging, unless, due to their packaging or the addition of perishable ingredients, the products could have a shorter date of minimum durability than would normally be expected by the consumer. Further, Parties must not require a supplier to place a translation of a trade mark or trade name on wine or distilled spirits containers, labels or packaging, or disclose an oenological (wine-making) practice on a wine label except to meet a legitimate human health or safety objective.

Unless a Party has entered into a pre-2003 agreement with another country or group of countries that requires that Party to restrict the use of such terms on labels of wine sold in its territory, a Party must not prevent imports of wine from other Parties only on the basis that the wine label includes certain descriptors or adjectives describing the wine or relating to wine-making, such as chateau, classic, clos, cream, ruby, special reserve, solera, or superior.

A Party must endeavour to base quality and identity requirements for any specific type, category, class, or classification of distilled spirits solely on minimum ethyl alcohol content and raw materials, added ingredients, and production procedures used to produce the distilled spirits.

Imported wine or distilled spirits must not be required by Parties to be certified by an official certification body regarding vintage, varietal, and regional claims (for wine or raw materials), and production processes (for distilled spirits), except for if a Party has a reasonable and legitimate concern about these characteristics and certification is necessary to verify claims such as age, origin or standards of identity.

Regarding certification, a Party must consider the Codex Alimentarius Guidelines for Design, Production, Issuance and Use of Generic Official Certificates (CAC/GL 38-2001) if it deems that certification of wine is necessary to protect human health and safety or to achieve other legitimate objectives. A Party must normally permit a wine or distilled spirits supplier to submit any required certification, test result or sample only with the initial shipment of the product. However, if a Party requires a supplier to submit a sample of the product in order to assess conformity with a technical regulation or standard, it must not require a sample quantity larger than is necessary to complete the relevant conformity assessment procedure.

A Party must not apply any final technical regulation, standard or conformity assessment procedure to wine or distilled spirits that have already been placed on the market when the measure enters into force (if the products are sold within their stipulated time period), unless problems of health and safety arise or threaten to arise.

Information and Communications Technology Products Annex

This annex applies to information and communication technology (ICT) products that use cryptography, the electromagnetic compatibility of information technology equipment (ITE) products and telecommunications equipment.

The Annex prohibits Parties from imposing or maintaining a technical regulation or conformity assessment procedures relating to products that use cryptography and are designed for commercial applications, which require a manufacturer or supplier of the product, as a condition of the manufacture, sale, distribution, import or use of the product, to:

- Transfer or provide access to a particular technology, production process, or other information that is proprietary to the manufacturer or supplier and relates to the cryptography in the product, to the Party or a person in the Party's territory;
- Partner with a person in its territory; or
- Use or integrate a particular cryptographic algorithm or cipher,
- Other than where the manufacture, sale, distribution, import or use of the product is by or for the government of the Party.

This prohibition also does not apply to requirements that a Party adopts or maintains relating to access to networks that are owned or controlled by the government, including those of central banks; or measures taken by a Party pursuant to supervisory, investigatory or examination authority relating to financial institutions or markets.

Pharmaceuticals, Cosmetics and Medical Devices Annexes

The Pharmaceuticals, Cosmetics and Medical Devices Annexes apply to the preparation, adoption and application of technical regulations, standards, conformity assessment procedures, marketing authorisation, and notification procedures of central government bodies that may affect trade in those products between the Parties.

Each Party is required to define the scope of the products subject to its laws and regulations for pharmaceutical and cosmetic products and medical devices, identify the agencies authorised to regulate those products in its territory, and make that information publicly available.

If more than one agency is authorised to regulate pharmaceutical products, cosmetic products or medical devices (respectively) within the territory of a Party, that Party shall examine whether there is overlap or duplication in the scope of those authorities and take reasonable measures to eliminate unnecessary duplication of any resulting regulatory requirements.

The annexes encourage collaborative efforts, through requirements that:

- Parties must endeavour to collaborate through relevant international and regional initiatives to improve the alignment of their respective regulations and regulatory activities for pharmaceutical and cosmetic products and medical devices.
- When developing or implementing regulations for cosmetic products or for the marketing authorisation of pharmaceutical products or medical devices, Parties must consider relevant scientific or technical guidance documents developed through international collaborative efforts.
- Parties must endeavour to apply scientific guidance documents that are developed through international collaborative efforts with respect to inspection of pharmaceuticals.
- Parties must endeavour to share, subject to their laws and regulations, information from post-market surveillance of cosmetic products, and on their findings regarding cosmetic ingredients.

Parties must comply with the obligations set out in Articles 2.1 and 5.1.1 of the TBT Agreement with respect to any marketing authorization or notification procedure that they prepare, adopt or apply for cosmetic products, pharmaceutical products and medical devices that do not fall within the definition of a technical regulation or conformity assessment procedure.

When developing regulatory requirements for pharmaceutical and cosmetic products and medical devices, a Party is required to consider its available resources and technical capacity in order to minimise the implementation of requirements that could inhibit the effectiveness of the procedure

for ensuring the safety, efficacy or manufacturing quality of such products; or lead to substantial delays in marketing authorisation for the products.

Parties must adhere to the following procedural rules with respect to the marketing authorisation of pharmaceutical products, medical devices, and cosmetics, and must:

- Provide an applicant who requests a marketing authorisation with its determination within a reasonable period of time.
- In the event that a marketing authorisation application is declined, inform the applicant of the reasons for the decision.
- Ensure that any marketing authorisation determination is subject to an appeal or review process that may be invoked at the request of the applicant.

With respect to the marketing authorization of both pharmaceutical products and medical devices, Parties must:

- Make their determination whether to grant marketing authorisation for a specific product/device on the basis of information on the safety and efficacy and the manufacturing quality of the product/device, labeling information related to the safety, efficacy and use of the product, and any other matters that may directly affect the health or safety of the user of the product/device.
- Not require sale data or related financial data concerning the marketing of the product/device as part of the determination.
- Administer any marketing authorisation process in a timely, reasonable, objective, transparent, and impartial manner, and identify and manage any conflicts of interest in order to mitigate any associated risks.
- In the event that periodic reauthorization for a pharmaceutical product or medical device is required, allow the product or device to remain on its market under the conditions of the previous marketing authorization pending a decision on the periodic reauthorization, except where a Party identifies a significant health or safety concern.
- Not require that a pharmaceutical product or medical device receive marketing authorisation from the country of manufacture as a condition for the product to receive marketing authorisation.

Pharmaceutical Annex-Specific Obligations

With respect to the marketing authorization of pharmaceutical products, Parties must review the safety, efficacy and manufacturing quality information submitted by the person who seeks marketing authorisation in a format that is consistent with the principles found in the *International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use* Common Technical Document.

Each Party shall, with respect to the inspection of a pharmaceutical product within the territory of another Party:

- Notify the other Party prior to conducting an inspection, unless there are reasonable grounds to believe that doing so could prejudice the effectiveness of the inspection.
- If practicable, permit representatives of that Party's competent authority to observe that inspection.
- Notify that Party of its findings as soon as possible following the inspection and, if the findings will be publicly released, no later than a reasonable time before that public release. The inspecting Party is not required to notify the other Party of its findings if it considers that those findings are confidential and should not be disclosed.

Cosmetics Annex obligations

With respect to the marketing authorization of cosmetic products, Parties must:

- Not conduct a separate marketing authorisation process for cosmetic products that differ only with respect to shade extensions or fragrance variants, unless a Party identifies a significant health or safety concern.
- Not require the submission of marketing information, including with respect to prices or cost, as a condition for the product receiving marketing authorisation.
- Not subject a product that has been granted marketing authorisation to periodic re-assessment procedures as a condition of retaining its marketing authorisation.
- Consider replacing any marketing authorisation process with other mechanisms such as voluntary or mandatory notification and post-market surveillance.
- Not require a cosmetic product to be labelled with a marketing authorisation or notification number.
- Not require that a cosmetic product receive marketing authorisation from the country of manufacture as a condition for the product to receive marketing authorisation.
- Not require that a cosmetic product be accompanied by a certificate of free sale as a condition of marketing, distribution or sale in the Party's territory.
- Not require that a cosmetic product be tested on animals to determine the safety of that cosmetic product, unless there is no validated alternative method available to assess safety.
- Permit a manufacturer or supplier to indicate any required information by relabelling the product or by using supplementary labelling of the product in accordance with the Party's domestic requirements after importation but prior to offering the product for sale or supply in the Party's territory.
- Apply a risk-based approach to the regulation of cosmetic products, and take into account that cosmetic products are generally expected to pose less potential risk to human health or safety than medical devices or pharmaceutical products.

If a Party prepares or adopts good manufacturing practice guidelines for cosmetic products, it shall use international standards for cosmetic products, or the relevant parts of them, as a basis for its

guidelines except when these would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.

Each Party shall endeavour to avoid re-testing or re-evaluating cosmetic products that differ only with respect to shade extensions or fragrance variants, unless conducted for health or safety purposes.

Medical Devices Annex-specific obligations

The Medical Devices Annex recognises that different medical devices pose different levels of risk, and requires that each Party classify medical devices based on risk, taking into account scientifically relevant factors. A Party must ensure that, if it regulates a medical device, it regulates the device consistently with the classification the Party has assigned to that device.

With respect to the marketing authorization of medical devices, Parties must permit a manufacturer or supplier to indicate any required information by relabelling the product or by using supplementary labelling of the product in accordance with the Party's domestic requirements after importation but prior to offering the product for sale or supply in the Party's territory.

Proprietary Formulas for Certain Food Products and Additives Annex

When gathering information relating to proprietary formulas in the preparation, adoption and application of technical regulations and standards, a Party is required to:

- Ensure that its information requirements are limited to what is necessary to achieve its legitimate objective.
- Ensure that the confidentiality of information gathered about products is respected in the same way as for domestic products and in a manner that protects legitimate commercial interests.

Organic Products Annex

A Party must enforce any requirement that it develops relating to the production, processing, or labelling of products as organic. New Zealand does not have a domestic organic products regime in place.

5.9 Investment

The obligations in the investment chapter of TPP should be read in the context of the broader Agreement, including the Preamble language noting the Parties' recognition of their inherent right to regulate and their resolve to preserve flexibility to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

The Investment Chapter does not apply to a Party's measures if and to the extent that those measures are covered by Chapter 11 (Financial Services). A Party requiring a service supplier to post a bond or other financial security does not result in the Investment Chapter applying to the supply of that

service. Rather, the Investment Chapter applies to the extent that the bond or financial security qualifies as a “covered investment”.

The Investment Chapter is divided into two sections: Section A sets out obligations that are owed by host governments to investors and investments of the other Parties; while Section B establishes a dispute settlement mechanism that provides investors with the ability to submit to arbitration a claim that a TPP government has violated one or more of the obligations in Section A, an investment agreement or an investment authorisation. The definitions set out in Section A also apply to Section B.

The obligations that the New Zealand Government owes to investors and investments under TPP are of two kinds: those in respect of which Parties may enter reservations; and those that are derived from obligations owed at customary international law and in respect of which Parties may not enter reservations. The key obligations of each type are described below.

Reservable obligations

National Treatment: Article 9.4 provides for non-discriminatory treatment of foreign and domestic investors and investments. It requires that each Party give investors and covered investments treatment no less favourable than the treatment it gives, in like circumstances, to its own investors and investments. Non-discriminatory treatment must be afforded during the establishment, acquisition, expansion, management, conduct, operation and sale phases of an investment.

Most-favoured-nation: Each Party must give investors and investments of other Parties, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments, treatment no less favourable than the treatment it gives, in like circumstances, to investors and investments from any other country (whether or not a Party to the TPP). This means that investors and investments from TPP Parties will receive the benefits of any additional liberalisation that New Zealand might provide to investors and investments from other countries under future agreements. However, the obligation does not encompass international dispute resolution procedures or mechanisms (Article 9.5).

There is a footnote against the term “in like circumstances” in both the National Treatment and Most-favoured-nation obligations of the Investment Chapter. This footnote says that whether treatment is accorded in “like circumstances” under these obligations depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

In addition, the Parties have agreed on a Drafters’ Note regarding interpretation of the term “in like circumstances” which is used in both the National Treatment and Most-favoured-nation obligations. This Drafters’ Note confirms the shared intent of the Parties to ensure that tribunals follow the existing approach set out in it when they determine whether or not investors or investments are in “like circumstances”. The Drafters’ Note confirms that these obligations do not prohibit all measures that result in differential treatment of investors or investments. Instead, they ensure that foreign investors

and their investments are not treated differently on the basis of their nationality. The existing approach is one whereby comparisons are made only with respect to investors or investments on the basis of relevant characteristics. It is a fact-specific inquiry requiring consideration of the totality of the circumstances, which include not only competition in the relevant business or economic sectors, but also such circumstances as the applicable legal and regulatory frameworks and whether the differential treatment is based on legitimate public welfare objectives. The Drafters' Note explains the approach further as follows:

"In considering the phrase "in like circumstances", NAFTA tribunals have held that investors or investments that are "in like circumstances" based on the totality of the circumstances have been discriminated against based on their nationality. See, e.g., *Archer Daniels Midland, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, (21 November 2007), para. 197, (finding a breach of the national treatment obligation after taking into account "all 'circumstances' in which the treatment was accorded . . . in order to identify the appropriate comparator").

NAFTA tribunals have also accepted distinctions in treatment between investors or investments that are plausibly connected to legitimate public welfare objectives, and have given important weight to whether investors or investments are subject to like legal requirements. See, e.g., *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), at paras. 166-167 ("NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in 'like circumstances' under Articles 1102 [National Treatment] or 1103 [Most-Favoured-Nation Treatment].... The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103."); *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Award (15 November 2004), at paras. 111-115 (holding that foreign investor was not "in like circumstances" with domestic investors because the difference in treatment was "plausibly connected with a legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity"); *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), at paras. 78-79 (the tribunal's assessment included whether the difference in treatment had a "reasonable nexus to rational government policies" and was not based on nationality)."

Performance Requirements: This obligation prohibits the Parties from imposing or enforcing a number of "performance requirements" on investors (whether from a TPP Party or not). These prohibited performance requirements are set out in paragraph 1. Several prohibitions relate to the use of local content or technology, as well as certain measures that interfere with privately agreed licensing contracts by requiring that royalty fees be below the contractually agreed level, or that the licensing contract be only of a certain duration.

The Performance Requirements Article also prohibits the Parties from conditioning the receipt of an advantage (such as a tax incentive) on the requirements that are listed in paragraph 2. These prohibited requirements also relate to local content as well as linking values or sales to foreign exchange inflows or earnings. This obligation does not prevent Parties from offering advantages to investors that locate production, supply a service, train or employ workers, construct or expand facilities, or carry out research and development, in the Party's territory.

There are a number of exceptions to the performance requirements obligation which preserve policy flexibility for governments, including for measures necessary to protect health and the environment.

In particular, certain performance requirements are not prohibited if:

- They are consistent with the TRIPS Agreement;
- They are imposed or enforced by a court, tribunal or competition authority to remedy a practice that has been determined anticompetitive;
- They are imposed or enforced by a tribunal as equitable remuneration under copyright laws;
- The Party adopts or maintains measures, including environmental measures, that are:
 - Necessary to secure compliance with laws and regulations that are not inconsistent with the TPP;
 - Necessary to protect human, animal or plant life or health; or
 - Related to the conservation of living or non-living exhaustible natural resources;
- They are qualification requirements for goods and services with respect to export promotion and foreign aid programs;
- They relate to government procurement; or
- They are imposed by an importing Party relating to the content of goods as necessary to qualify for preferential tariffs or preferential quotas (Article 9.9.2).

Senior Management and Boards of Directors: Article 9.10 contains two obligations. First, Parties may not require an enterprise that is a covered investment⁷¹ to appoint natural persons of any particular nationality to senior management positions. Second, while a Party can require that a majority of the board of directors (or any committee of a board) of an enterprise of that Party that is a covered investment, be of a particular nationality or resident in the territory of the Party, it may not do so if this would materially impair the ability of the investor to exercise control over its investment.

Reservations

Article 9.11 (Non-Conforming Measures) allows the Parties to maintain or adopt measures that are inconsistent with the core obligations listed above (i.e. "non-conforming measures"). Each Party has identified these non-conforming measures in individual Schedules that are contained in two Annexes

⁷¹ A "covered investment" is defined as, with respect to a Party, "an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter".

to the Agreement.⁷² Annex I sets out existing legislative measures (“non-conforming measures”) that violate or may violate one or more of the reservable obligations. Annex I has three key features:

- It contains a factual list of current “non-conforming measures”.
- It is subject to a “standstill” provision meaning that the Party cannot adopt a new non-conforming measure that is more restrictive than the one already listed in Annex I.
- It is subject to a “ratchet” clause which means that the Party must automatically extend the benefits of any future liberalisation of these measures to all other TPP Parties, and that liberalisation gets locked-in as the new (more liberal) level of commitment.

Annex II lists reservations for sectors and activities where the Party has reserved the right to maintain existing discriminatory measures or adopt new or more discriminatory measures in the future. In these areas, a Party retains the full right to regulate in a restrictive or discriminatory way and the “ratchet” clause does not apply. That said, no Party may introduce a new measure that is covered by Annex II after the TPP enters into force which requires an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an existing investment.

Finally, Article 9.11 also includes a number of carve-outs to Articles 9.4 (National Treatment), 9.5 (Most-Favoured-Nation Treatment) and 9.10 (Senior Management and Board of Directors) that need not be included in Parties’ Annexes. In particular, these relate to the interaction of the national treatment and most-favoured-nation treatment obligations with intellectual property rights under the TPP Chapter and the TRIPS Agreement. In addition, the national treatment, most-favoured-nation treatment and senior management and board of directors obligations do not apply to government procurement or subsidies or grants provided by a Party.

Annex I and Annex II also apply to the reservable obligations in the Cross-Border Trade in Services Chapter. Some of the exceptions set out in Annex I and Annex II apply to reservable obligations in the Investment Chapter, some apply to reservable obligations in the Cross-Border Trade in Services Chapter and others apply to reservable obligations in both Chapters. We have summarised below all of the non-conforming measures that New Zealand has included in its Annex I and Annex II. The obligations that are reserved against vary for each measure depending on which obligation or obligations the measure would be inconsistent with if it was not listed. To understand which obligations a particular reservation applies to, please refer to the relevant Annex.

Parties may amend or modify their Schedules to Annex I or II as set out in Article 30.2 (Amendments) of Chapter 30 (Final Provisions).

Investment and Cross-Border Trade in Services reservations – Annex I

The reservations set out in New Zealand’s Annex I relate to:

⁷² Note that these Annexes (Annex I and II) apply to both the Investment Chapter and the Cross Border Trade in Services Chapter.

- Requirements under New Zealand's financial reporting regime for certain overseas non-issuer companies to file audited financial statements with the Registrar of Companies.
- Restrictions on the registration of patent attorneys as set out in the Patents Act 1953.
- Provisions in the Dairy Industry Restructuring Act 2001 relating to management of a national database for herd testing data.
- Requirements in the Constitution of Chorus Limited for government approval for the shareholding of any single overseas entity to exceed 49.9 percent and that at least half of Board directors be New Zealand citizens.
- The provision under the Radiocommunications Act 1989 that requires written approval of the Chief Executive of the Ministry of Business, Innovation and Employment for the acquisition by foreign governments or their agents of licences or management rights to use the radio frequency spectrum, or any interest in it.
- Provisions in the Primary Products Marketing Act 1953 that give the Government the ability to impose regulations enabling the establishment of statutory marketing authorities with monopoly marketing and acquisition powers for products derived from beekeeping; fruit growing; hop growing; deer farming or game deer; or goats. Such regulations may, among other things, require that board members or personnel be nationals of or resident in New Zealand.
- The requirement that only a licensed air transport enterprise may provide international scheduled air services as a New Zealand international airline. Licenses are subject to conditions to ensure compliance with New Zealand's air services agreements and may include requirements that an airline is substantially owned and effectively controlled by New Zealand nationals, has its principal place of business in New Zealand and/or is subject to the effective regulatory control of the New Zealand Civil Aviation Authority.
- The restriction that no one foreign national may hold more than 10 percent of shares that confer voting rights in Air New Zealand unless they have the permission of the Kiwi Shareholder.⁷³ In addition, at least three members of the Board of Directors must be ordinarily resident in New Zealand, and more than half of the Board of Directors must be New Zealand citizens.
- The fact that certain foreign investment activities are subject to New Zealand's overseas investment regime as set out in relevant provisions of the Overseas Investment Act 2005, the Fisheries Act 1996 and the Overseas Investment Regulations 2005. These activities are:
 - Acquisition or control by non-government sources of 25 percent or more of any class of shares or voting power in a New Zealand entity where either the consideration for the transfer or the value of the assets exceeds NZ\$200 million.
 - Commencement of business operations or acquisition of an existing business by non-government sources, including business assets, in New Zealand, where the total

⁷³ The Kiwi Share in Air New Zealand is a single NZ\$1 special rights convertible preference share issued to the Crown. The Kiwi Shareholder is Her Majesty the Queen in Right of New Zealand.

expenditure to be incurred in setting up or acquiring that business or those assets exceeds NZ\$200 million.

- Acquisition or control by government sources of 25 percent or more of any class of shares or voting power in a New Zealand entity where either the consideration for the transfer or the value of the assets exceeds NZ\$100 million.
- Commencement of business operations or acquisition of an existing business by government sources, including business assets, in New Zealand, where the total expenditure to be incurred in setting up or acquiring that business or those assets exceeds NZ\$100 million.
- Acquisition or control, regardless of dollar value, of certain categories of land that are regarded as sensitive or require specific approval according to New Zealand's Overseas Investment legislation.
- Any transaction, regardless of dollar value, that would result in an overseas investment in fishing quota.

This reservation reflects a commitment to a screening threshold for TPP non-governmental investors which is higher than existing policy (NZ\$100m). No changes would be required to the way in which investments in sensitive land or fishing quota are screened. It should also be noted that New Zealand has a reservation (noted below under Annex II) that preserves the Government's ability to alter the OIA approval criteria.

- Any existing non-conforming tax measures, which are exempt from the performance requirements obligation.

Investment reservations – Annex II

In Annex II, New Zealand has reserved the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services as well as the following, to the extent that they are social services established for a public purpose: child care; health; income security and insurance; public education; public housing; public training; public transport; public utilities; social security and insurance; and social welfare.

The Annex II 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. (Note that combination of Annex I and Annex II reservations in respect of New Zealand's overseas investment regime means that New Zealand can change the approval criteria against which investment activities are screened, but cannot amend the activities subject to the screening regime.)

New Zealand has also reserved the right to accord differential treatment to countries under any existing bilateral or multilateral agreements and any measures under any existing or future international agreement relating to aviation, fisheries and maritime matters. Further, New Zealand has expressly reserved the right to adopt or maintain measures that accord differential treatment to a Party or non-party that are taken as part of the wider process of economic integration or trade

liberalisation between the Parties to the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) or the Pacific Agreement on Closer Economic Relations (PACER).

Other listed reservations allow New Zealand to take non-conforming measures in respect of:⁷⁴

- Water, including the allocation, collection, treatment and distribution of drinking water.
- The devolution of a service that is provided in the exercise of governmental authority at the time the Agreement enters into force (where the measure is taken solely as part of the devolution).
- The sale of any shares in an enterprise, or any assets of an enterprise, where the enterprise is wholly owned or under the effective control of the New Zealand Government.
- The control, management or use of protected areas or species owned or protected under enactments by the Crown.
- Nationality or residency in relation to animal welfare and the preservation of plant, animal and human life and health.
- The foreshore and seabed, internal waters as defined in international law, territorial sea, the Exclusive Economic Zone and the continental shelf.
- The specific commitments New Zealand made under GATS (as set out in its Schedule of Specific Commitments), as modified by Appendix A.
- The provision of fire-fighting services (excluding aerial fire-fighting services).
- Research and development services carried out by State funded tertiary institutions or by Crown Research Institutes when such research is conducted for a public purpose; and certain research and experimental development services.
- Composition and purity testing and analysis services; technical inspection services; other technical testing and analysis services; geological, geophysical, and other scientific prospecting services; and drug testing services.
- Controlling of the activities of foreign fishing consistent with the provisions of the United Nations Convention on the Law of the Sea.
- The production, use, distribution or retail of nuclear energy.
- Preferential co-production arrangements for film and television productions.
- The promotion of film and television production in New Zealand and the promotion of local content on public radio and television, and in films.
- The holding of shares in the co-operative dairy company arising from the amalgamation authorised under the *Dairy Industry Restructuring Act 2001* (DIRA) (or any successor body); and the disposition of assets of that company or its successor bodies.

⁷⁴ Note that the obligations that New Zealand reserves the right to breach vary for each set of sectors/activities, depending on the policy space required.

- The export marketing of fresh kiwifruit to all markets other than Australia.
- Specification of the terms and conditions for the establishment and operation of any government endorsed allocation scheme for the rights to the distribution of export products falling within the HS categories covered by the WTO Agreement on Agriculture to markets where tariff quotas, country-specific preferences or other measures of similar effect are in force; and the allocation of distribution rights to wholesale trade service suppliers pursuant to the establishment or operation of such an allocation scheme.
- The establishment or implementation of mandatory marketing plans for the export marketing of products derived from agriculture, beekeeping, horticulture, arboriculture, arable farming, and the farming of animals, where there is support within the relevant industry for such a plan.
- All services suppliers and investors for the supply of adoption services.
- Gambling, betting and prostitution services.
- Cultural heritage of national value, public archives, library and museum services, and services for the preservation of historical or sacred sites or historical buildings.
- Maritime cabotage, the establishment of registered companies for the purpose of operating a fleet under the New Zealand flag, and the registration of vessels in New Zealand.
- Wholesale and retail trade services of tobacco products and alcoholic beverages for public health or social policy purposes.
- The supply of compulsory social insurance for personal injury caused by accident, work related gradual process disease and infection, and treatment injury.
- The supply of disaster insurance for residential property for replacement cover up to a defined statutory maximum.
- Any taxation measure with respect to the sale, purchase or transfer of residential property.

Non-reservable obligations

Minimum Standard of Treatment: The minimum standard of treatment obligation in Article 9.6 requires New Zealand to treat covered investments in accordance with all customary international law principles that protect the investments of aliens, including fair and equitable treatment and full protection and security. This customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation. “Fair and equitable” treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; while “full protection and security” requires each Party to provide the level of police protection required under customary international law.

To establish that there has been a breach of this obligation, it is not sufficient to show only that:

- A Party breaches another obligation in the TPP or another international agreement;
- A Party takes or fails to take an action that may be inconsistent with an investor’s expectations (even if there is loss or damage to a covered investment as a result); or

- A subsidy or grant has been issued, renewed, maintained, modified or reduced by a Party (even if there is loss or damage to a covered investment as a result).

Transfers: Under Article 9.8, each Party is obliged to permit transfers relating to covered investments to be made freely and without delay into and out of their territories, and in a freely useable currency at the market rate of exchange prevailing at the time of the transfer. The Parties are also required to permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or investor of another Party. There are, however exceptions to this obligation that allow a Party to prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its law relating to matters including bankruptcy, insolvency, or the protection of the rights of creditors; issuing, trading, or dealing in securities, futures, options, or derivatives; criminal or penal offences; financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; and ensuring compliance with orders or judgements in judicial or administrative proceedings.

Expropriation: The expropriation obligation in Article 9.7 obliges a Party to comply with four conditions if it wishes to expropriate or nationalise a covered investment. These conditions are that the expropriation or nationalisation must be:

- For a “public purpose”.
- Made in a non-discriminatory manner.
- Accompanied by payment of prompt, adequate, and effective compensation in accordance (further details are set out in the Article as to how compensation is to be paid).
- In accordance with due process of law.⁷⁵

This obligation does not apply to certain actions that comply with Chapter 18 (Intellectual Property) and the TRIPS Agreement. The Article also clarifies that certain actions taken by Parties in respect of subsidies or grants do not constitute an expropriation.

Annex 9-B provides that the expropriation obligation addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. The second is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. The Annex provides guidance as to what does and does not constitute indirect expropriation. It explains that determination of whether there is indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- The economic impact of the government action (although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred).

⁷⁵ Note that Annex 9-C (Expropriation Relating to Land) contains specific limitations on measures of direct expropriation relating to land by Singapore and Viet Nam.

- The extent to which the government action interferes with distinct, reasonable investment-backed expectations.
- The character of the government action.

The Annex also includes the important clarification that non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances. For example, regulatory actions to protect public health include measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.

Denial of Benefits: Article 9.14 allows a New Zealand to deny the benefits of the Investment Chapter to an investor of another Party that is an enterprise (and to its investments) if the enterprise is owned or controlled either by persons of a non-Party or of the denying Party and the enterprise has no substantial business activities in the territory of any Party other than the denying Party.

Investment and Environmental, Health and other Regulatory Objectives: Article 9.15 confirms that nothing in the Chapter should be read as preventing New Zealand from taking any measure that is otherwise consistent with the chapter and that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

5.9.1 Investor State Dispute Settlement (ISDS)

Section B of the Investment Chapter provides a mechanism for the settlement of disputes between foreign investors and the government of the country in which the investment is made. If a dispute cannot be settled within six months through consultation and negotiation, the investor may submit the issue to arbitration. The investor may do so either on their own behalf, or on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly. New Zealand has agreed a side letter with Australia that would mean that no investor of New Zealand could have recourse to ISDS against Australia under Section B, and that no investor of Australia could have recourse to ISDS against New Zealand.

A claimant may make the submission to arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) or arbitration under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceeding (or, if only one of the respondent and the Party of the claimant is a Party to the ICSID Convention, then under the ICSID Additional Facility Rules), the UNCITRAL Arbitration Rules, or any other arbitration institution or rules to which the claimant and the respondent agree.

A claim may only be submitted to arbitration under Section B if the claimant (and, if applicable, the enterprise) have signed a waiver of any right to initiate or continue any claim in a domestic court or administrative tribunal (Article 9.19).

An investor may bring a claim in respect of an alleged violation by the respondent of:

- An obligation in Section A of the Investment Chapter.
- An investment authorisation.
- An investment agreement between the respondent government and a TPP investor (such as an agreement relating to mining concessions or infrastructure development), provided that the subject matter of the claim and the claimed damages relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the investment agreement.

In previous FTAs and investment agreements, New Zealand has not given consent for investors to bring claims in respect of investment authorisations or investment agreements. There are, however, several restrictions that narrow the scope of claims in respect of investment authorisations and investment agreements.

Investment authorisations are defined as authorisations that the foreign investment authority of a Party grants to a covered investment or an investor of another Party. New Zealand's "foreign investment authority" is restricted to the Minister of Finance, the Minister of Fisheries or the Minister for Land Information, to the extent that they make a decision to grant consent under the *Overseas Investment Act 2005*. To be clear, the following are not encompassed within the definition of "investment authorisations": (i) actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws; (ii) non-discriminatory licensing regimes; and (iii) a Party's decision to grant to a covered investment or an investor of another Party a particular investment incentive or other benefit, that is not provided by a foreign investment authority in an investment authorisation.

Annex 9-H further limits the application of the dispute settlement procedures in the TPP to decisions under the *Overseas Investment Act*. This means that claims relating to investment authorisations would only arise against New Zealand if the Government breached a decision made under the *Overseas Investment Act* to allow a foreign investment to proceed. By way of example, if the Government was to reverse an approval after it had been granted, or if the Government breached any condition agreed as part of that approval, then the affected TPP investor could bring a claim.

The definition of investment agreements is also narrowed by several requirements, including that the obligation only applies to investment agreements that are:

- Concluded and take effect after the date of entry into force of TPP.
- Between an authority at the central level of government and a covered investment or investor (the term "central level of government" is further narrowed in the case of unitary states such as New Zealand to mean an authority at the ministerial level of government).

- In relation to 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.

In addition, Article 9.18.2 makes it clear that when a claim is submitted to arbitration for breach of an investment authorisation or investment agreement, the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.⁷⁶

The investment dispute settlement mechanism applies to the “pre-establishment” phase of investment, meaning that an investor can bring a claim for a breach of National Treatment, Most-favoured-nation Treatment and Performance Requirements, during the period before an actual investment is made, where an investor is taking concrete steps to make an investment.

As mentioned above, Annex 9-H contains an exception in relation to decisions under New Zealand’s *Overseas Investment Act 2005* to grant consent, or to decline to grant consent, to an overseas investment transaction that requires prior consent under that Act. These decisions are not subject to the dispute settlement provisions, meaning that an investor cannot bring a claim in respect of such decisions. There are no limitations on the Government’s ability to enforce conditions of a consent, or compliance with the *Overseas Investment Act*.⁷⁷

In addition, there are a number of important provisions in the Chapter designed to safeguard a Government’s right to regulate and avoid exposure to frivolous claims. Some of these have been outlined above, notably the Annex to the expropriation provision that emphasises a country’s ability to take non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives. The Minimum Standard of Treatment Article also clarifies that the obligation is that which exists at customary international law, and that a determination that there has been a breach of another provision of the TPP, or of a separate international agreement, does not establish that there has been a breach of the obligation.

Section B contains a number of procedural rules that mitigate any risk to New Zealand in connection with the arbitration process. These include:

- A “cooling off” period whereby the claimant is required to deliver a notice of intention to submit the claim to arbitration at least 90 days before the actual submission to arbitration.
- A prohibition on submitting claims after three years and six months from the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach, and knowledge that the claimant or enterprise (as applicable) has incurred loss or damage.

⁷⁶ In the case of investment authorisations, 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.

⁷⁷ Annex II-H contains similar limitations on the application of Section B to foreign investment decisions made by Australia, Canada and Mexico.

- Allowing the tribunal to hear preliminary questions, such as an objection to the tribunal's jurisdiction, or an objection that a claim submitted is not a claim for which an award in favour of the claimant may be made (Article 9.22).
- Provision for the tribunal to accept *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties. Such submissions may come, for example, from an environmental organisation (Article 9.22).
- Provision for the tribunal to award reasonable costs and attorney' fees associated with a respondent's preliminary objection. In making a decision whether to award costs and fees, the tribunal is required to consider whether the claimant's claim was frivolous (Article 9.22).
- Where a respondent's defence relies on an argument that the measure at issue is within the scope of a non-conforming measure set out in its Schedule, the respondent may require the tribunal to request the Commission to provide an interpretation in relation to the issue. A decision issued by the Commission is binding on the tribunal (Article 9.24).
- Provision for any disputing party to seek consolidation of two or more claims that have been submitted separately to arbitration where the claims have a question of law or fact in common and arise out of the same events or circumstances (Article 9.27).
- A prohibition on the tribunal's ability to award punitive damages (Article 9.28).

There are extensive provisions in relation to transparency of arbitral proceedings, including that a tribunal is to conduct hearings open to the public (subject to arrangements for protection of information that is designated as protected information or that may be withheld in accordance with Article 29.2 (Exceptions Chapter; Security Exceptions Article) or Article 29.6 (Exceptions Chapter; Disclosure of Information Article)). The respondent is required to make various documents publicly available, including the notice of intent; the notice of arbitration; pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Articles 9.22(2), 9.22(3) and 9.27; minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal.

5.10 Cross-Border Trade in Services

The obligations in the Cross Border Trade in Services Chapter apply to a wide range of measures of a Party that affect cross-border trade in services by service suppliers from other TPP countries, including measures that affect the production, distribution, marketing, sale, or delivery of a service.

Reservable obligations

Four of the obligations are subject to reservations:

- *National Treatment*: Article 10.3 provides that each Party must afford services and services suppliers of other TPP Parties treatment no less favourable than the treatment it gives its own services and service suppliers in like circumstances.

- *Most-favoured-nation:* Under Article 10.4, each Party must afford services and services suppliers of other TPP Parties treatment no less favourable than the treatment it gives services and services suppliers from any other country (whether or not a Party to the TPP) in like circumstances. This obligation means that service suppliers from TPP Parties would receive the benefits of any additional liberalisation that New Zealand might provide to third countries in future agreements.
- *Market Access:* A Party may not have measures that impose the type of quantitative limitations on services and services suppliers specified in Article 10.5, nor measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service. In addition to its application to cross border trade, this obligation applies to services where they are provided by a covered investment (as defined in Chapter 9: Investment) with a commercial presence in New Zealand.
- *Local Presence:* A Party may not condition the cross-border supply of a service on a service supplier of another Party establishing or maintaining a representative office or any form of enterprise, or being resident in its territory (Article 10.6).

Non-reservable obligations

Key obligations that may not be reserved against are the Domestic Regulation and Transparency obligations.

Domestic Regulation: Article 10.8 sets out requirements relating to the administration of measures affecting trade in services, as well as to licensing and qualification requirements and procedures, technical standards, and requirements for authorisation to supply services. In particular, each Party is required to ensure that its measures affecting trade in services are administered in a reasonable, objective and impartial manner. In the case of measures relating to qualification requirements and procedures, technical standards, and licensing requirements, each Party must endeavour to ensure that its measures are based on objective and transparent criteria. In addition to its application to cross border trade, this obligation would apply to services where they are provided by a covered investment (as defined in Chapter 9: Investment) with a commercial presence in New Zealand.

Transparency: Article 10.11 contains obligations relating to the transparency of regulations relating to cross border trade in services. In addition to its application to cross border trade, this obligation applies to services where they are provided by a covered investment (as defined in Chapter 9: Investment) with a commercial presence in New Zealand.

Exclusions

There are a number of areas that are explicitly excluded from coverage of the Chapter. These are services supplied in the exercise of government authority, financial services as defined in Chapter 11 (Financial Services), government procurement and some air services. In addition, the obligations do not apply in respect of subsidies or grants provided by a Party.

Reservations

As noted above, Parties are permitted to enter reservations to the national treatment, most-favoured-nation, market access and local presence obligations. Each Party's list of reservations has two parts. The first part (Annex I) sets out existing legislative measures ("non-conforming measures") that violate or may violate any one or more of the national treatment, most-favoured-nation, market access and local presence obligations. Annex I has three key features:

- It contains a factual list of current "non-conforming measures".
- It is subject to a "standstill" provision meaning that the Party cannot adopt a new non-conforming measure that is more restrictive than the one already listed in Annex I.
- It is 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.

The second part of the list of reservations (Annex II) sets out sectors that are exempted from any one or more of the national treatment, most-favoured-nation, market access and local presence obligations. In these areas each government retains the full right to regulate in a restrictive or discriminatory way, as it deems necessary, and the "ratchet" clause does not apply. New Zealand's services reservations are detailed below.

Services reservations – Annex I

Below is a summary of the non-conforming measures that New Zealand has listed in Annex I:⁷⁸

- Registration of patent attorneys is restricted to those who satisfy the criteria set out in the *Patents Act 1953* (British subjects or citizens of the Republic of Ireland).
- Certain provisions in the *Dairy Industry Restructuring Act 2001* that provide for management of a national database for herd testing data.
- Provision under the *Radiocommunications Act 1989* that require written approval of the Chief Executive of the Ministry of Business, Innovation and Employment for the acquisition by foreign governments or their agents of licences or management rights to use the radio frequency spectrum, or any interest therein.

Services reservations – Annex II

New Zealand's Annex II reservations in relation to cross border trade in services would allow New Zealand to take any measure that accords differential treatment to countries under any existing bilateral or multilateral agreements and any measures under any existing or future international agreement relating to aviation, fisheries and maritime matters. New Zealand may also take any measure that is not inconsistent with its obligations under Article XVI of the General Agreement on Trade in Services (GATS).

⁷⁸ Note that the obligations that are reserved against vary for each measure depending on what obligation the measure would be inconsistent with if it was not listed.

Other listed reservations would allow New Zealand to take non-conforming measures in respect of:⁷⁹

- Social services established for a public purpose, including health, income security and insurance, public education, public housing and social welfare.
- Water, including the allocation, collection, treatment and distribution of drinking water.
- The devolution of a service that is provided in the exercise of governmental authority at the time the Agreement enters into force (where the measure is taken solely as part of the devolution).
- The sale of any shares in an enterprise, or any assets of an enterprise, where the enterprise is wholly owned or under the effective control of the New Zealand Government.
- The control, management or use of protected areas or species owned or protected under enactments by the Crown.
- Nationality or residency in relation to animal welfare and the preservation of plant, animal and human life and health.
- The foreshore and seabed, internal waters as defined in international law, territorial sea, the Exclusive Economic Zone and the continental shelf.
- The provision of fire-fighting services (excluding aerial fire-fighting services).
- Research and development services carried out by State funded tertiary institutions or by Crown Research Institutes when such research is conducted for a public purpose; and certain research and experimental development services.
- Composition and purity testing and analysis services; technical inspection services; other technical testing and analysis services; geological, geophysical, and other scientific prospecting services; and drug testing services.
- Control of the activities of foreign fishing consistent with the provisions of the United Nations Convention on the Law of the Sea.
- The production, use, distribution or retail of nuclear energy.
- Preferential co-production arrangements for film and television productions.
- The promotion of film and television production in New Zealand and the promotion of local content on public radio and television, and in films.
- The export marketing of fresh kiwifruit to all markets other than Australia.
- Specification of the terms and conditions for the establishment and operation of any government endorsed allocation scheme for the rights to the distribution of export products falling within the HS categories covered by the WTO Agreement on Agriculture to markets where tariff quotas, country-specific preferences or other measures of similar effect are in

⁷⁹ Note that the obligations that New Zealand reserves the right to breach vary for each set of sectors/activities, depending on the policy space required.

force; and the allocation of distribution rights to wholesale trade service suppliers pursuant to the establishment or operation of such an allocation scheme.

- All services suppliers and investors for the supply of adoption services.
- Gambling, betting and prostitution services.
- Cultural heritage of national value, public archives, library and museum services, and services for the preservation of historical or sacred sites or historical buildings.
- Maritime cabotage, the establishment of registered companies for the purpose of operating a fleet under the New Zealand flag, and the registration of vessels in New Zealand.
- Public health or social policy purposes with respect to wholesale and retail trade services of tobacco products and alcoholic beverages.
- The supply of compulsory social insurance for personal injury caused by accident, work related gradual process disease and infection, and treatment injury.
- The supply of disaster insurance for residential property for replacement cover up to a defined statutory maximum.

5.11 Financial Services

This Chapter contains a range of obligations relating to trade in financial services. For the purposes of the Chapter, and consistent with the WTO, the term “financial services” means any service of a financial nature, and includes all insurance and insurance-related services, and all banking and other financial services (excluding insurance), as well as services incidental or auxiliary to a service of a financial nature.

The Chapter applies to a Party’s measures relating to: financial institutions of another Party, investors of another Party and their investments in financial institutions in the Party’s territory, and cross-border trade in financial services (Article 11.2.1). In addition, the Chapter incorporates a number of obligations from Chapter 9 (Investment), including the minimum standard of treatment, expropriation and compensation, and transfers obligations (as well as the denial of benefits obligation and, where applicable, the payments and transfers obligation from Chapter 10: Cross-Border Trade in Services).

The investor state dispute settlement mechanism in Section B of the Investment Chapter is also incorporated into Chapter 11 (Financial Services), meaning that an investor in financial services may bring a claim alleging that certain investment obligations, including those set out above, have been violated.⁸⁰

⁸⁰ Note that with respect to Brunei Darussalam, Chile and Mexico, Annex 11-E applies. This Annex states that these countries do not consent the submission of a claim to arbitration under Section B of the Investment Chapter for a breach of Article 9.6 (Minimum Standard of Treatment), as incorporated into this Chapter, for five years after the Agreement enters into force for Brunei Darussalam, Chile and Peru; and for seven years after the Agreement enters into force for Mexico. Accordingly, if an investor submits such a claim to arbitration, it may not recover for loss of damage that occurred prior to those dates.

The Chapter does not apply to measures adopted or maintained by a Party relating to activities or services forming part of a public retirement plan or statutory system of social security; or conducted for the account, or with the guarantee, or using the financial resources of, the relevant Party, including its public entities (unless such activities are conducted by the Party's financial institutions in competition with a public entity or a financial institution). Government procurement is also outside the scope of the Chapter, as are subsidies or grants with respect to the cross-border supply of financial services, including government-supported loans, guarantees and insurance.

Similarly to the Investment and Cross-Border Trade in Services Chapters, the obligations that the New Zealand Government owes in respect of financial services are of two kinds: those in respect of which Parties may enter reservations; and those in respect of which Parties may not enter reservations. The key obligations of each kind are described below.

Reservable obligations

Non-Discrimination: New Zealand is required to give investors of another Party, financial institutions of another Party, investments of investors of another Party in financial institutions, and cross-border financial service suppliers of another Party treatment no less favourable than the treatment it gives to its own services and service suppliers or to services and service suppliers from any other country (whether or not a Party to the TPP) in like circumstances (Articles 11.3 and 11.4). A Party is required to ensure that self-regulatory organisations observe the national treatment and MFN obligations when certain conditions are met (Article 11.14).

Article 11.10.4 clarifies the relationship between the national treatment and MFN obligations with relevant Articles in the TRIPS Agreement.

Market Access (Article 11.5): The market access obligation prohibits a Party from putting in place certain types of quantitative limitations on financial institutions of another Party or investors of another Party seeking to establish such institutions. For example, a Party must not impose limitations on the number of financial institutions, or the number of people that may be employed in a financial service sector. It also prohibits measures that restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service.

Cross-Border Trade (11.6): This Article requires a Party to permit, under terms and conditions that accord national treatment, cross-border financial service suppliers of another Party to supply the financial services specified in Annex 11-A. A Party is also required to permit people in its territory, as well as its nationals (wherever they may be) to purchase financial services from cross-border financial service suppliers of another Party. However, this obligation does not prevent a Party from requiring registration or authorisation of cross-border financial service suppliers of another Party, and of financial instruments. For New Zealand, the following financial services are specified in Annex 11-A (Cross-Border Trade):

- Insurance:

- Insurance of risks relating to maritime shipping and commercial aviation and space launching and freight; and goods in international transit.
 - Reinsurance and retrocession.
 - Services auxiliary to insurance.
 - Insurance intermediation.
- The provision and transfer of financial information and financial data processing and related software.
- Advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services.

New Financial Services (Article 11.7): This Article obliges a Party to permit a financial institution of another TPP country to supply any new financial service, so long as it is a service that the Party would permit its own financial institutions, in like circumstances, to supply without adopting a law or modifying an existing law. However, a Party may determine the form through which the new financial service may be supplied and may require an authorisation for the supply of the service.

Senior Management and Boards of Directors (Article 11.9): This Article prohibits a Party from doing two things: (i) requiring financial institutions of another Party to engage individuals of any particular nationality as senior managerial or other essential personnel; and (ii) requiring that more than a minority of the board of directors of a financial institution of another Party be composed of nationals of the Party, persons residing in the territory of the Party, or a combination of these two.

Financial Services reservations

Similar to the Investment and Cross-Border Trade in Services Chapters, the Financial Services Chapter allows Parties to enter reservations to the national treatment, most-favoured-nation treatment, market access for financial institutions, cross-border trade, and senior management and boards of directors obligations (the reservable obligations). Each Party's list of reservations in the Financial Services Chapter has two parts. The first part (Section A of its Schedule to Annex III) sets out existing legislative measures ("non-conforming measures") that violate or may violate any one or more of the reservable obligations. Section A of New Zealand's Schedule to Annex III has three key features:

- It contains a factual list of current "non-conforming measures".
- It is subject to a "standstill" provision preventing adoption of a new non-conforming measure that is more restrictive than the one already listed.
- It is subject to a "ratchet" clause which means that if the Government liberalises a financial service by repealing or amending a restriction, that liberalisation gets locked-in as the new (more liberal) level of commitment.

The second part of the list of reservations (Section B of the Schedule to Annex III) sets out sectors and activities that are exempted from any one or more of the reservable obligations. In these areas, each government retains the full right to regulate in a restrictive or discriminatory way, as it deems

necessary, and the “ratchet” clause does not apply. New Zealand’s financial services reservations are detailed below.

In addition, where New Zealand has set out a non-conforming measure under the Cross-Border Trade in Services or Investment Chapters (in Annex I or Annex II) then those measures will be treated as non-conforming for the purposes of the Financial Services Chapter and not subject to in the corresponding obligations in the Financial Services Chapter, to the extent that the entry is covered by the Financial Services Chapter.

Below is a summary of the non-conforming measures that New Zealand has listed in Section A of its Schedule to Annex III:

- The provision of crop insurance for wheat can be restricted in accordance with the *Commodity Levies Amendment Act 1995*.
- The provision of insurance intermediation services related to the export of kiwifruit can be restricted in accordance with the *Kiwifruit Industry Restructuring Act 1999* and regulations relating to the export marketing of kiwifruit.
- At least one director of a corporate trustee and one director of a fund manager of a registered Kiwisaver scheme must be a New Zealand resident under the *Kiwisaver Act 2006*.

In Section B of its Schedule to Annex III, New Zealand has reserved the right to adopt or maintain any measure:

- With respect to the supply of compulsory social insurance for personal injury caused by accident, work related gradual process disease and infection, and treatment injury; and disaster insurance for residential property for replacement cover up to a defined statutory maximum.
- With respect to the establishment or operation of exchanges, securities markets, or futures markets.
- With respect to the establishment or operation of any unit trust, market or other facility established for the trade in, or allotment or management of, securities in the co-operative dairy company arising from the amalgamation authorised under the *Dairy Industry Restructuring Act 2001* (DIRA) (or any successor body).
- With respect to insurance and insurance-related services for industry marketing boards established for products under specified CPC codes.
- That requires all companies to have one or more directors, of whom at least one must live in New Zealand; or live in a country that has an agreement with New Zealand allowing for the recognition and enforcement in that country of New Zealand judgments imposing regulatory regime criminal fines, and be a director of a company that is registered in that country.
- That makes provision for public law enforcement and correctional services, and any measure with respect to the following, to the extent that they are a social service established for a public purpose: child care; health; income security and insurance; public education; public housing; public training; public transport; public utilities; social security and insurance; or social welfare.

- Which provides a subsidy or grant to any entities that are controlled, or wholly or partially owned, by the Government and which may conduct financial operations, including measures taken in relation to the privatisation of such entities.
- Which provides a subsidy or grant to any entity that is systemically important to the infrastructure of the financial market, including: exchanges; clearing and settlement facilities; and market operators.

New Zealand has also made the following specific commitments in Annex II-B:

Portfolio Management: Each Party is required to allow a financial institution organised in the territory of another Party to provide specified services (including investment advice and certain portfolio management services) to a collective investment scheme located in its territory. For New Zealand, a collective investment scheme means a “registered scheme” as defined under the *Financial Markets Conduct Act 2013*.

Transfer of Information: Each Party is required to allow a financial institution of another Party to transfer information in electronic or other form, into and out of its territory, for data processing if such processing is required in the institution’s ordinary course of business. This commitment does not prevent New Zealand from adopting or maintaining measures to protect personal data, personal privacy and the confidentiality of individual records and accounts, or from requiring a financial institution to obtain prior authorisation from the relevant regulator to designate a particular enterprise as a recipient of such information, based on prudential considerations (provided this right is not used as a means of avoiding our commitments on the transfer of information).

Supply of Insurance by Postal Insurance Entities: Additional disciplines apply if a Party allows its postal insurance entity to underwrite and supply direct insurance services to the public, other than insurance for letters or packages. Applicable exceptions means this obligation would not apply to any current New Zealand entity.

Electronic Payment Card Services: Parties are required to allow the supply of electronic payment services for payment card transactions into its territory from the territory of another Party although certain conditions may be imposed. These services do not include the transfer of funds to and from transactors’ accounts. For New Zealand, the term “payment cards” means credit cards or debit cards in physical or electronic form.

Non-reservable obligations

Recognition: A Party may recognise prudential measures of any other country in the application of measures covered by the Financial Services Chapter, in a variety of ways. If recognition is achieved through an agreement or arrangement, the Party must provide adequate opportunity to another Party to demonstrate that should be entitled to accede to the agreement or arrangement, or to negotiate a comparable agreement or arrangement (Article 11.12).

Transparency and Administration of Certain Measures: Under Article 11.13, each Party commits to promote regulatory transparency in financial services and must ensure that measures governed by this Chapter are administered in a reasonable, objective and impartial manner. The Chapter contains specific rules on publication and consultation of financial services regulations which replace some of the general publication and review obligations in Chapter 26 (Transparency). There are also transparency obligations around the application process for the supply of financial services.

Payment and Clearing Systems: Article 11.15 requires each Party to give financial institutions of another Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This access must be provided in accordance with national treatment.

Expedited Availability of Insurance Services: If a TPP Party has regulatory product approval procedures to expedite the offering of insurance services by licensed suppliers, it shall endeavour to maintain or improve them (Article 11.16).

Performance of Back-Office Functions: Parties recognise the importance of avoiding the imposition of arbitrary requirements on back-office functions of financial institutions (although Parties may require financial institutions to ensure compliance with any domestic requirements applicable to those functions) (Article 11.17).

Exceptions

In addition to the reservations noted above, there are a number of exceptions set out in the Financial Services Chapter that apply to all Parties. These exceptions ensure that:

- Parties may adopt or maintain measures for prudential reasons, including to protect investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system. This exception applies across the whole of the Agreement (with the exception of the goods and goods-related chapters).
- Public entities may take non-discriminatory measures of general application in pursuit of monetary and related credit policies or exchange rate policies. This exception also applies to Chapters 9 (Investment), 10 (Cross-Border Trade in Services), 13 (Telecommunications), and 14 (E-commerce).
- A Party may prevent or limit transfers by a financial institution or cross-border financial service supplier to, or for the benefit of, an affiliate of or person related to that institution or supplier, through the equitable, non-discriminatory, and good faith application of measures relating to maintenance of the safety, soundness, integrity, or financial responsibility of financial institutions or cross-border financial service suppliers.

Nothing in the Financial Services Chapter requires a Party to provide or allow access to information related to individual customers' financial affairs, or to confidential information where disclosure would be contrary to the public interest or prejudice legitimate commercial interests (Article 11.8).

Committee on Financial Services

The Chapter establishes a Committee on Financial Services to assess the functioning of the Agreement as it applies to financial services, and inform the Commission of the results.

Consultations and Dispute Settlement

The Chapter sets up a consultation mechanism whereby a Party may request consultations with another Party regarding any matter under the Agreement that affects financial services, and the other Party must give sympathetic consideration to such a request. Each Party must establish a contact point to respond to any requests for information from other Parties in regard to any non-conforming measures at the regional level of government. A Party may request consultations if it considers that a non-conforming measure applied by a regional level of government of another Party creates a material impediment to trade or investment by a financial institution, an investor, investments in a financial institution, or a cross-border financial service supplier. Consultations should be held with a view to exchanging information on the operation of the measure and considering whether further steps are appropriate.

The state-to-state Dispute Settlement provisions of the Agreement apply to the obligations in the Financial Services Chapter. However, Article 11.20 makes some modifications to the process, including special requirements that panelists in a dispute have expertise specific to financial services, and an expedited process for determining whether Article 11.11 (Exceptions) is a valid defence to a claim. There are also special procedures put in place for the situation where a claim is brought by an investor, including a process allowing a binding joint determination by the authorities of the respondent and the home Party of the claimant as to whether and to what extent Article 11.11 (Exceptions) applies and is therefore a valid defence to the claim.

5.12 Temporary Entry for Business Persons

The Temporary Entry Chapter ensures efficient visa processing procedures and transparency around requirements for temporary entry to the TPP Parties. It does not apply to people seeking access to the employment market of any Party, nor does it apply to measures regarding citizenship, nationality, residence or employment on a permanent basis.

There is a requirement for Parties to accord certain rights to an applicant for an immigration formality, including making a decision as expeditiously as possible after receiving a completed application, informing the applicant of the decision, and if the application has been approved, of the period of stay and other conditions. Where an applicant requests it, a Party must endeavour to promptly provide information on the status of an application. A Party's fees for processing application for an immigration formality must be reasonable (Article 12.3).

Each Party is required under Article 12.4 to set out in a country-specific annex (Annex 12-A) its commitments regarding temporary entry of business persons. A Party must include in the Annex any conditions and limitations for the entry and temporary stay.

A business person must still meet any applicable licensing or other requirements, including any mandatory codes of conduct, to practice a profession or otherwise engage in business activities even if a Party has granted temporary entry under this Chapter.

A Party may refuse to issue an immigration formality to a business person where their temporary entry might adversely affect the settlement of any labour dispute at the place of employment, or the employment of any person involved in that dispute.

Grant of Temporary Entry

New Zealand has made commitments as summarised in the following table in respect of Business Visitors, Intra Corporate Transferees, Installers and Servicers, and Independent Professionals.

Category	Description of Category	Conditions and Limitations
Business Visitors	A business person seeking temporary entry for the purposes specified; who is not seeking to enter the labour market; and whose principal place of business, actual place of remuneration, and predominant place of accrual of profits remains outside NZ.	Entry for a period not exceeding in aggregate three months in any calendar year
Intra Corporate Transferees	An executive, manager or specialist as defined and who is an employee of a goods supplier, service supplier or investor of a Party with a commercial presence in NZ; and whose salary and any related payments are paid entirely by the service supplier or enterprise that employs them.	Entry for an initial stay of up to a maximum of three years.
Installers and Servicers	A business person who is an installer or servicer of machinery or equipment, if installation or servicing by the supplying company is a condition of the machinery or equipment's purchase.	Entry for periods not exceeding three months in any twelve-month period.
Independent Professionals	A self-employed business person with advanced technical or professional skills, without the requirement for a commercial presence, working under a valid contract in New Zealand. The Schedule sets out criteria for such persons, and also specifies that the commitment is only in respect of the services sectors set out in New Zealand's GATS Commitments.	Entry for a period of stay up to a maximum of twelve months and subject to economic needs tests.

New Zealand only makes the commitments in each of these categories to any Party that has made commitments in the equivalent categories.

Provision of information

Each Party is required to promptly publish online, or otherwise make publicly available, information on the requirements for temporary entry under the Chapter as well as the typical timeframe for the processing of any application for an immigration formality. Each Party is also required to have appropriate mechanisms to respond to enquiries from interested persons regarding measures related to temporary entry.

Cooperation and Committee

The Parties must consider undertaking mutually agreed cooperation activities to share their experience in developing and applying procedures related to visa processing and border security.

The Chapter establishes a Committee on Temporary Entry for Business Persons (Committee) which is to meet within once every three years, unless otherwise agreed by the Parties. The Committee's functions include to:

- Review the implementation and operation of the Chapter.
- Consider opportunities for the Parties to further facilitate temporary entry of business persons.
- Consider any other matter arising under the Chapter.

Dispute settlement

The Agreement's Dispute Settlement mechanism in Chapter 28 does not apply to the Temporary Entry Chapter unless the matter involves a pattern of practice and the business persons affected have exhausted all available administrative remedies regarding the matter.

5.13 Telecommunications

Approaches to regulation

In Article 13.3, the Parties recognise that they may each determine how best to implement their obligations under the Chapter, and that a Party may regulate directly (either in anticipation of an issue that the Party expects may arise or to resolve an issue that has already arisen in the market), rely on the role of market forces, or use any other appropriate means that benefit the long term interests of end users.

Access to and use of public telecommunications services

Article 13.4.1 requires each Party to ensure that enterprises of another Party have access to and use of any public telecommunications service offered in its territory or across its borders, on reasonable and non-discriminatory terms and conditions. Conditions on access to and use of public telecommunications networks or services can only be imposed where necessary to safeguard public service responsibilities of suppliers of public telecommunications networks and services, or to protect the technical integrity of public telecommunications networks or services (Article 13.4.5).

Article 13.4.2 requires each Party to permit service suppliers of other Parties to:

- Purchase or lease, and attach terminal or other equipment that interfaces with a public telecommunications network.
- Provide services to individual or multiple end-users over leased or owned circuits.
- Connect owned or leased circuits with public telecommunications networks and services with circuits leased or owned by another enterprise.
- Perform switching, signalling, processing, and conversion functions.
- Use operating protocols of their choice.

The use of public telecommunications services for movement of information in its territory or across its borders must also be available to enterprises of other Parties (Article 13.4.3).

A Party may take such measures as are necessary to ensure the security and confidentiality of messages and protect the privacy of personal data of end-users of public telecommunications networks and services, so long as these do not discriminate in an arbitrary or unjustifiable manner or act as a disguised restriction on trade.

Obligations relating to suppliers of public telecommunications services

Article 13.5 sets out the following obligations relating to suppliers of public telecommunications services:

- *Interconnection*: Each Party must ensure that suppliers of public telecommunications services in its territory provide interconnection with suppliers of those services of another Party. Each Party must also ensure that those suppliers take reasonable steps to protect the confidentiality of specified commercially sensitive information and only use that information for the purposes of providing public telecommunications services. There is also an obligation for each Party to provide its telecommunications regulatory body with authority to require interconnection at reasonable rates.
- *Number Portability*: Each Party must ensure that suppliers of public telecommunications services in its territory provide number portability without impairment to quality and reliability, on a timely basis, and on reasonable and non-discriminatory terms and conditions.
- *Access to Numbers*: Each Party must ensure that suppliers of public telecommunications services of another Party established in its territory must have access to telephone numbers on a non-discriminatory basis.

International mobile roaming

While Parties are not required to regulate rates or conditions for international mobile roaming services, they are required to endeavour to cooperate on promoting transparent and reasonable rates for such services (Article 13.6.1).

If an individual Party does choose to regulate rates or conditions for wholesale international roaming services, it must, in situations that are specified in Article 13, ensure that suppliers of public telecommunication services from other TPP Parties have access to those rates or conditions for its customers who are roaming in the regulating Party's territory, provided that there is either an arrangement with that supplier's Party to reciprocally regulate rates or conditions for wholesale international mobile roaming services or that supplier agrees to make available wholesale international mobile roaming services at rates or conditions reasonably comparable⁸¹ to the regulated rates or conditions and to meet any additional requirements imposed by the Party regulating rates or conditions.

Parties ensuring access to regulated rates or conditions for wholesale international mobile roaming services consistent with this Article will be deemed to be in compliance with MFN and other relevant non-discrimination obligations.

⁸¹ In the case of any dispute over what constitutes reasonably comparable rates or conditions, this will be determined by the regulator of the Party setting the regulated rates.

Article 13.6.6 requires each Party to provide information to the other Parties on rates for retail international roaming services for voice, data, and text messages offered to consumers visiting from another Party.

Treatment by major suppliers of public telecommunications services

Each Party is required to ensure that major suppliers in their territory give suppliers of public telecommunications services of other Parties, treatment no less favourable than that accorded in like circumstances to their subsidiaries, affiliates or non-affiliated service suppliers. This requirement is in regard to the availability, provisioning, rates or quality of like public telecommunications services, and the availability of technical interfaces necessary for interconnection (Article 13.7).

Competitive safeguards

Parties are required to maintain appropriate measures to prevent major suppliers of public telecommunications services, which alone or together constitute “major suppliers”, from engaging in or continuing anti-competitive practices – for example, anti-competitive cross-subsidisation (Article 13.8).

Resale

Parties may not prohibit the resale of public telecommunications services (Article 13.9). Each Party must ensure that major suppliers in its territory offer for resale, at reasonable rates, to suppliers of public telecommunications services of another Party, public telecommunications services that the major supplier provides at retail to end users. Each Party must also ensure that major suppliers in its territory do not impose unreasonable or discriminatory conditions or limitations on the resale of those services. Parties may determine which public telecommunications services are offered for resale by major suppliers. If a service is not offered for resale, Parties must allow service suppliers to request that the service be offered for resale, without prejudice to the Party’s decision on the request.

Unbundling of network elements by major suppliers

Each Party must give its telecommunications regulatory body (or other appropriate body) authority to require a major supplier in its territory to offer to public telecommunications service suppliers access to network elements on an unbundled basis on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory and transparent. Each Party has discretion to determine the network elements required to be made available in its territory and the suppliers that may obtain such elements (Article 13.10).

Interconnection with major suppliers

Article 13.11.1 requires each Party to ensure that a major supplier in its territory provides interconnection for the facilities and equipment of suppliers of public telecommunications services of another Party and sets out the conditions on which this must occur.

Each Party must ensure that a major supplier in its territory provides suppliers of public telecommunications services of another Party the opportunity to interconnect their facilities and equipment with those of the major supplier through a reference interconnection offer or another

standard interconnection offer, or through the terms and conditions of an interconnection agreement that is in effect (Article 13.11.2).

In addition, suppliers of public telecommunications services from other Parties must have the opportunity to interconnect their facilities and equipment with those of the major supplier through negotiation of a new interconnection agreement (Article 13.11.3).

Each Party must make publicly available the applicable procedures for interconnection negotiations with a major supplier in its territory (Article 13.11.4), and provide a means for suppliers of another Party to obtain the rates, terms, and conditions necessary for interconnection offered by a major supplier (Article 13.11.5).

Provisioning and pricing of leased circuits services by major suppliers

Under Article 13.12, leased circuits services that are public telecommunications services are required to be provided in a reasonable period of time on terms and conditions, and at rate, that are reasonable and non-discriminatory, and based on a generally available offer. A Party's appropriate body must have the authority to require a major supplier in its territory to offer leased circuits services that are public telecommunications services to suppliers of another Party at capacity-based and cost-oriented prices.

Co-location by major suppliers to suppliers of public telecommunications services

Each Party must ensure that a major supplier in its territory provides to suppliers of public telecommunications services of another TPP country who are in the Party's territory physical co-location of equipment necessary for interconnection or access to unbundled network elements based on a generally available offer, on a timely basis, and on terms and conditions and at cost-oriented rates that are reasonable and non-discriminatory (Article MM.13.1).

Where physical co-location is not practical, a Party may meet this obligation by ensuring provision of alternative options (such as facilitating virtual co-location) (Article 13.13.2).

Each Party has discretion as to which premises owned or controlled by major suppliers in its territory are subject to the co-location obligation, and if a Party does not require that a major supplier offer co-location at certain premises, it must still allow service suppliers to make a request that those premises be offered for co-location (without prejudice to a Party's decision on such a request).

Access to poles, ducts, conduits, and rights-of-way owned or controlled by major suppliers

Each Party must ensure that a major supplier provides access to poles, ducts, conduits, rights-of-way or any other structure as determined by the Party to suppliers of public telecommunications services of another Party in its territory. In determining which of these structures access will be provided for, the Party must take into account factors such as the competitive effect of lack of access, whether the structure can feasibly be economically or technically substituted in order to provide a competing service, or other specified public interest factors.

Access must be provided on a timely basis, on terms and conditions and at rates that are reasonable, non-discriminatory and transparent, subject to technical feasibility (Article 13.14).

International submarine cable systems

Article 13.15 requires each Party to ensure access to submarine cable landing stations in its territory to suppliers of public telecommunications service of another Party. Access must be consistent with Articles 13.11 (Interconnection), 13.12 (Provisioning and Pricing of Leased Circuits Services) and 13.13 (Co-Location).

Independent regulatory bodies and government ownership

Each Party must ensure that its telecommunications regulatory body is separate from, and not accountable to, any supplier of public telecommunications services, and that its decisions are impartial with respect to all market participants. More favourable treatment to a supplier owned by the national government of the Party is not permitted (Article 13.16).

Universal service

Each Party may define its universal service obligation, but is obliged to ensure that it is not more burdensome than necessary for the kind of universal service it has defined, and to administer the obligation in a transparent, non-discriminatory, and competitively neutral manner (Article 13.17).

Licensing process

A Party that requires a supply of public telecommunications services to have a licence must ensure the public availability of the licensing criteria and procedures it applies, the period it normally requires to reach a decision on an application for a licence, and the terms and conditions of all licences in effect (Article 13.18.1).

If requested, a Party must give an applicant reasons for denying, revoking or refusing to renew a licence (Article 13.18.2), or imposing supplier-specific conditions on a license.

Allocation and use of scarce resources

Each Party is required to administer its procedures for the allocation and use of scarce telecommunications resources (including frequencies, numbers and rights-of-way) in an objective, timely, transparent, and non-discriminatory way (Article MM.19.1).

Each Party must make public the current state of frequency bands allocated and assigned to suppliers (although it does not have to provide detailed identification of frequencies allocated or assigned for government uses) (Article 13.19.2).

When a Party makes a spectrum allocation for commercial telecommunication services, it must endeavour to rely on an open and transparent process that considers the public interest. In addition, Parties must endeavour to rely generally on market-based approaches in assigning spectrum for terrestrial commercial telecommunications services (Article 13.19.3).

Enforcement

Article 13.20 requires each Party to give its competent authority the authority to enforce its measures relating to the obligations in Articles 13.4, 5, and 7-14.

Resolution of telecommunications disputes

Article 13.21.1 imposes requirements on Parties in relation to the resolution of disputes in its territory, including that:

- Enterprises have access to a telecommunications regulatory body or other relevant body to resolve disputes in relation to matters set out in Articles 13.4 to 13.15.
- Review is available in respect of disputes regarding the terms, conditions, and rates for interconnection with a major supplier in the Party's territory.

Article 13.21.2 prohibits a Party from allowing an application for judicial review to constitute grounds for non-compliance with the determination or decision of the telecommunications regulatory body, unless the judicial body issues an order that the determination or decision not be enforced while the proceeding is pending.

Transparency

Article 13.22 builds on the 'publication' provisions in Chapter 26 (Transparency) by requiring that each Party ensure that its telecommunications regulatory body takes certain steps to ensure transparency where it seeks public input for a proposal for a regulation.

Flexibility in the choice of technology

Parties are not permitted to prevent suppliers of public telecommunications services from choosing the technologies they wish to use to supply their services, subject to requirements necessary to satisfy legitimate public policy interests, provided that any measure restricting that choice is not prepared, adopted or applied in a manner that creates unnecessary obstacles to trade (Article 13.23).

Relation to international organisations

The Parties have undertaken to promote international standards for global compatibility and interoperability of telecommunications networks and services.

Committee on telecommunications

A committee is established to ensure the effective implementation of the Telecommunications Chapter. The committee is composed of Parties' representatives, although representatives of other relevant entities, including from the private sector, can be invited to attend its meetings. The committee's functions include reviewing and monitoring the implementation and operation of the Chapter, and discussing and reporting on issues to the Commission.

5.14 Electronic Commerce

The obligations in the Electronic Commerce Chapter apply to measures that affect trade by electronic means. They do not apply to government procurement; or to information held or processed by, or on behalf of, a Party (or to measures related to such information) (Article 14.2).

Customs duties: Customs duties cannot be imposed on electronic transmissions between a person of one Party and a person of another Party (Article 14.3). This does not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically.

Non-discriminatory treatment of digital products: Article 14.4 requires each Party to afford non-discriminatory treatment to digital products. However, this requirement does not apply to the extent it is inconsistent with the rights and obligations under Chapter 18 (Intellectual Property). The non-discriminatory treatment obligation also does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance. It also does not apply to broadcasting.

Domestic Electronic Transactions Framework: Each Party is required under Article 14.5 to maintain domestic legal frameworks governing electronic transactions consistent with the principles of the *UNCITRAL Model Law on Electronic Commerce 1996* or the *United Nations Convention on the use of Electronic Communications in International Contracts 2005*. Parties are also required to avoid any unnecessary regulatory burden on electronic transactions and facilitate input from interested persons in the development of regulatory frameworks for electronic transactions.

Electronic Authentication and Electronic Signatures: The Chapter provides for the ease of transactions by electronic form (Article 14.6). A Party may not deny the legal validity of a signature solely on the basis of it being electronic, except in circumstances where its law provides otherwise. In addition, a Party must not adopt or maintain specified measures that would hinder electronic authentication.

Online Consumer Protection: Each Party is required to have consumer protection laws against fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities (Article 14.7).

Personal Information Protection: Each Party is required under Article 14.8 to have a legal framework to protect personal information of electronic commerce users. Each Party must endeavour to adopt non-discriminatory practices when protecting users of electronic commerce from personal information protection violations that occur in the Party's jurisdiction. Each Party is required to publish information on the protections it provides, including how individuals can pursue remedies and how business can comply with any legal requirements. Each Party must endeavour to exchange information to promote compatibility of protection mechanisms.

Paperless Trading: Each Party must endeavour to make trade administration documents public in electronic form and to accept electronic submission of such documents (Article 14.9).

Cross-Border Transfer of Information by Electronic Means: Article 14.12 requires each Party to allow cross-border transfer of information by electronic means, including personal information, where the activity is for the conduct of a covered person's business. (The Chapter defines 'covered person'.) However, a Party may adopt or maintain measures that affect the cross-border transfer of information

by electronic means to achieve a legitimate public policy objective as long as the measures are not a means of arbitrary or unjustifiable discrimination, a disguised restriction on trade, or greater than that required to achieve the objective.

Location of Computing Facilities: No Party may require a “covered person” to use or locate computing facilities in that Party’s territory as a condition for conducting business there. However, this does not prevent a Party from having measures inconsistent with the requirement in order to achieve a legitimate public policy objective if the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and does not impose restrictions greater than required to achieve the objective (Article 14.14).

Unsolicited Commercial Electronic Messages: Each Party is required by Article 14.14 to have measures in place that require suppliers of unsolicited commercial electronic messages to enable recipients to prevent ongoing receipt of those messages, require recipients’ consent to receive those messages, or otherwise provide for the minimisation of unsolicited commercial electronic messages. Parties must provide recourse against suppliers of unsolicited commercial electronic messages who do not comply with these measures. Parties are also required to endeavour to cooperate regarding regulation of unsolicited commercial electronic messages.

Source Code: Article 14.17 prohibits Parties from imposing a condition on the import, distribution, sale or use of mass-market software (or of products containing that software) that requires the transfer of, or access to, source code of software owned by a person of another Party (Article 14.17). Software used for critical infrastructure is excepted, as are certain commercial arrangements and specific requirements a Party may have in place with respect to modification of source code necessary to comply with its laws and regulations.

Cooperation: Parties must endeavour to work together to assist SMEs to overcome obstacles encountered in the use of electronic commerce, exchange information and experiences, participate actively in regional and multilateral fora to promote the development of electronic commerce, and encourage private sector self-regulation (Article 14.15).

5.15 Government Procurement

The obligations in the Government Procurement Chapter apply to any measure regarding “covered procurement”. For each Party, “covered procurement” is defined by the commitments that they have set out in the Annex to the Chapter. These commitments set out the entities whose procurement practices are covered, the goods and services covered by the Chapter, the value threshold at which the obligations take effect and any specific exceptions or derogations from coverage. In addition, the Scope provision (Article 15.2) excludes various activities from the application of the obligations. These excluded activities include acquisition or rental of land; non-contractual agreements or assistance provided by a Party; procurement or acquisition related to government banking, public debt, and liquidation or management services for regulated financial institutions; public employment contracts; procurement done for development aid, funded by an international organization or in accordance

with particular international agreements on the stationing of troops; and procurement outside a Party's territory.

The Chapter requires each Party to ensure that its procuring entities comply with the obligations when they conduct "covered procurements" (that is, procurements of covered goods and services by listed entities that meet or exceed the listed thresholds and are not otherwise excluded).

Exceptions: Article 15.3 sets out exceptions to the obligations that allow the Parties to take otherwise non-conforming measures for certain legitimate public policy purposes, so long as the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties.

General Principles: Article 15.4 sets out a number of general principles that apply to government procurement, including:

- *Non-discrimination:* Parties are required to treat goods, services and suppliers of any other Party no less favourably than domestic goods, services and suppliers, and those of any other Party under the TPP with respect to any measure regarding covered procurement. With respect to such measures, a Party may not treat one locally established supplier less favourably than another on the basis of foreign affiliation or ownership; or discriminate against a locally established supplier on the basis that the goods or services of that supplier are goods or services of any other Party.
- *Procurement Methods:* Procuring entities must use an open tendering procedure for covered procurement, except in some limited circumstances. Parties must apply rules of origin applicable in the normal course of trade to covered procurement of goods.
- *Rules of Origin:* Each Party must apply to covered procurement of goods the rules of origin that it applies to those goods in the normal course of trade.
- *Offsets:* Parties must not seek, take account of, impose or enforce any offset at any stage of a procurement.
- *Use of Electronic Means:* The Parties must seek to provide opportunities for covered procurement to be undertaken through electronic means. When conducting covered procurement by electronic means, a procuring entity must ensure that the procurement is conducted using IT systems and software that are generally available and interoperable with other such systems and software; and to have in place mechanisms that ensure the integrity of information provided by suppliers.

Publication of Procurement Information: Parties are required to promptly publish any measure of general application relating to covered procurements, as well as any changes or additions. The Parties are also required to respond to inquiries relating to that information (Article 15.6).

Notices of Intended Procurement: Article 15.7 requires procuring entities to publish a notice of intended procurement for each covered procurement except in specified circumstances where limited tendering is permitted.

Conditions for Participation: Parties may only impose certain conditions on participation in a covered procurement. These conditions must be limited to those that ensure a supplier has the legal and financial capacities and the commercial and technical abilities to fulfil the requirements of that procurement (Article 15.8). This does not preclude a procuring entity from promoting compliance with laws relating to labour rights recognised in the Agreement. In establishing the conditions for participation, a procuring entity must not require the supplier to have previously been awarded one or more contracts by a procuring entity, or had prior work experience, in the territory of a given Party; but it may require relevant prior experience where essential to meet the requirements of the procurement.

In assessing whether a supplier satisfies the conditions for participation, a procuring entity is required to evaluate suppliers based on their business activities both inside and outside the territory of the Party of the procuring entity. In addition, the procuring entity must base its evaluation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.

Qualification of Suppliers: Article 15.9 provides that Parties (including procuring entities) may maintain a supplier registration system, but stipulates that the system must not create unnecessary obstacles to the participation of other Parties' suppliers in its procurement, or be used to prevent or delay the inclusion of other Parties' suppliers from being considered for a particular procurement. This Article also sets out rules that must be met if a Party's measures authorise the use of selective tendering, and if a Party establishes or maintains a multi-use list. Article 15.9 also imposes obligations requiring a procuring entity or other entity of a Party to promptly inform suppliers of a decision with respect to a request for participation in a procurement or application for inclusion on a multi-use list; as well as any decision, and on request of a supplier, a written explanation of the reasons for the decision, to reject a supplier's request for participation or application for inclusion on a multi-use list, cease to recognise a supplier as qualified, or remove a supplier from a multi-use list.

Limited Tendering: Article 15.10 allows a procuring entity to use limited tendering⁸² procedures provided that it does not do so for the purpose of avoiding competition among suppliers, to protect domestic suppliers, or in a manner that discriminates against suppliers of any other Party. The Article sets out the specific circumstances in which a procuring entity may use limited tendering.

Negotiations: A Party may provide for its procuring entities to conduct negotiations in the context of covered procurement if its intention to do so was indicated in the notice of intended procurement or if no tender is obviously the most advantageous in terms of the evaluation criteria set out in that notice or the tender documentation (Article 15.11). A procuring entity must ensure that any

⁸² A Limited Tendering process is one whereby the procuring entity contracts a supplier or suppliers of its choice, without an open, competitive process.

elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria; and provide a common deadline for the remaining participating suppliers to submit any new or revised tenders following the conclusion of negotiations.

Technical Specifications: Pursuant to Article 15.12, technical specifications or any conformity assessment procedures must not be set with the purpose or the effect of creating an unnecessary obstacle to trade between the Parties. Procuring entities must, where appropriate, set out any technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics; and base the technical specification on applicable international standards (or, if they do not exist, on national technical regulations, recognised national standards, or building codes). A procuring entity must not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer or supplier, unless that is the only way to describe the procurement requirements, in which case the entity must include words such as "or equivalent" in the tender documentation.

Tender Documentation: Article 15.13 requires procuring entities to make tender documentation available promptly on request to any interested suppliers. The documentation must include all information necessary for suppliers to prepare and submit tenders. The Article sets out a list of information to be included in the tender documentation unless already provided in the notice of intended procurement. Procuring entities are required to take into account factors such as the complexity of the procurement in establishing any date for the delivery of goods or the supply of services being procured. Procuring entities must promptly reply to any reasonable request for relevant information by any interested or participating supplier, as long as doing so does not give that supplier an advantage over other suppliers.

Time Periods: Article 15.14 requires the procuring entity to provide sufficient time for suppliers to obtain the tender documentation and to prepare and submit requests for participation and responsive tenders, taking into account relevant factors and consistent with its own reasonable needs. The Article sets out rules around deadlines for the submission of tenders.

Treatment of Tenders and Awarding of Contracts: Article 15.15 requires procuring entities to receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process and the confidentiality of tenders. It requires a procuring entity to award the contract to the supplier that it has determined to be fully capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted: the most advantageous tender, or, where price is the sole criterion, the lowest price, unless the procuring entity determines that it is not in the public interest to award a contract.

Post-Award Information: Article 15.16 sets out obligations in relation to post-award information. It requires procuring entities to promptly inform suppliers that have submitted a tender of the contract award decision. If an unsuccessful supplier makes a request, the procuring entity must give the reasons it was unsuccessful or the relative advantages of the successful supplier's tender. It also requires

procuring entities to publish a notice containing information about the goods or services procured, the contact details of the procuring entity and the successful supplier and the value of the contract.

Procuring entities are required to keep documentation relating to tenders and awards for covered procurement for at least three years after the award of a contract.

Disclosure of Information: A Party, including its procuring entities, must not (except to the extent required by law or with the written authorisation of the supplier that provided the information) disclose information that would prejudice legitimate commercial interests of a particular supplier or that might prejudice fair competition between suppliers (Article 15.17).

Integrity in Procurement Practices: Under Article 15.18, Parties are required to ensure that measures exist to address corruption in its government procurement, and that they have in place policies and procedures to eliminate to the extent possible or manage any potential conflicts of interest in a procurement.

Domestic Review: Article 15.19 sets out obligations requiring Parties to have at least one independent, impartial administrative body or judicial authority that can review challenges or complaints by a supplier in certain specified situations. The Article includes procedural requirements.

Modification and Rectification of Annex: Parties may modify or rectify their Schedules to Annex 15-A, but must notify the other Parties if they intend to do so. There is provision for Parties to raise objections to any proposed modification and the emphasis is on seeking to resolve any objections through consultations (Article 15.20).

Small and medium-sized enterprises (SMEs): If a Party maintains a measure that provides preferential treatment for SMEs, then it has to ensure the transparency of the measure. To facilitate participation by SMEs in covered procurement, each Party must, to the extent possible and if appropriate, provide comprehensive procurement-related information in a single electronic portal; endeavour to make all tender documentation available free of charge; conduct procurement by electronic means or through other new information and communication technologies; and consider the size, design and structure of the procurement, including the use of subcontracting by SMEs (Article 15.21).

Cooperation and Committee: Article 15.22 requires Parties to endeavour to cooperate in certain matters (such as facilitating participation in government procurement, especially by SMEs, information exchange, capability building, and institutional strengthening), while provision is made for establishment of a Committee on Government Procurement under Article 15.23 to address matters related to the implementation and operation of the Chapter.

Further Negotiations: The Committee is required to review the Chapter and may agree to further negotiations with a view to improving market access coverage, revising the thresholds set out in Annex 15-A, revising the Threshold Adjustment Formula in Section H of Annex 15-A, and reducing and eliminating remaining discriminatory measures. Also, the Parties are required to commence

negotiations no later than three years following TPP's entry into force, with a view to achieving expanded coverage.

New Zealand's Government Procurement Commitments: New Zealand's commitments for government procurement are set out in Annex 15-A. Section A lists the central government entities the procurement of which is subject to the obligations in the chapter. These entities are:

- Ministry for Primary Industries
- Canterbury Earthquake Recovery Authority
- Department of Conservation
- Department of Corrections
- Crown Law Office
- Ministry of Business, Innovation and Employment
- Ministry for Culture and Heritage
- Ministry of Defence
- Ministry of Education
- Education Review Office
- Ministry for the Environment
- Ministry of Foreign Affairs and Trade
- Government Communications Security Bureau
- Ministry of Health
- Inland Revenue Department
- Department of Internal Affairs
- Ministry of Justice
- Land Information New Zealand
- Ministry of Māori Development
- New Zealand Customs Service
- Ministry of Pacific Island Affairs
- Department of the Prime Minister and Cabinet
- Serious Fraud Office
- Ministry of Social Development
- State Services Commission
- Statistics New Zealand
- Ministry of Transport
- The Treasury
- Ministry of Women's Affairs
- New Zealand Defence Force
- New Zealand Police

Procurement by these entities would only be covered if the procurement equals or exceeds the following thresholds (which are to be adjusted at two-yearly intervals)⁸³:

⁸³ The threshold is expressed in International Monetary Fund Special Drawing Rights (SDRs), a unit of account used by the International Monetary Fund and based on a basket of international currencies. The conversion from SDRs to New Zealand dollars changes periodically with currency fluctuations.

Goods	SDR130,000
Services	SDR130,000
Construction Services	SDR5,000,000

In addition, procurement by the following entities is also covered by the obligations:

New Zealand Antarctic Institute
New Zealand Trade and Enterprise
Civil Aviation Authority of New Zealand
Energy Efficiency and Conservation Authority
Maritime New Zealand
New Zealand Fire Service Commission
Tertiary Education Commission
Sport New Zealand (excluding procurement of goods and services containing confidential
information related to enhancing competitive sport performance)
Careers New Zealand
Education New Zealand

The thresholds (which are to be adjusted at two-yearly intervals) for procurement by these entities are:

Goods	SDR400,000
Services	SDR400,000
Construction Services	SDR5,000,000

Exceptions: For New Zealand, the obligations in the Chapter do not apply to procurement of research and development services; or to public health, education and welfare services. In addition, the following are excluded from application of the obligations:

- Any procurement by one entity listed in the Annex from another entity listed in the Annex.
- Procurement of goods or services in respect of contracts for construction, refurbishment or furnishing of chanceries abroad.
- Any programme, preference, set-aside or any other measure that benefits SMEs.
- Any procurement for the purposes of developing, protecting or preserving national treasures of artistic, historic, archaeological value or cultural heritage.
- Procurement of storage or hosting of government data and related services based on storage or processing outside the territory of New Zealand to protect government information as described in Article 14.2.6.(b).

5.16 Competition Policy

Competition Law and Authorities and Anticompetitive Business Conduct: Each Party must maintain or adopt laws that prohibit anticompetitive business conduct, and must endeavour to apply those laws to all commercial activities in its territory. Each Party must maintain an authority responsible for

enforcement of its laws. That authority's enforcement policy must be to act in accordance with the objective of promoting economic efficiency and consumer welfare (Article 16.1).

Procedural Fairness in Competition Law Enforcement: Article 16.2 requires each Party to have certain practices and procedures in place in relation to the conduct of competition law investigations and enforcement proceedings. These include a right to be heard and present evidence in its defence, a right to seek review in a court or other independent tribunal of any sanction or remedy to which a person is subject under a Party's laws, and protection of confidential information.

Private Rights of Action: There is no absolute obligation for a Party to provide for an independent private right of action whereby a person can seek redress from a court or other independent tribunal for injury to its business or property caused by a violation of competition laws (although Parties are encouraged to do so). However, if a Party does not provide for such a right of action, then it is required to provide, on a non-discriminatory basis, a right to request the competition authority to initiate an investigation into an alleged violation of competition laws, and to seek redress from a court or other independent tribunal following a finding of violation by the competition authority (Article 16.3).

Cooperation: Each Party is required to cooperate with the others by exchanging information on the development of competition policy, and to cooperate, as appropriate, on enforcement issues (Article 16.5).

Consumer protection: Each Party must adopt or maintain laws or regulations to prohibit fraudulent and deceptive commercial activities (Article 16.6). Further, they must promote, as appropriate, cooperation and coordination on matters of mutual interest related to fraudulent and deceptive commercial activities. The Parties must endeavour to cooperate and coordinate on these matters through their public bodies or officials responsible for consumer protection policy.

Transparency: Article 16.7 sets out various obligations with respect to the transparency of a Party's competition enforcement policy, including that each Party must endeavour to maintain and update its information on the APEC Competition Law and Policy Database, and must ensure that any final decision finding a violation of its competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning on which the decision is based.

Consultations: A Party must enter into consultations with any Party that requests it to do so. A request for consultations must indicate, if relevant, how the matter that is the subject of the request affects trade or investment between the Parties (Article 16.8). This Chapter is not subject to the Dispute Settlement mechanism in Chapter 28.

5.17 State-Owned Enterprises

The SOEs Chapter applies with respect to the activities of state-owned enterprises (SOEs) and designated monopolies of a Party that affect trade or investment between Parties within the free trade area. For the purposes of the Chapter, the following definitions apply:

- “*Designated monopoly*” means an entity designated as the sole provider or purchaser of a good or service in a market. These can be government-owned or privately-owned, but in the case of privately-owned entities, the obligations only cover new designations after the TPP comes into force.
- “*State-owned enterprise*” means an enterprise that is principally engaged in commercial activities, and that is more than 50 percent owned or controlled by the government. The focus is on commercial companies (with an orientation towards profit, rather than those which operate on a not-for-profit or cost-recovery basis), which means that the obligations do not apply to entities that mainly serve a public benefit, such as health and education agencies, even if those entities have some commercial activities or charge for some of their services. For New Zealand, the definition of SOEs captures companies subject to the *State-Owned Enterprises Act 1986* and other commercially focused companies in which the Government owns a majority share, including Air New Zealand.

The provisions contain an exception for entities which are below a size threshold. At the TPP’s entry into force, the threshold will exclude entities with an annual revenue from commercial activities which is below SDR200 million (currently around NZ\$400 million), to be adjusted every three years. This means that only New Zealand’s larger SOEs are subject to the obligations.

Article 17.2 states that the Chapter does not apply to:

- The regulatory or supervisory activities or the conduct of monetary policy and related credit policy and exchange rate policy of a central bank or monetary authority.
- The regulatory or supervisory activities of a financial regulatory body that exercises regulatory or supervisory authority over financial service suppliers.
- Activities undertaken for the purpose of the resolution of a failing or failed financial institution or any other failing or failed enterprise principally engaged in the supply of financial services.
- Sovereign wealth funds (except that the non-commercial assistance obligation applies in certain circumstances).
- An independent pension fund of a Party; an enterprise owned or controlled by an independent pension fund of a Party (except that the non-commercial assistance obligation applies in certain circumstances).
- Government procurement.

The Chapter states that nothing prevents a Party’s SOE from providing goods or services exclusively to that Party for the purposes of carrying out that Party’s governmental function (Article 17.2).

Delegated Authority: Each Party must ensure that its SOEs, state enterprises and designated monopolies act in a manner that is not inconsistent with the Party’s obligations under the TPP when they exercise any governmental authority directed or delegated by that Party. New Zealand already has this obligation under customary international law (Article 17.3).

Commercial considerations and Non-discriminatory treatment

Article 17.4 requires each Party to ensure that SOEs act in accordance with commercial considerations in their purchase of goods or services, (except if acting to fulfil a public service mandate in a non-discriminatory manner). Commercial considerations include factors such as price, quality and availability that normally guide commercial decisions. The obligation only exists when the SOE is engaging in commercial activities, which excludes activities undertaken on a cost-recovery or not-for-profit basis.

Article 17.4 also requires each Party to ensure that its SOEs provide non-discriminatory treatment as follows:

- If they are purchasing a good or service:
 - Afford treatment no less favourable to a good or service of an enterprise of another Party as compared to a like good or service of a domestic enterprise, an enterprise of any other Party, or an enterprise of a non-Party; and
 - Afford treatment no less favourable to a good or service supplied by an enterprise that is a covered investment in its territory as compared to a like good or service supplied by an enterprise that is an investment of a domestic investor, an investor of any other Party, or an investor of a non-Party.
- If they are selling a good or service:
 - Afford treatment no less favourable to an enterprise of another Party as compared to domestic enterprises, enterprises of any other Party, or enterprises of a non-Party; and
 - Afford treatment no less favourable to an enterprise that is a covered investment in its territory as compared to an enterprise that is an investment of a domestic investor, an investor of any other Party, or an investor of a non-Party.

These obligations reflect the principles of New Zealand's State-owned Enterprises Act 1986 and New Zealand's existing international obligations in relation to 'state trading enterprises'.

Each Party has to ensure that any of its designated monopolies acts in accordance with commercial considerations when it is purchasing or selling the monopoly good in the relevant market except when they are fulfilling the terms of their designation. Each Party has to ensure that any of its designated monopolies:

- If they are purchasing a monopoly good or service:
 - Afford treatment no less favourable to a good or service of an enterprise of another Party as compared to a like good or service of a domestic enterprise, an enterprise of any other Party, or an enterprise of a non-Party; and
 - Afford treatment no less favourable to a good or service supplied by an enterprise that is a covered investment in its territory as compared to a like good or service

supplied by an enterprise that is an investment of a domestic investor, an investor of any other Party, or an investor of a non-Party.

- If they are selling a monopoly good or service:
 - Afford treatment no less favourable to an enterprise of another Party as compared to domestic enterprises, enterprises of any other Party, or enterprises of a non-Party; and
 - Afford treatment no less favourable to an enterprise that is a covered investment in its territory as compared to an enterprise that is an investment of a domestic investor, an investor of any other Party, or an investor of a non-Party.

Parties must also ensure that any of its designated monopolies do not use their monopoly position to engage in anticompetitive practices in a non-monopolised market in its territory that negatively affect trade or investment between the Parties.

Article 17.4.3 ensures that an SOE or designated monopoly is not prevented from purchasing or supplying goods or services on different terms or conditions including those relating to price, or refusing to purchase or supply goods or services. However, such differential treatment or refusal must be undertaken in accordance with commercial considerations.

Courts and administrative bodies

Each Party is required to provide its courts with jurisdiction over civil claims against a foreign SOE based on a commercial activity carried on in its territory. It does not have to do so if it does not provide jurisdiction over similar claims against enterprises that are not SOEs (Article 17.5.1).

Each Party must ensure that any of its administrative bodies that regulate an SOE exercise its regulatory discretion in an impartial manner with respect to enterprises that it regulates (including those that are not state-owned enterprises) (Article 17.5.2).

Non-commercial assistance

Article 17.6 prohibits a TPP Party from causing adverse effects or injury to the interests of another TPP Party through non-commercial assistance (such as financing or loan guarantees on better than commercially-available terms or equity capital inconsistent with usual investment practice, provided either directly by the government or through another entity) that it provides to an SOE by virtue of that SOE's government ownership or control. There are three key aspects to the obligation:

- *Non-commercial assistance from a Party to its SOEs:* A Party must not cause adverse effects to the interests of another Party through the use of non-commercial assistance that it provides to any of its SOEs with respect to:
 - The production and sale of a good by the SOE.
 - The supply of a service by the SOE from the territory of the Party into the territory of another Party.

- The supply of a service in the territory of another Party through an enterprise that is a covered investment in the territory of that other Party or a third Party.⁸⁴
- *Non-commercial assistance from a state enterprise or SOE to another state enterprise or SOE:* With respect to the same matters set out above, each Party must ensure that its state enterprises or SOEs do not cause adverse effects to the interests of another Party through the use of non-commercial assistance that the state enterprise or SOE provides to any of its state-owned enterprises.
- *Non-commercial assistance to a covered investment in another Party:* A Party must not cause injury to a domestic industry of another Party through the use of non-commercial assistance that it provides to any of its SOEs that are a covered investment in the territory of another Party. This obligation applies in circumstances where the non-commercial assistance is provided with respect to the production and sale of a good by SOE in the territory of the other Party, and where a like good is produced and sold in the territory of the other Party by a domestic industry of that other Party.

Article 17.6.4 specifies that a service supplied by a SOE of a Party within that Party's territory shall be deemed to not cause adverse effects.

The Chapter defines "adverse effects" in Article 17.7 and "injury" in Article 17.8. "Adverse effects" include displacing a competitor's goods or services from a market (involving a significant change in market shares); the significant undercutting of a competitor's prices; or significant price suppression, price depression or lost sales. The adverse effects and injury tests are based on the tests used in the WTO's *Subsidies and Countervailing Measures Agreement*.

Adverse effects are deemed not to arise from a Party's initial capitalisation of an SOE or a Party's acquisition of a controlling interest in a company (so that it becomes an SOE) which principally supplies services within the Party's territory (Article 17.7.6).

Transparency

Article 17.10 requires each Party to provide to the other Parties or make publicly available on an official website a list of its SOEs. The list must be kept updated. The Article also requires each Party to promptly notify the other Parties or publish the designation of a monopoly or expansion of the scope of an existing monopoly and the terms of its designation.

Article 17.10 also requires each Party to make certain information available concerning an SOE, government monopoly, or a policy or programme that provides for non-commercial assistance to an SOE. The obligations only apply if the requesting Party includes with its request an explanation of how the activities of the SOE or monopoly, or the policy or programme, may be affecting trade or investment between the Parties and is subject to safeguards for confidential information.

⁸⁴ This is an exception to the general rule noted above that the obligations in the Chapter apply to the activities of state-owned enterprises and designated monopolies of a Party that affect trade or investment between Parties within the free trade area.

Dispute settlement

Annex 17-B sets out a process that Parties (and a panel if one has been established) must follow in the event of a dispute under Article 17.4 (Non-discriminatory treatment and commercial considerations) or 17.6 (Non-commercial assistance) in order to obtain information relevant to the claims that is not otherwise readily available.

Exceptions

The Chapter contains exceptions as explained below.

Commercial considerations and non-discriminatory treatment: With respect to the obligations to act in accordance with *commercial considerations* and to provide *non-discriminatory treatment*, Parties may:

- Adopt or enforce any measure, or take measures with respect to an SOE, to respond temporarily to a national or global economic emergency.
- Allow an SOE to supply financial services pursuant to a government mandate and subject to other constraints.
- Allow an SOE to fulfil any terms of a public service mandate that are inconsistent with the commercial considerations obligation, so long as it does so in a non-discriminatory way.
- Allow a monopoly to fulfil any terms of its designation that are inconsistent with the commercial considerations obligation, so long as it does so in a non-discriminatory way.
- Take measures consistent with respect to reservations in the services and investment chapters that are inconsistent with the non-discriminatory treatment obligation.

Non-commercial assistance: With respect to the obligation not to cause adverse effects or injury to the interests of another TPP Party through the provision of non-commercial assistance, Parties may:

- Take any measure with respect to any service supplied in the exercise of governmental authority.
- Adopt or enforce any measure, or take measures with respect to an SOE, to respond temporarily to a national or global economic emergency.
- Allow an SOE to provide financial services pursuant to a government mandate if the country in which the financial service is supplied requires a local presence in order to supply those circumstances, and certain constraints are met.
- Allow an SOE to assume temporary ownership of an enterprise outside the Party's territory as a consequence of foreclosure.

General Exceptions: The GATT exceptions which are incorporated into TPP through the Exceptions Chapter apply to the obligations in the SOEs Chapter.

Entities at the sub-central level of government

The following obligations do not apply to New Zealand's entities at the sub-central level of government:

- Commercial considerations and non-discriminatory treatment for SOEs (Article 17.4.1).
- Commercial considerations and non-discriminatory treatment for monopolies (Article 17.4.2).
- Specified aspects of the non-commercial assistance obligation (Article 17.6).
- Transparency (Article 17.10.1).

Country-Specific Annexes

Each Party to the Agreement has set out in an Annex country-specific exceptions specific to its situation and sensitivities. New Zealand has country-specific exceptions preserving space for government assistance that causes adverse effects, if the assistance relates to:

- An SOE's supply of construction, operation, maintenance or repair services of physical infrastructure supporting communications between New Zealand and other TPP Parties.
- An SOE's supply of air transport services and maritime transport services to the extent that they provide a connection for New Zealand to the rest of the world. For air services, the exception applies if the assistance is provided to maintain an SOE's ongoing operations and does not cause a significant increase in the SOE's market share or significantly undercut the services of a competitor.
- Solid Energy.

New Zealand has agreed in a side letter with Australia that it will only rely on the second of these exceptions with respect to air transport services between the two countries if non-commercial assistance being provided to an SOE is solely intended to enable the SOE to continue operate as a going concern; and if the non-commercial assistance does not cause a significant increase in the SOE's market share of the service or a significant price undercutting by the service supplied by the SOE as compared with the price of a like service provided by an Australia service supplier in the same market, or a significant price suppression, price depression, or lost sales in the same market.

Further negotiations

Article 17.14 obliges the Parties to conduct further negotiations on extending the application of the disciplines in the Chapter to the activities of SOEs and designated monopolies at a sub-central level of government; as well as the obligation regarding non-commercial assistance in order to address effects caused in a market of a non-Party through the supply of services by an SOE.

5.18 Intellectual Property

The Intellectual Property (IP) Chapter includes a number of provisions that are modelled off or build on provisions in the TRIPS Agreement. Most of the obligations in the IP Chapter are consistent with New Zealand law. Some obligations would, however, require New Zealand to amend aspects of its intellectual property laws. The key areas that would require amendments are in respect of the term of protection for copyright, protection against circumvention of technological protection measures, performers' rights, plant variety rights and the period of data protection for agricultural chemical products.

The IP Chapter contains the following sections:

- (a) General Provisions;
- (b) Cooperation;
- (c) Trademarks;
- (d) Country Names;
- (e) Geographical Indications;
- (f) Patents and Undisclosed Test or Other Data;
- (g) Industrial Designs;
- (h) Copyright and Related Rights;
- (i) Enforcement;
- (j) Internet Service Providers; and
- (k) Final Provisions.

There are also six annexes to the IP Chapter that provide country-specific exceptions for certain Parties, including New Zealand. Each of the sections and annexes are described in turn below.

5.18.1 Section A: General Provisions

Nature and scope of obligations

Article 18.5 requires each Party to give effect to the provisions of the IP Chapter. In other words, each Party is required to implement the minimum standards set out in the IP Chapter. Article 18.5 also permits Parties to implement more extensive protection of intellectual property rights in their domestic law than is required by the IP Chapter. The provision provides clarity that other obligations in the IP Chapter that might be read as a “ceiling” do not require a Party to unwind protection that is already provided over and above the provisions of the IP Chapter.

Article 18.5 also provides that each Party is free to determine how to implement the provisions of the IP Chapter in its own legal system and practice. The Article provides scope for Parties to decide the appropriate method of implementing their obligations under the IP Chapter.

Understandings regarding certain public health measures

Under Article 18.6, each Party affirms its commitment to the WTO *Declaration on the TRIPS Agreement and Public Health*, which was adopted by WTO Members in 2001 (Declaration on TRIPS and Public Health). The Declaration on TRIPS and Public Health clarifies how the TRIPS Agreement should be interpreted to enable Parties to take measures to protect public health.

The Article clarifies that the TPP obligations do not prevent a Party from taking measures to protect public health. For this purpose, the obligation permits each Party to determine what constitutes a national emergency or other circumstances of extreme urgency, and clarifies that public health crises such as HIV/AIDS, tuberculosis or malaria can constitute national emergencies or cases of extreme emergency.

If any waiver of a provision of the TRIPS Agreement, or any amendment of the TRIPS Agreement enters into force, and a Party's application of a measure in conformity with that waiver or amendment is contrary to the obligations of the IP Chapter, the Parties shall immediately consult in order to adapt the IP Chapter in light of the waiver or amendment.

Article 18.6 also requires each Party to notify, if it has not already done so, the WTO of its acceptance of the 2005 *Protocol Amending the TRIPS Agreement* (2005 Protocol). The 2005 Protocol would permanently incorporate into the TRIPS Agreement additional flexibilities to grant special compulsory licences for the export of medicines, referred to as the "Paragraph 6 System". In 2011, New Zealand notified WTO Members that it had accepted the 2005 Protocol.

Further flexibilities under the Declaration on TRIPS and Public Health in relation data protection are described under the Patents Section.

International agreements

Article 18.7 requires each Party to ratify or accede to the following multilateral treaties if it has not already done so:

- *Patent Cooperation Treaty*, as amended on September 28, 1979.
- *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm, July 14, 1967.
- *Berne Convention for the Protection of Literary and Artistic Works*, as revised at Paris, July 24, 1971 (Berne Convention).
- *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, done at Madrid, June 27 1989.
- *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended on September 26, 1980 (Budapest Treaty).
- *Singapore Treaty on the Law of Trademarks*, done at Singapore, March 27, 2006.
- *International Convention for the Protection of New Varieties of Plants*, as revised at Geneva, March 19, 1991 (UPOV 91).
- *WIPO Copyright Treaty*, done at Geneva, December 20, 1996 (WCT).
- *WIPO Performances and Phonograms Treaty*, done at Geneva, December 20 1996 (WPPT).

New Zealand has ratified all of these treaties except for the Berne Convention, the Budapest Treaty, UPOV 91, the WCT and the WPPT. The obligations that would be imposed on New Zealand by the Berne Convention, the Budapest Treaty, the WCT and the WPPT are explained in separate NIAs.

Annex 18-A applies to Article 18.7.2 and provides New Zealand with an alternative option to acceding to UPOV 91. Under Annex 18-A, New Zealand would instead be required to either:

- Accede to UPOV 91 within three years of the date of entry into force of the Agreement for New Zealand; or

- Adopt a plant variety rights system that gives effect to UPOV 91 within three years of the date of entry into force of the Agreement for New Zealand.

Annex 18-A provides that nothing shall preclude the adoption by New Zealand of measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party. Furthermore, the consistency of such measures with the obligation to accede to UPOV 1991, or adopt a plant variety rights system that gives effect to UPOV 1991, would not be subject to the dispute settlement provisions of the Agreement.

Annex 18-A also provides that interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of the Agreement.

If New Zealand decided to accede to UPOV 91, the legal obligations that would be imposed on New Zealand are explained at the end of this subsection.

National Treatment

Article 18.8 requires each Party to accord to nationals of another Party treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property rights. This obligation is known as “national treatment”. In other words, the intellectual property protection that New Zealand provides to domestic rights holders must also be provided to nationals of other Parties.

This obligation is already included in the TRIPS Agreement, which means that for most of the obligations in the IP Chapter, New Zealand is already subject to a national treatment obligation in respect of all WTO Members. The national treatment obligation in the IP Chapter is, however, broader than the TRIPS national treatment obligation because some of the obligations in the IP Chapter require more protection than the TRIPS Agreement requires.

The national treatment obligation applies to matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by the IP Chapter. Included within the obligation are the prohibitions in the IP Chapter on technological protection measures (explained in the Copyright and Related Rights section below).

Also included in the national treatment obligation is any form of payment, such as licensing fees, royalties, equitable remuneration or levies in respect of uses of copyright works that fall under the copyright provisions. The practical effect of this is that, if the New Zealand Government was to set up a compulsory licence scheme to remunerate copyright owners for uses of copyright works that infringe an exclusive right that New Zealand must provide copyright owners under TPP, then New Zealand would not be able to exclude rights holders from other Parties from that licence scheme. Currently, New Zealand does not have any compulsory licence schemes for copyright works.

Article 18.8.2 provides an exception for secondary uses of sound recordings. The exception applies to uses of sound recordings via:

- Analogue communications.
- Freely available over the air broadcasts.

Essentially, this provision applies to free-to-air radio and television uses of sound recordings, as well as other freely available broadcasts. An example might be playing the radio in a café.

This exception to national treatment permits New Zealand to limit the protection that the nationals of another Party would receive in New Zealand to the protection that they would be given in that other Party. For example, if a rights owner is not able to get a license fee for a freely available broadcast in another Party, New Zealand can limit nationals of that other Party from doing so in New Zealand, even if our law provides that a domestic rights owner can license such broadcasts.

Article 18.2.3 replicates the national treatment exception from Article 3.2 of the TRIPS Agreement. This exception permits each Party to require foreign nationals to designate an address for service in its territory.

Transparency

Article 18.9.1 requires each Party to endeavour to make laws, regulations, procedures and court rulings concerning the protection and enforcement of intellectual property rights available on the Internet.

Article 18.9.2 and 18.9.3 require each Party to endeavour to make available on the Internet applications for trade marks, geographical indications, designs, patents and plant variety rights, and the details of registered rights for that subject matter. The publication in respect of registered rights must be sufficient to enable the public to become acquainted with the registration or grant of such rights.

Application of the IP Chapter to existing subject matter and prior acts

Article 18.10 requires each Party to apply the obligations of the IP Chapter to all subject matter that is protected by an intellectual property right in its territory at the date of entry into force of the Agreement. This means that if a patent is registered, or a copyright is still within the term of protection, it must receive the protection set out in the IP Chapter.

The provision clarifies however that subject matter that has fallen into the public domain does not need to be protected anew. For example, this means that copyright works for which the term has expired in New Zealand before the date of entry into force of the Agreement would not need to receive an extension of term.

In addition, this Article clarifies that acts that have occurred before entry into force of the Agreement would not be subject to the obligations of the IP Chapter. For example, if an unreasonable curtailment of the patent term for a pharmaceutical has been caused by an act that occurred before the

Agreement enters into force, that act would not be required to be subject to the obligations to extend patent term to compensate for unreasonable curtailment.

Exhaustion of intellectual property rights

Article 18.11 provides that a Party is not prevented from determining whether and under what conditions intellectual property rights would be exhausted under its legal system. A common example of exhaustion is where the original rights owner cannot continue to enforce their rights after they have been sold to a third party (known as exhaustion after first sale). The best practical example of an exhaustion policy is providing for parallel importation of goods protected by intellectual property rights. The Article clarifies that none of the obligations in the IP Chapter prevent New Zealand from providing for the parallel importation of goods protected by an intellectual property right.

5.18.2 Section B: Cooperation

Cooperation Activities and Initiatives: Article 18.13 requires the Parties to endeavour to cooperate among relevant intellectual property institutions, such as the respective intellectual property offices of the Parties. The provision includes a list of issues for possible cooperation, such as developments in domestic and international intellectual property policy, or education and awareness relating to intellectual property.

Patent Cooperation and Work Sharing: Article 18.14 requires the Parties to endeavour to cooperate specifically on the issue of patent work sharing, for example by making search and examination results available to other Parties, or by exchanging information on quality assurance systems and quality standards relating to patent examination. Each Party is also required to endeavour to cooperate to reduce differences in procedures and process of their patent offices in order to reduce the cost and complexity of obtaining patents.

Traditional Knowledge Cooperation: Article 18.16 requires the Parties to endeavour to cooperate between their respective intellectual property agencies, or other relevant institutions, to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources.

Each Party would also be required to endeavour to pursue quality patent examination in relation to traditional knowledge issues, which may include:

- Taking account of publicly available information related to traditional knowledge when determining prior art.
- Giving third parties an opportunity to cite prior art disclosures related to traditional knowledge to the patent examining authority.
- Using databases or libraries containing traditional knowledge where appropriate.
- Training of patent examiners in the examination of applications that are related to traditional knowledge associated with genetic resources.

Cooperation on Request: Article 18.17 provides that cooperation under the IP Chapter is subject to resources, and upon mutually agreed terms and conditions between the Parties involved.

5.18.3 Section C: Trade Marks

Types of Signs Registrable as Trade Marks: Article 18.18 prohibits the Parties from refusing to register a trade mark because it is not visually perceptible or only because it consists of a sound. Each Party must make best efforts to register scent marks. A Party may, however, require that trade marks must be able to be described or represented graphically.

Collective and Certification Marks: Article 18.19 requires each Party to enable collective marks and certification marks to be protected. Parties must also enable geographical indications to be protected under its trade mark regime.

Use of Identical or Similar Signs: Article 18.20 requires each Party to give registered trade mark owners the exclusive right to prevent third parties from using in trade an identical or similar sign, including a geographical indication, as the registered trade mark if the use would be likely to result in confusion and was not authorised by the owner. Confusion must be presumed to occur if the sign is the same as the sign protected by the trade mark registration and used on identical goods or services.

Well Known Trade Marks: Article 18.22.1 prevents each Party from refusing to recognise a trade mark as well-known, because it has not been previously registered or recognised as well-known in its territory or elsewhere.

Article 18.22.2 requires each Party to prohibit the use of a trade mark, and enable an application for its registration to be refused or its registration to be cancelled, if the trade mark is identical or similar to a well-known trade mark, whether registered or not, for goods or services that are *not* identical or similar to those identified by a well-known trademark, and provided that:

- The use of that trade mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trade mark.
- The interests of the owner of the trade mark are likely to be damaged by such use.

Article 18.22.4 requires each Party to prohibit the use of a trade mark, and enable an application for its registration to be refused or its registration to be cancelled, if:

- The trade mark is identical or similar to a well-known trade mark for identical or similar goods or services;
- The use of the trade mark is likely to cause confusion with the well-known trade mark; and
- The well-known trade mark was well-known before the trade mark was registered or used.

Procedural Aspects of Examination, Opposition and Cancellation: Articles 18.23 and 18.24 impose administrative requirements on each Party's trade mark system. These include:

- Giving reasons in writing for any refusal to register a trade mark.

- Giving applicants an opportunity to respond to communications from the Party's trade mark office, contest an initial refusal to register a trade mark and appeal any final decision in court.
- Giving people an opportunity to oppose the registration of a trade mark or seek cancellation of the registration.
- Requiring administrative decisions in opposition and cancellation proceedings to be reasoned and in writing.
- Enabling people to apply for, and maintain, trade marks electronically.
- Providing a publicly available online database of trade mark applications and registered trade marks.

Classification of Goods and Services: Article 18.25 requires each Party to adopt or maintain a trade mark classification system that is consistent with the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*.

Term of Protection for Trade Marks: Article 18.26 requires each Party to provide that the initial term of registration for a trade mark, and each subsequent renewal of a registration, be a term of at least ten years.

Non-Recordal of a Licence: Article 18.27 prohibits the Parties from requiring trade mark licences to be formally recorded (for example, on a public register) for the licence to be deemed valid or for the trade mark owner to benefit from use of the trade mark by a licensee.

Domain Names: Article 18.28 imposes certain requirements on each Party with respect to the management of its country-code top level domain (ccTLD) names (e.g. ".nz"). These include ensuring there is available, in accordance with a Party's law and relevant administrators policies regarding the protection of privacy and person data:

- A low cost, fair and equitable, not overly burdensome dispute settlement procedure that does not preclude resort to court litigation.
- Online public access to a database of contact information for the owner of a domain-name registration.

The Article also requires each Party to provide, in connection with a Party's system for the management of ccTLD names, appropriate remedies when a person registers or holds a domain name that is identical or confusingly similar to a trade mark with a bad faith intent to profit.

5.18.4 Section D: Country Names

Article 18.29 requires each Party to provide the legal means to prevent commercial use of a Party's name in a manner which misleads consumers as to the origin of goods.

5.18.5 Section E: Geographical Indications (GIs)

Administrative procedures for the protection or recognition of Geographical Indications

The Parties have the flexibility to protect GIs through a trade mark system, a *sui generis* legislative system or through other legal means. Article 18.31 applies if a Party protects GIs through administrative procedures, such as through a trade mark system or a *sui generis* legislative system (for example, New Zealand's Geographical Indications (Wines and Spirits) Act 2006). Article 18.31 requires that Party to:

- Accept applications for GIs from nationals of a Party without requiring the relevant Party to be involved on behalf of its nationals.
- Process applications for GIs without overly burdensome formalities.
- Make regulations on the application process available to the public.
- Ensure that applicants or other interested persons can ascertain the status of applications.
- Provide a procedure for those applications to be opposed by interested persons, including publishing applications.
- Provide for cancellation of the protection of a GI.

Grounds of opposition and cancellation

Article 18.32 applies if a Party protects a GI through the administrative procedures referred to in Article 18.31. Under this Article, each Party must ensure that an interested person can oppose a GI or apply to have it cancelled on the following grounds:

- The GI is likely to cause confusion with a pre-existing application for a trade mark.
- The GI is likely to cause confusion with a pre-existing registered trade mark.
- The GI is customary in the common language of the Party as the common name for the relevant goods to which the GI application relates (e.g. it is a generic term for goods).

A Party may require these grounds to apply at the time of filing of the GI. A Party is not required to apply the grounds of opposition in respect of wines and spirits GIs.

Article 18.32.3 requires each Party not to preclude the possibility that a GI may be cancelled or otherwise cease in the basis that it has ceased meeting the conditions upon which it was originally protected.

Article 18.32.4 requires Parties who protect GIs through judicial procedures to ensure that the GI can be denied protection where the above grounds have been met, and permit proceedings to be commenced on these grounds. This obligation would apply to New Zealand where protection for a GI was sought through an action in respect of the common law tort of "passing off".

Article 18.32.5 requires each Party to comply with the obligations on grounds of opposition and cancellation where it protects translations or transliterations of GIs.

Guidelines for determining whether a term is the term customary in the common language

Article 18.33 requires each Party to ensure that its relevant authorities have the authority to take into account certain factors when they are determining whether a term is customary in the common language as the common name for goods to which a GI application relates. The factors are:

- Whether the term is used to refer to the product in competent sources such as dictionaries, newspapers and relevant websites.
- How the product referenced by the term is marketed and used in trade in the territory of the Party.

Multi-component terms

Article 18.34 requires Parties to not protect an individual component of a multi-component GI if the individual component is a term is customary in the common language as the common name for goods to which a GI relates.

Date of protection

Article 18.35 applies if a Party protects a GI through administrative procedures, such as through a trade mark system or a *sui generis* legislative system. It requires Parties to protect GIs under such systems no earlier than the date of application to protect the GI.

Protection of a GI under an international agreement

Article 18.36 applies if a Party protects a GI through an international agreement with another Party or a non-party. Under this Article, New Zealand could choose to protect those GIs through its domestic administrative or judicial procedures, in which case the relevant provisions around opposition etc. described above would apply. If New Zealand instead chose to protect such GIs in another manner, the Article sets out certain requirements it must meet.

Article 18.36 sets out different requirements in respect of existing international agreements to which GIs can be added, and new international agreements that are entered into after the date of entry into force of the TPP Agreement. An international agreement would be considered “existing” if:

- It was concluded in principle before the TPP Agreement was concluded in principle;
- It was signed before the TPP Agreement was signed; or
- It entered into force before the TPP Agreement entered into force.

If New Zealand entered into an international agreement with another country after one of these dates, it would be required to provide the following in respect of GIs that are proposed to be protected in that agreement:

- Provide an opposition process in respect of those GIs, and permit interested persons to oppose such GIs on the grounds that there is a prior trade mark right or the GI is a term customary in the common language for the relevant goods. These grounds are not required in respect of GIs for wines and spirits.

- Make information available about the process for protecting GIs under the international agreement and allow third persons to ascertain the status of any requests for protection.
- Make the relevant list of GIs available to the public, including specifying whether any translations or transliterations of those GIs would be protected, or whether any single components of a multi term GI would be protected.
- Provide a reasonable time for persons to object to the protection of a GI.
- Inform the other TPP Parties when opposition processes are beginning.

If New Zealand was to add a list of new GIs to any existing trade agreements it currently has, it would be required to instead provide the following in respect of those GIs:

- Make information available about the process for protecting GIs under the Agreement and allow them to ascertain the status of any requests for protection.
- Provide an opportunity for interested Parties to comment on those GIs before they are protected.
- Inform the other Parties of the opportunity to comment.

Furthermore, for any GIs protected through international agreements, each Party is required to ensure the following:

- That protection commences no earlier than the date of entry into force of the Agreement.
- The Party does not preclude the possibility that protection for the GI could cease.

5.18.6 Section F: Patents and undisclosed test or other data

General patents provisions

Patentable Subject Matter: Article 18.37 requires each Party to make patents available for inventions in any field of technology if the invention is new, involves an inventive step and is capable of industrial application. Patents must be made available for either new uses of a known product, new methods of using a known product, or new processes of using a known product. A number of exclusions are permitted, including:

- Inventions whose commercial exploitation must be prevented to protect public order or morality, human, animal or plant life or health, the environment.
- Diagnostic, therapeutic and surgical methods for the treatment of humans or animals.
- Biological processes for the production of plants or animals other than non-biological and microbiological processes.
- Plants and animals other than microorganisms, with the proviso that inventions derived from plants must be patentable.

Grace Period: Article 18.38 requires each Party to provide that public disclosures of an invention, by or with the consent of the patent applicant in the twelve months before a patent application is filed, would be disregarded when determining whether the invention is novel or inventive. A Party may limit eligibility for the grace period to disclosures made by an inventor or joint inventor.

Patent Revocation: Article 18.39 prevents each Party from cancelling, revoking or nullifying a patent on grounds other than fraud, misrepresentation or inequitable conduct, or one of the grounds that would have justified a refusal to grant the patent in the first place. Patents may also be revoked if this is done in a manner consistent with Article 5A of the Paris Convention and the TRIPS Agreement.

Patent Filing: Article 18.42 requires each Party to provide that the first inventor to file a patent application for a particular invention should be granted a patent, if the invention is patentable, unless that application has been withdrawn, abandoned or refused before it is published.

Amendments, Corrections and Observations: Article 18.43 requires each Party to provide applicants with at least one opportunity to make amendments, corrections and observations in connection with their applications.

Publication of Patent Applications: Article 18.44 requires each Party to publish pending patent applications promptly after eighteen months from the filing date – or from the earliest priority date if priority is claimed – or as soon as practicable after that. Patent applicants must be given the opportunity to request earlier publication.

Information Relating to Published Patent Applications and Granted Patents: Article 18.45 requires each Party to make available to the public certain information that is held by its patent office and created after the Agreement enters into force for that Party, including search and examination results, (including information related to prior art searches) certain non-confidential communications from applicants and patent and non-patent related literature citations submitted by applicants and third parties.

Patent term adjustment for patent office delays

Article 18.46 requires each Party to provide a procedure for patent applicants to request that the examination of their patent applications be carried out earlier than might otherwise be the case.

Article 18.46.3 requires each Party to provide for extension of the patent term if there are “unreasonable” delays in the examination and grant of patents. Such extensions need only be provided if the patent owner requests an extension.

An unreasonable delay is defined as a delay in grant of more than five years from the filing date of the patent application, or three years from the date that request for examination was filed, whichever is the later. Periods of time that do not occur during the processing or examination of the application by IPONZ, or that are not caused directly by IPONZ, or that are due to the actions of the patent applicant can be ignored when determining whether there has been unreasonable delay.

Protection of undisclosed test or other data for agricultural chemical products

Article 18.47 requires each Party to provide ten years of data protection for new agricultural chemical products. A new agricultural chemical product is defined as an agricultural chemical product that does

contain a chemical entity that has been previously approved in that Party. This means that the data provided to support an application for marketing approval of the new product cannot be used by the relevant agency to approve an application for marketing approval of a generic version of the product until ten years after the date of approval of the new product.

Patent term adjustment for unreasonable curtailment

Article 18.48 requires each Party to extend the term of a patent covering a pharmaceutical product to compensate for “unreasonable curtailment of the effective patent term as a result of the marketing approval process”. Unreasonable curtailment is not defined in the Article. The effective patent term is the period of time between the date of marketing approval and the expiry of the patent on the pharmaceutical product. Any extension of term may be subject to conditions and limitations, provided that those conditions and limitations are consistent with Article 18.48.

A Party may also provide for an accelerated marketing approval process for pharmaceutical products.

Regulatory review exception

Article 18.49 requires each Party to allow persons to make or use or export a patented pharmaceutical without the permission of the patent owner for the purposes of developing or submitting information required to obtain regulatory approval for a pharmaceutical product in the territory of the Party.

A Party may also allow persons to make, use or export a patented pharmaceutical for the purposes of seeking approval in another country.

Protection of undisclosed test or other data for new pharmaceutical products

Article 18.50 requires each Party to provide five years of data protection for new pharmaceutical products. A new pharmaceutical product is defined as a pharmaceutical product that does contain a chemical entity that has been previously approved in that Party. This means that the data provided to support an application for marketing approval of the new product cannot be used by other manufacturers to support an application for marketing approval of a generic version of the product until five years after the date of approval of the new product. The definition of new pharmaceutical product in Article 18.53 makes clear that this obligation does not cover combinations of previously approved and new chemical entities.

The Article also requires each Party to either:

- Provide three years of data protection for new clinical information submitted in support of an application for marketing approval of a previously approved pharmaceutical product covering a new indication, new formulation or new method of administration; or, alternatively,
- Provide five years of data protection for new pharmaceutical products that contain a chemical substance that has not been previously approved for marketing in New Zealand. This would require coverage for pharmaceuticals that are combinations of previously approved and new chemical entities.

Article 18.50.3 makes it clear that a Party may provide for an exception to the provisions on pharmaceutical data protection to protect public health in accordance with the Declaration on TRIPS and Public Health, or any waiver of the TRIPS Agreement to implement the Declaration on TRIPS and Public Health, or any amendment to the TRIPS Agreement to implement the Declaration on TRIPS and Public Health.

Biologics

Article 18.51 provides two options for Parties in respect of protecting a new pharmaceutical product that is or contains a biological pharmaceutical (biologic). A Party may decide to provide effective market protection through at least eight years of data protection. Alternatively, a Party may decide to provide effective market protection through at least five years of data protection, along with other measures, including existing measures in the case of New Zealand, recognising that market circumstances also contribute to the required effective market protection, to deliver a comparable outcome in the market. These measures and circumstances could include regulatory settings, patents and the time it takes for follow-on medicines to become established in the market.

The Parties have also agreed to consult after ten years from the date of entry into force of the Agreement, or as otherwise decided by the TPP Commission, to review the period of protection and the scope of the protection required by Article 18.51.

This Article defines biologics as products that are, or contain, proteins produced using biotechnology processes, for use in human beings for the prevention, treatment, or cure of a disease or condition. The Article does not require a Party to provide protection to any subsequent or second marketing approval of that biologic, or to any pharmaceutical product that contains a previously approved biologic.

Patent linkage

Article 18.53 requires each Party to put in place a system that enables a pharmaceutical patent holder to be notified that a generic version of their product has been submitted to the Party's regulatory authority for regulatory approval. Each Party would also need to ensure there is sufficient time and opportunity for a patent owner to seek a preliminary (or interim) injunction to resolve a patent dispute prior to a generic version of its patented medicine entering the market.

The system is often called "patent linkage", but New Zealand would not need to adopt the patent linkage systems found in some other TPP countries.

Alteration of the period of data protection

Article 18.54 requires each Party to not alter the period of data protection that it provides for new pharmaceutical products, biologic products and agricultural chemical products in the event that those products are protected by a patent and the patent protection expires on a date that is earlier than the period of data protection the Party is otherwise required to provide to those products.

5.18.7 Section G: Industrial designs

Protection: Article 18.55 requires each Party to provide adequate and effective protection of industrial designs, including where the design is applied only to a part of an article. Article 18.55 is subject to the limitations and exceptions provided in Articles 25 and 26 of the TRIPS Agreement.

5.18.8 Section H: Copyright and related rights

Right of Reproduction: Article 18.58 requires each Party to give authors, performers and producers of sound recordings the exclusive right to authorise or prohibit another person from making a reproduction of their works, performances and sound recordings.

Right of Communication to the Public: Article 18.59 requires each Party to provide authors of works the exclusive right to authorise or prohibit another person from communicating their work to the public by wire or wireless means. This right must cover “interactive” communications (where the person receiving the communication chooses the time and place they receive it).

Right of Distribution: Article 18.60 requires each Party to provide authors, performers and producers of sound recordings the exclusive right to authorise or prohibit another person from making copies of their works, performances and phonograms available to the public via selling them.

No Hierarchy: Article 18.61 sets out a rule that applies where two different rights holders have rights in the same work (such as a songwriter and a record label). Each Party must ensure that the authorisation of one rights owner does not remove the need for the authorisation of the other before the work can be exploited.

Related rights

Article 18.62 requires each Party to provide performers with the right to authorise another person to, or prohibit another person from:

- Broadcast and communicate their live performances to the public (such as, a live concert broadcast via the television).
- Fix their performances into a recording.

The Article also requires each Party to provide performers and producers of sound recordings the right to authorise or prohibit another person from communicating sound recordings to the public. This right must include “interactive” communications (where the person receiving the communication chooses the time and place they receive it).

In the case of analogue and free-to-air non interactive transmissions, a Party may determine whether to provide the right at all, or to limit it in some way.

Copyright term

Article 18.63 requires each Party to provide at least a 70 year term of protection for copyright works:

- For works where the term is calculated from the life of the author (like books and written music), the term must be the life of the author plus 70 years.
- For works where the term is calculated from the date the work is first published (like sound recordings and films) the term must be 70 years from the end of the calendar year in which the work is published. If these works are not published within 25 years of the date the work is created, then the term must be 70 years from the end of the calendar year in which the work was created.

New Zealand has secured a transition period of eight years from the date of entry into force of the Agreement for New Zealand before it is required to implement a 70 year term of protection for copyright works. For works that would otherwise have expired under New Zealand's current 50 year term during that transition period, New Zealand is required to implement a 60 year term of protection.

Copyright exceptions

Article 18.65 requires each Party to apply the "three step test" for copyright exceptions. The three step test is not a new obligation for New Zealand, but under the provisions of the IP Chapter the test would apply to a broader range of rights than New Zealand's existing international obligations (due to the fact that the rights in the IP Chapter are broader than New Zealand's existing international obligations).

The three step test requires a Party's exceptions to copyright to:

- Be limited to certain special cases;
- Not conflict with the normal exploitation of the work; and
- Not unreasonably prejudice the legitimate interests of the right holder.

In addition to the three step test, Article 18.66 requires each Party to endeavour to achieve an appropriate balance in its copyright or related rights system, among other things via limitations and exceptions to copyright in both the physical and digital environment.

When considering the appropriate balance, a Party must give due consideration to legitimate purposes, including criticism, comment, news reporting, teaching, scholarship, research, and facilitating access to published works for the print disabled.

Contractual transfers

Article 18.67 requires each Party to ensure that the rights in the copyright section are freely transferable via contract, and can be exercise in the name of rights holder. This Article is without prejudice to a Party's laws regarding the ownership of copyright under employment contracts or other default rules in law.

Technological protection measures

Article 18.68 sets out a range of obligations relating to technological protection measures (TPMs). A TPM is defined as "any technology, device or component that controls access to a work, performance or phonogram, or that protects copyright or related rights in a work, performance, or phonogram".

Under this Article, each Party is required to provide for civil and criminal remedies against a person who circumvents a TPM when they know or have reason to know circumvention is not permitted.

Each Party is also required to provide civil and criminal remedies for a person who makes TPM circumvention devices or services available to the public, if:

- The device or service is promoted, advertised or marketed by that person for the purpose of circumvention;
- The main purpose of the device is to circumvent a TPM (meaning that if the device or service has a commercially significant purpose other than circumvention, it is not captured); or
- The device or service is primarily designed, produced, or performed for the purpose of circumvention.

A Party is only required to provide criminal remedies where any of the above activities are done intentionally, and for the purpose of commercial advantage or financial gain. The type of remedies required under the TPM obligations is set out in the Enforcement Section – but is essentially the same as for copyright infringement.

A Party may choose not to apply criminal procedures and penalties where the prohibited activity is done by a non-profit library, museum, archive, educational institution, or non-commercial public broadcasting entity. A Party may also choose not to apply civil remedies to these entities if the prohibited activity is done in good faith without knowledge that it is prohibited.

Each Party is also required to ensure that a rights owner can pursue a breach of the TPM provisions in court separately from any claim they might pursue relating to copyright infringement.

Article 18.68.2 sets out a rule that applies when manufacturers of consumer electronics devices use TPMs to run those devices with specific applications or other hardware. The paragraph clarifies that a Party does not need to require third party technology manufacturers to design their devices to work alongside or “respond” to the relevant TPM.

A Party may also provide exceptions to the prohibitions on TPMs to enable people to use content protected by TPMs for legitimate purposes. Article 18.68.4 sets out rules as to the nature and scope of these exceptions, as follows:

- Exceptions must enable non-infringing uses of a work.
- Exceptions must be put in place after it has been determined through a legislative, regulatory or administrative process that the TPM would have an actual or likely negative impact on a non-infringing use of a work.
- Parties must consider evidence presented in the process.
- Exceptions must not undermine the adequacy of a Party’s system for protecting TPMs.

Rights management information

Article 18.69 requires each Party to provide a range of protections regarding rights management information (RMI). RMI means:

- Information that identifies a work, performance, or phonogram or its author, producer or performer;
- Information about the terms and conditions of use of the work; or
- Any numbers or codes that represent this information.

Each Party must provide civil and criminal remedies against any person who:

- Knowingly removes or alters any rights management information;
- Knowingly distributes or imports for distribution rights management information knowing it has been removed or altered without permission; or
- Knowingly distributes, imports for distribution, broadcasts, communicates or makes available a copyright work, performance, or sound recording, with knowledge that rights management information has been removed or altered without permission.

These prohibitions only apply where a person knows or has reason to know that the prohibited activity would induce, enable, facilitate or conceal an infringement of copyright or related rights.

Criminal remedies are only required where any of the above activities are done intentionally, and for the purpose of commercial advantage or financial gain. A Party may choose not to apply criminal procedures and penalties where the prohibited activity is done by a non-profit library, museum, archive, educational institution, or non-commercial public broadcasting entity.

The type of remedies required under the TPM obligations are further set out in the Enforcement Section – but are essentially the same as that for copyright infringement.

A Party may exclude the prohibited conduct from these remedies if the conduct is permitted under law for the purpose of law enforcement, essential security interests or other related government purposes.

A Party may also choose to limit the obligations to electronic information only.

5.18.9 Section I: Enforcement

General obligations

Article 18.71 is a general enforcement obligation that requires each Party to ensure remedies are available under its laws to permit effective action against infringements of the rights in the IP Chapter. Such remedies must include expeditious remedies in certain cases, and must be sufficient to constitute a deterrent to future infringements.

The Article also requires each Party to apply its intellectual property enforcement procedures in a way that avoids the creation of barriers to legitimate trade, and in a way that safeguards against abuse of the procedures. Procedures also need to be fair, equitable, and not unnecessarily costly. They also may not entail unreasonable time limits or unwarranted delays.

Article 18.71.3 requires each Party to ensure enforcement procedures are available against digital infringements to the same extent they are against physical infringements.

Article 18.71.5 requires each Party to take into account the need for proportionality between the seriousness of the infringement and the remedies or penalties that are applicable when they implement the enforcement provisions of the IP Chapter, as well as the interests of third parties.

Presumptions

Article 18.72 requires each Party to provide a number of presumptions for the purpose of enforcement procedures for infringements of intellectual property rights. The presumptions are rebuttable with evidence to the contrary.

In respect of copyright and related rights, each Party needs to provide a presumption that the person whose name is indicated as the creator or publisher is the designated rights holder of a work, and a presumption that copyright or related rights exist in the work. A Party may implement these presumptions through their rules on the validity of matters set out in sworn court documents.

Each Party is also required to provide that a registered trade mark is considered *prima facie* valid to be valid, and provide that that claims in a granted patent are also considered to be *prima facie* to satisfy patentability criteria.

Enforcement practices with respect to intellectual property rights

Article 18.73 sets out some transparency requirements regarding enforcement of intellectual property rights. The Article requires each Party to provide that final judicial decisions and administrative rulings generally be in writing, state any findings of fact, and the reasons for the decision. It also requires each Party to publish such decisions or otherwise make them available to the public. The Article also requires each Party to publish information on their efforts to provide effective enforcement of intellectual property rights.

Civil and administrative procedures and remedies

Article 18.74 sets out a range of obligations in respect of civil intellectual property enforcement procedures. Each Party is required to make civil judicial procedures available for enforcement of the intellectual property rights in the Chapter.

In civil proceedings, each Party is required to ensure its judicial authorities have the authority to do the following:

- Award damages where a person knows or has reason to know that they are infringing.
- Award an account of profits for the infringing activity.

- Consider any legitimate measure of value the rights owner submits when determining the amount of damages the infringer must pay.
- Award injunctive relief that conforms to Article 44 of the TRIPS Agreement.
- Provide adequate compensation to those that have been wrongfully subject to an enforcement procedure due to a rights holder's abuse of the procedure.
- Order the prevailing Party in a proceeding to be awarded court costs and attorneys' fees where appropriate.
- In respect of pirated copyright and counterfeit trademark goods, order such goods be destroyed (except in exceptional circumstances), and that materials or implements used to produce such goods be destroyed or disposed outside the channels of commerce.
- Order the infringer or an alleged infringer to provide information he or she possesses or controls, subject to a Party's laws regarding privilege and confidentiality of information sources and personal information.
- Impose sanctions on any person for violation of any court order concerning the protection of confidential information produced or exchanged during the court proceedings.

In respect of copyright and trademarks infringements, each Party is also required to establish or maintain either:

- A system of pre-established damages, in which case damages must be of an amount that would compensate the right holder for the harm caused; or
- A system of additional damages, in which case judicial authorities must be able to award any amount they consider appropriate having regard to all the circumstances of the infringement.

In respect of the protections in the Agreement for technological protection measures and rights management information, each Party is required to provide judicial authorities with the authority to:

- Impose provisional measures.
- Order the type of damages available for copyright infringement.
- Order court costs and fees to be paid.
- Order the destruction of devices and products found to be involved in the prohibited activity.

Any administrative proceedings provided by a Party must conform to the same principles set out under this Article.

Provisional measures

Article 18.75 sets out obligations in relation to provisional measures, such as *ex parte* (or without notice) processes or interlocutory proceedings. The Article requires each Party to ensure judicial authorities act on requests for *ex parte* hearings expeditiously in accordance with that Party's court rules.

Under Article 18.75, each Party must also provide its courts with the authority to:

- Require the applicant to provide reasonably available information to satisfy the court that an intellectual property right is being infringed.
- Order the applicant to provide a security or equivalent assurance so that the defendant is protected from abuse of an *ex parte* procedure. Each Party must ensure the level of the security does not unreasonably deter the applicant from using the procedures.
- In respect of the infringement of copyright and related rights or trade marks, order the seizure of suspected infringing goods, materials, and at least for trade mark counterfeiting any documentary evidence relevant to the infringement.

Special requirements related to border measures

Article 18.76 sets out a number of provisions related to customs procedures at the border for counterfeit trade mark and pirated copyright goods.

In respect of suspect counterfeit or confusingly similar trade mark goods, or pirated copyright goods that have been imported into the territory, each Party is required to provide:

- For a rights owner to apply to have the goods detained or suspended from release.
- That a rights holder seeking to detain goods must provide adequate evidence to the competent authority that there is a *prima facie* infringement of the rights holder's trade mark or copyright, and sufficient information to identify the goods.
- That a rights holder seeking to detain goods provides reasonable security or equivalent assurance to protect the owner of the goods and competent authorities from abuse of the process, which may be in the form of a bond.
- That the requirements around evidence, information and assurances do not unreasonably deter a person from using the procedures.
- That the relevant authorities can provide to the rights holder information about the detained goods, including the name and address of the consignor, exporter, consignee or importer, a description of the goods, the quality of goods and, if known, the country of origin of the goods, and contact information for the owner of the goods to the rights owner once the goods have been detained (subject to the Party's laws on privacy and confidentiality of information). Such information, if not provided immediately, must be provided within 30 working days of the seizure or determination that the goods are pirated copyright or counterfeit goods.

Each Party is also required to provide the relevant authority with power to initiate border measures on its own, without complaint from a rights holder (known as *ex officio* powers). This obligation applies to goods that are under customs control and that are imported, destined for export, or in transit.

As an alternative to providing *ex officio* powers for in transit goods, a Party may instead endeavour to share available information about the suspect goods with the destination country.

Each Party is required to ensure that infringement proceedings can be pursued in respect of the detained goods, and that competent authorities (such as a court) conducting this proceeding have the authority to order the destruction of the goods.

Each Party is required to ensure that goods that are not destroyed are disposed outside the channels of commerce in a manner that avoids harm to the rights owner, in all but exceptional cases. Furthermore, each Party must not permit relevant authorities to simply remove an unlawfully attached trademark to counterfeit trademark goods, other than exceptional cases in order to release the goods into the channels of commerce.

If a Party establishes fees in relation to the procedures in this Article, those fees must not unreasonably deter a person from using the procedures.

Each Party must also ensure the procedures under this Article apply to goods of a commercial nature sent in small consignments. Parties are not required to apply this obligation to small quantities of goods of a non-commercial nature contained in travellers' personal luggage.

Criminal procedures and penalties

Article 18.77 sets out a range of obligations in relation to criminal procedures for trademark counterfeiting and copyright or related rights piracy.

An overarching obligation is that criminal procedures must apply to wilful trademark counterfeiting or copyright piracy "on a commercial scale". In respect of copyright, commercial scale infringing acts are defined as:

- Acts carried out for commercial advantage or financial gain; or
- Acts that are not carried out for commercial advantage or financial gain but that are significant, and have a substantial prejudicial impact on the rights owner in relation to the marketplace.

A further obligation is that criminal liability should also be available for a person aiding and abetting another person to perform the prohibited activity.

Each Party must provide that the following activities must be subject to criminal procedures and penalties if they are carried out on a commercial scale:

- Wilful importation and exportation of counterfeit trademark or pirated copyright goods.
- Wilful importation and domestic use in the course of trade of labels or packaging to which a registered trademark has been applied without authority of the owner of the registered trade mark, that are intended to be used on identical goods or services for which the trademark has been registered.

Each Party must also ensure appropriate criminal remedies are available for the unauthorised copying of a film during a showing in a cinema.

Each Party is also required to provide that the criminal procedures can result in:

- Penalties that include sentences of imprisonment.
- Monetary fines sufficiently high to provide a deterrent to future acts of infringement consistent with the level of penalties applied for crimes of corresponding gravity.

In respect of criminal procedures, each Party is also required to provide judicial or competent authorities with the authority to do the following:

- Take into account in determining penalties the seriousness of the circumstances, which may include whether the infringement was a threat to, or effects on, health and safety.
- Order the seizure of suspected counterfeit trademark or pirated copyright goods, the seizure of any material or implements used in the offence, the seizure of any documentary evidence relevant to the alleged offence, and the seizure of assets obtained as a result of the offence.
- Order the forfeiture, at least for serious offences, of any assets obtained as a result of the offence.
- Order the forfeiture or destruction of:
 - Counterfeit trademark or pirated copyright goods.
 - Materials or implements that have been predominantly used in the creation of pirated copyright goods.
 - Any labels or packaging that a counterfeit trademark has been applied to and that has been used in the offence.
- Release or provide access to goods, materials or other implements to the rights owner for the purpose of initiating civil proceedings.
- Act on their own initiative without complaint by the rights owner.

As an alternative to seizure or forfeiture of assets, a Party may instead provide their judicial authorities to order a fine that corresponds to the value of the assets.

If a Party requires a rights owner to identify items for seizure in the course of a criminal proceeding, it should not require the items to be described in any greater detail than is needed to identify them for seizure.

If a judicial authority orders the destruction of goods in a criminal proceeding, the Party must ensure they do not compensate the defendant for that destruction.

If a judicial authority does not order the destruction of counterfeit trademark or pirated copyright goods in a proceeding, the Party must ensure the goods are disposed outside the channels of commerce in a way that avoids causing harm to the rights owner.

Trade secrets

Article 18.78 sets out a number of requirements in respect of trade secrets. The obligations must at least apply to the type of information set out in Article 39.2 of the TRIPS Agreement, which is information that is

- Secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- Has commercial value because it is secret; and
- Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

In addition, the obligations are without prejudice to a Party's laws in relation to whistleblowing.

Article 18.78 also requires each Party to provide for criminal procedures and penalties to apply one or more of the following situations:

- Wilful access to a trade secret in a computer system without permission;
- Wilful misappropriation of a trade secret without permission, including by means of a computer system; or
- Fraudulent disclosure of a trade secret, or alternatively wilful disclosure of a trade secret without permission, including by means of a computer system.

A Party may require one or more of the following thresholds to be met before the above activity needs to be criminalised:

- The act was done for the purpose of commercial advantage or financial gain;
- The act related to a product or service in national or international commerce;
- The act was done with an intention to injure the owner of the trade secret;
- The act was directed by, or was for the benefit of, a foreign economic entity; or
- The act was detrimental to a Party's economic interests, international relations, national defence, or security.

Protection of encrypted program-carrying satellite and cable signals

Under Article 18.79, each Party must make it a criminal offence to manufacture, import, export, sell, lease or distribute a device or system that assists in the decoding of an encrypted programme carrying satellite signal ("signal") without permission from the lawful distributor of the signal. Encrypted programme-carrying satellite or cable signals would include, for example, a signal provided by a pay television service that must be decoded with a device in the home. Civil remedies need to be available in respect for any person who holds an interest in the signal or its content injured by the activity.

Each Party must also make it a criminal offence to distribute a signal if the person distributing it knows it has been decoded without permission from the lawful distributor of the signal.

Each Party is also required to provide civil and criminal remedies against a person who wilfully manufactures or distributes equipment if they know the equipment is intended to be used in the unauthorised reception of a signal.

Each Party is also required to provide civil and criminal remedies against a person who receives or assists another to receive a signal without permission from the lawful distributor the signal. A Party

may limit the application of Article 18.79 to cases in which a person intends to avoid payment for the signal.

Government use of software

Under Article 18.80.2, each Party is required to adopt or maintain appropriate laws, regulations, policies, guidelines that require central government agencies to only use legitimate computer software.

5.18.10 Section J: Internet Service Providers

Section J of the IP Chapter deals with “safe harbours” for internet service providers (ISP). If an ISP meets certain conditions which are set out in Article 18.82, that Party must ensure that the ISP is protected from being penalised for copyright infringement (known as a safe harbour).

For the purposes of Section J, an ISP is defined as:

- A provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing;
- A provider of online services for storage of material online at the direction of a user; or
- A provider of online services for information location, such as referring or linking users to online locations.

Article 18.82.1 requires each Party to establish or maintain a framework of legal remedies for rights holders to address copyright infringement online, and appropriate safe harbours for ISPs.

The framework must include legal incentives for ISPs to cooperate with copyright owners, or to take other action, to deter the unauthorised storage and transmission of copyrighted materials. Legal incentives are not defined in Article 18.82. Potential liability for copyright infringement might be an example of a legal incentive.

The framework must also include limitations on ISP liability that have the effect of precluding monetary relief being awarded against an ISP for copyright infringement. Limitations on the type of remedy available for copyright infringement, or limitations on liability itself being available against the ISP, can meet this standard.

Article 18.82.2 requires each Party to apply its limitations precluding monetary relief in four situations, if those situations would attract possible copyright liability under that Party’s law:

- If the ISP is transmitting, routing, or providing connections for material without modification of its content.
- If the ISP is caching material through an automated process.
- If the ISP is storing material on a system or network controlled or operated by or for the service provider at the direction of a user.

- If the ISP is referring or linking users to an online location by using information location tools, including hyperlinks and directories.

Article 18.82.3 requires each Party to require an ISP to expeditiously remove or disable access to material on its network or system if the ISP obtains actual knowledge that the material infringes copyright. The ISP must also be required to do this if it becomes aware of facts or circumstances that indicate the material is infringing, such as by receiving a notice from the rights owner. This is commonly referred to as “notice and takedown”. The notice and takedown obligations in Article 18.82 apply to ISPs who are storing material (such as a web locker) or who are referring or linking users to online locations (such as a search engine).

If an ISP removes or disables access under the notice and takedown obligations, the Party must ensure the ISP cannot be liable for doing so under other grounds. The Party must also ensure that its law provides that any notice sent to an ISP contains information reasonably sufficient to enable the ISP to identify the allegedly infringing material, and details of the person sending the notice.

Under Article 18.82.4, if a Party provides a “counter-notice” system (in addition to a notice and takedown system), that Party must require ISPs to restore any material they have disabled access to upon receiving a counter notice from the person who originally put it there, unless the rights owner takes court action within a reasonable time. Although New Zealand does not provide a counter notice system, it would need to comply with this obligation if it chose to adopt one.

Article 18.82.5 requires each Party to ensure that monetary remedies are available in its legal system if a person makes a material misrepresentation in a notice or counter notice and that causes injury to an interested Party.

Article 18.82.6 requires each Party to ensure that safe harbours for ISPs are not conditioned on the ISP monitoring its service, or proactively seeking out information about infringing activity on its network.

Article 18.82.7 requires each Party to ensure that a rights owner who has made a legally sufficient claim of copyright infringement can expeditiously obtain details of an alleged infringer from an ISP through a judicial or administrative process. The process must be consistent with the principles of due process and privacy.

5.18.11 Section K: Final Provisions

The Final Provisions Section provides transition periods for countries that need to change their laws in order to comply with the provisions of the IP Chapter. As noted above, New Zealand has secured a transition period of eight years from the date of entry into force of the Agreement for New Zealand before it is required to implement a 70 year term of protection for copyright works.

5.18.12 Plant variety rights and UPOV 91

The six annexes to the IP Chapter provide certain Parties with country-specific exceptions to the obligations in the IP Chapter or flexibilities in implementing the obligations. As explained above, Annex 18-A provides New Zealand with an alternative option to acceding to UPOV 91. Subject to that exception, the legal obligations that would be imposed on New Zealand in giving effect to, or acceding to, UPOV 91 are summarised below.

Chapter II of UPOV 91 sets out the general obligations of the Contracting Parties. Article 2 requires each Contracting Party to grant and protect breeders' rights.

Article 3 sets out the plant genera and species for which breeders' rights must be granted. Article 3(1) requires each Contracting Party that is already a UPOV member to extend protection to all plant genera and species if it does not already do so, within five years of the date that UPOV 91 enters into force for that Party. Article 4 requires each Contracting Party to accord national treatment to nationals and residents of other Contracting Parties.

Chapter III (5 – 9) sets out the conditions for the grant of a plant variety right (PVR). If these conditions are satisfied in relation to a particular variety, a PVR must be granted. No other conditions may be imposed. These conditions (novelty, distinctness, uniformity and stability) are essentially the same as those set out in UPOV 78 and in the Plant Variety Rights Act 1987 (PVR Act).

Chapter IV (Articles 10 – 13) sets out the procedures that must be provided for in respect of the making of applications for a PVR, in particular those relating to the filing of applications, right of priority, examination of the application and provisional protection. These conditions are essentially the same as those set out in UPOV 78 and in the PVR Act with only minor differences.

Chapter V (Articles 14 – 19) relate to the nature and scope of the exclusive rights that Contracting Parties must provide for PVR owners. Article 14 (1) – (4) set out the specific acts that PVR owners have the exclusive right to do. These rights are significantly greater than those provided for under UPOV 78 and the PVR Act. Article 14(5) provides that these rights extend to varieties 'essentially derived' from protected varieties. The rights provided in UPOV 78 and the PVR Act do not extend to such varieties.

Article 15 provides for exceptions to the exclusive rights provided for plant breeders. Compulsory exceptions are set out in Article 15(1). Each Contracting Party must provide for these exceptions. Two of the exceptions are somewhat narrower than those provided for under the PVRA, one (an experimental use exception) is new.

Article 15(2) is an optional exception relating to 'farm saved seed' of protected varieties. Farm saved seed is seed saved by a farmer from a crop that is used to plant a subsequent crop property. Contracting Parties are not required to provide for this exception. If a Contracting Party does provide this exception, that Party has some flexibility in how it applies the exception.

Article 16 requires each Contracting Party to provide for 'exhaustion' of PVRs. The principle of 'national' exhaustion is applied. Where any material of a protected variety has been placed on the market by a PVR owner in a Contracting Party, with the consent of the PVR owner, the PVR owner has no rights over subsequent sales of the material, unless they involve further propagation of the material. The PVR Act is silent on the issue of exhaustion.

Article 17 requires that each Contracting Party shall not restrict the free exercise of the PVR except in the public interest. If such restrictions result in the grant of a compulsory license, then there is a requirement to ensure that the PVR owner receives 'equitable remuneration'. The PVR Act already meets this requirement.

Article 18 requires that a PVR is independent of any measures to regulate the use or exploitation of plant material. Article 19 requires that the term of the PVR must be at least 25 years from grant for trees and vines and at least twenty years from grant for other types of plant. The PVR Act currently provides a term of 23 years from grant for woody plants and 20 for all others.

Chapter VI of UPOV91 (Article 20) deals with the rules relating to plant variety denominations. The denomination is the 'generic' name by which a protected variety is known. The rules in Article 20 are consistent with the practice established in the PVR Act.

If New Zealand accedes to UPOV 91, New Zealand would be required to adopt all measures necessary for the implementation of UPOV 91 (Article 30(1)). By virtue of its obligations under UPOV 78, New Zealand already fulfils many of these requirements.

Chapter VII (Articles 21 and 22) deal with nullity and cancellation of a PVR. A PVR must be declared null and void if it is established that the criteria for grant were not met at the time of grant. A PVR may be cancelled, if subsequent to grant it is established that the conditions for grant are no longer met. The PVR Act provides for both (although under the general heading 'Cancellation of grants').

Chapter VIII sets out the administrative provisions for the UPOV Union. There is a requirement (in Article 29) that each Member State makes a financial contribution to the finances of the Union. This mirrors a similar obligation in UPOV 78.

Chapter IX deals with implementation of the Convention, and other Agreements. Under Article 30(2) of UPOV 91, a Contracting Party depositing its instrument of accession must be in a position, under its laws, to give effect to the provisions of UPOV 91. In practice this means amending the PVR Act so that it is consistent with UPOV 91.

No reservations to UPOV 91 are permitted (Article 35(1)), except for one exception (Article 35(2)) that New Zealand is not eligible to take advantage of.

Article 36 requires a Contracting Party that deposits its articles of ratification or accession to provide specified information to the Secretary General. Each Contracting Party is also required to promptly

notify the Secretary General of any changes to its PVR legislation and the extension of the application of UPOV 91 to additional plant genera and species.

UPOV 91 does not include a dispute resolution process.

5.19 Labour

Article 19.3.1 requires each Party to adopt and maintain in its laws and regulations (as well as in relevant practices) the following rights as stated in the *International Labour Organization (ILO) Declaration*:

- Freedom of association and the effective recognition of the right to collective bargaining.
- The elimination of all forms of forced or compulsory labour.
- The effective abolition of child labour and, for purposes of TPP, a prohibition on the worst forms of child labour.
- The elimination of discrimination in respect of employment and occupation.

Parties are also required (under Article 19.3.2) to adopt and maintain laws and regulations (as well as relevant practices) governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. New Zealand would be able to determine what are acceptable conditions of work for it.

Parties are prohibited from waiving, or otherwise derogating from (or offering to do so), their laws or regulations implementing:

- Article 19.3.1, if to do so would be inconsistent with one of the ILO rights listed in that paragraph; or
- Article 19.3.1 or 19.3.2, if to do so would weaken or reduce adherence to one of the ILO rights listed in Article 19.3.1, or to a condition of work referred to in Article 19.3.2 in a special trade or customs area in the Party's territory.

This prohibition only applies where the waiver or derogation is done in a manner affecting trade or investment between the Parties.

Under Article 19.5, a Party must not fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of the Agreement. However, the Article specifies that each Party retains the right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of resources between labour enforcement activities among the labour rights and acceptable conditions of work listed in Article 19.3.1 and Article 19.3.2.

Each Party is required to discourage (through initiatives it considers appropriate), the import of goods produced in whole or in part by forced or compulsory labour (Article 19.6).

Article 19.7 requires each Party to endeavour to encourage enterprises to adopt voluntarily corporate social responsibility initiatives on labour issues that it endorses or supports.

Article 19.8 obliges each Party to take certain steps regarding public awareness and procedural guarantees, including to promote awareness of its labour laws, and to ensure that persons with a recognised interest under its law in a particular matter have access to impartial and independent tribunals for enforcement of its labour laws. There are also obligations around due process requirements for such proceedings, for there to be a right of review or appeal, and for there to be procedures to effectively enforce final tribunal decisions.

Each Party must consider written submissions from persons of a Party on matters related to the Chapter, and must make its procedures for the receipt and consideration of submissions readily accessible and publicly available (Article 19.9).

Labour Council

The Chapter establishes a Labour Council (Article 19.12), composed of senior governmental representatives, with functions that include to consider matters related to the Chapter and discuss matters of mutual interest; and establish and review priorities to guide decisions by the Parties about labour cooperation and capacity building activities. The Council is also required to review implementation of the Chapter during the fifth year after entry into force of the Agreement and thereafter as agreed between the Parties with a view to ensuring its effective operation. Provision is made for the Council to meet regularly.

The Council is required to provide a means for receiving and considering views from interested persons on matters related to the Chapter. Each Party has to convene a new, or consult an existing, national labour consultative or advisory body, or maintain a similar mechanism, for members of its public to provide views on matters regarding the Chapter (Article 19.13.2).

The Parties are required to, as appropriate, liaise with relevant regional and international organizations, such as the ILO and APEC, on matters related to the Chapter (Article 19.12.9).

Article 19.11 makes provision for a cooperative labour dialogue between Parties on any matter arising under the Chapter in the event that this is requested by a Party. Also, there is provision in Article 19.14 for Labour Consultations. These may be requested at any time by a Party and the consulting Parties are required to make every attempt to arrive at a mutually satisfactory resolution of the matter through such consultations. The Parties may request advice from an independent expert chosen by consensus to assist them and may have recourse to procedures as good offices, conciliation or mediation. If the consulting Parties are unable to resolve the issue, then any consulting Party may request that the Council representatives of the consulting Parties convene to consider the matter. This may also involve advice from experts and recourse to procedures such as good offices, conciliation or mediation. Labour Consultations must be conducted before a Party is able to have recourse to dispute settlement under Chapter 28 (Dispute Settlement).

5.20 Environment

General obligations

Article 20.3 contains several core obligations:

- Each Party must strive to ensure that its environmental laws and policies provide for and encourage high levels of environmental protection, and must also strive to continue to improve its levels of environmental protection.
- A Party must not fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.
- A Party may not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.

Other, more specific obligations are set out below.

Ozone layer

Each Party must take measures to control production and consumption of, and trade in, substances that are controlled by the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Article 20.5.1). New Zealand would be deemed in compliance with this obligation if it maintained the *Ozone Layer Protection Act 1996* (or any subsequent measure that provides an equivalent or higher level of environmental protection).

Each Party must make publicly available appropriate information about its programmes and activities related to ozone layer protection (Article 20.5.2).

Parties must cooperate to address matters of mutual interest related to ozone-depleting substances (Article 20.5.3).

Protection of the marine environment from ship pollution

Each Party is required to take measures to prevent pollution of the marine environment from ships where that pollution is regulated by the International Convention for the Prevention of the Pollution from Ships (MARPOL) (Article 20.6.1). New Zealand would be deemed in compliance with this obligation by maintaining the measures in the *Maritime Transport Act* which implement its obligations under MARPOL (or any subsequent measure that provides an equivalent or higher level of environmental protection).

The Parties are required to cooperate to address matters of mutual interest with respect to the pollution of the marine environment from ships (Article 20.6.3).

Each Party is required to make publicly available appropriate information about its programmes and activities related to the prevention of pollution of the marine environment from ships (Article 20.6.2).

Biodiversity

Each Party must promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy (Article 20.15).

Invasive alien species

The Committee that is established under the Environment Chapter is required to coordinate with the Committee established under Chapter 7 (Sanitary and Phytosanitary Measures) to identify cooperative opportunities to share information and management experiences on the movement, prevention, detection, control, and eradication of invasive alien species, with a view to enhancing efforts to assess and address the risks and adverse impacts of invasive alien species (Article 20.14).

Marine capture fisheries

Article 20.16 sets out a number of obligations in respect of marine capture fisheries. Each Party must seek to operate a fisheries management system that regulates marine wild capture fishing and that is designed to prevent overfishing and overcapacity, to reduce bycatch of non-target species and juveniles, and to promote the recovery of overfished stocks for all marine fisheries in which its persons conduct fishing activities. Such a management system is required to be based on the best scientific evidence available and on internationally recognized best practices for fisheries management and conservation. Each Party is also required to promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures.

The Article also addresses subsidies, prohibiting Parties from granting or maintaining any of the following subsidies that are specific in accordance with the meaning given to that term in the WTO's *Subsidies and Countervailing Measures (SCM) Agreement*:

- Subsidies for fishing that negatively affect overfished fish stocks.
- Subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for illegal, unreported or unregulated fishing in accordance with the rules and procedures of such organization or arrangement and in conformity with international law.

Subsidy programmes established by a Party before the entry into force of TPP and that negatively affect overfished stocks have to be brought into conformity as soon as possible and no later than three years of the date of entry into force.

Each Party is required to make best efforts to refrain from introducing new, or extending or enhancing existing, subsidies that meet the tests in Articles 1.1 and 2 of the SCM Agreement and that contribute to overfishing or overcapacity.

Each Party must notify regularly to the other Parties any subsidy that meets the tests in Articles 1.1 and 2 of the SCM Agreement, and that the Party grants or maintains to persons engaged in fishing or fishing related activities. Notifications have to cover subsidies provided within the previous two-year period and include the information required under Article 25.3 of the SCM Agreement. To the extent

possible, notifications must have the information listed in Article 20.18.10, including the catch data by species in the fishery for which the subsidy is provided; status of the fish stocks in the fishery for which the subsidy is provided; fleet capacity in the fishery for which the subsidy is provided; conservation and management measures in place in the relevant fish stock; and total imports/exports per species.

Article 20.16 also requires each Party to provide, to the extent possible, information in relation to other fisheries subsidies that it grants or maintains and that are not prohibited under the Article, in particular fuel subsidies.

A Party may request additional information from the notifying Party regarding its notifications. In such a case, the notifying Party must respond to the request as quickly as possible and in a comprehensive manner.

Article 20.18 also addresses illegal, unreported and unregulated (IUU) fishing. The Parties must endeavour to improve cooperation internationally in relation to the importance of concerted international action to address IUU fishing, as reflected in regional and international instruments. In support of efforts to combat IUU fishing practices and to help deter trade in products from species harvested from such practices, each Party is required to:

- Cooperate with other Parties to identify needs and build capacity.
- Support monitoring, control, surveillance, compliance and enforcement systems.
- Implement port State measures.
- Strive to act consistently with relevant conservation and management measures adopted by Regional Fisheries Management Organizations (RFMOs) of which it is not a member so as not to undermine those measures.
- Endeavour not to undermine catch or trade documentation schemes operated by RFMOs or Arrangements (RFMAs) or an intergovernmental organisation that has in its scope the management of shared fisheries resources, where the Party is not a Member of those RFMOs or RFMAs.

Conservation and trade

Each Party is required under Article 20.17 to adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).

In relation to wild fauna and flora, the Parties are required to:

- Exchange information and experiences on issues of mutual interest related to combating the illegal take of, and illegal trade in, wild fauna and flora.
- Undertake, as appropriate, joint activities on conservation issues of mutual interest, including through relevant regional and international fora.

- Endeavour to implement, as appropriate, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade.
- Take appropriate measures to protect and conserve wild fauna and flora that it has identified are at risk within its territory.
- Maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management and wild fauna and flora conservation, and endeavour to enhance public participation and transparency in these frameworks.
- Endeavour to develop and strengthen cooperation and consultation with interested non-governmental entities in order to enhance implementation of measures to combat the illegal take of or illegal trade in wild fauna and flora.

Each Party must take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of its law or another applicable law, where the primary purpose of the law is to conserve, protect, or manage wild fauna or flora. In addition, each Party shall endeavour to take measures to combat the trade of wild fauna and flora transhipped through its territory that, based on credible evidence, were illegally taken or traded.

Environmental goods and services

Under the Environmental Goods and Services provision (Article 20.20), the Parties must endeavour to address any potential barriers to trade that may be identified by a Party, including by working through the Environment Committee and in conjunction with other relevant TPP Committees, as appropriate.

Cooperation frameworks

Article 20.10 on Cooperation Frameworks requires the Parties to cooperate to address matters of joint or common interest among them related to the implementation of the Chapter, where there is mutual benefit from such cooperation. Each Party must designate the authority responsible for cooperation to serve as its national contact point on matters relating to coordination of cooperation activities and must notify the other Parties in writing within 90 days of entry into force of the Agreement of its contact point.

Where possible and appropriate, the Parties are required to seek to complement and utilise their existing cooperation mechanisms and take into account relevant work of regional and international organisations. Each Party is required to promote public participation in the development and implementation, as appropriate, of cooperative activities.

The Parties are required, through their national contact points for cooperation, to periodically review the implementation and operation of Article 20.10 and report their findings to the Committee that is established under the Chapter. Through the Committee, the Parties may periodically evaluate the necessity of designating an entity to provide administrative and operational support for cooperative activities. If the Parties agree to establish such an entity, they must agree on the funding of the entity, on a voluntary basis to support its operation.

Procedural matters

Each Party is required under Article 20.7 to promote public awareness of its environmental laws, regulations and policies by ensuring that relevant information is available to the public.

Each Party must ensure that interested persons in its territory can request the competent authorities to investigate alleged violations of its environmental laws, and that the competent authorities give due consideration to those requests.

Each Party must ensure that proceedings for the enforcement of its environmental laws are available under its law. These proceedings may be judicial, quasi-judicial, or administrative, and must be fair, equitable, transparent, and comply with due process of law. Any hearings must be open to the public, unless the administration of justice requires otherwise. Persons with a recognised interest under the country's law in a particular matter must have appropriate access to these proceedings.

Each Party is required to provide appropriate sanctions or remedies for violations of its environmental laws and to ensure that, in the establishment of the sanctions or remedies, appropriate account is taken of relevant factors including the nature and gravity of the violation, damage to the environment, and any economic benefit the violator derived from the violation.

Public participation and submissions

Each Party must seek to accommodate requests for information about their implementation of the Chapter, and must use consultative mechanisms (for example, national advisory committees) to seek views on matters related to implementation of the Chapter (Article 20.8).

Further, each Party must provide for the receipt and consideration of written submissions from persons regarding its implementation of the Chapter, and must respond in a timely manner to those submissions (Article 20.9). Each Party has to make its procedures for the receipt and consideration of written submissions readily accessible and publicly available.

Voluntary mechanisms

Under Article 20.11, each Party is required to encourage:

- The use of flexible and voluntary mechanisms (such as voluntary auditing) to protect its natural resources and environment.
- The continued development and improvement of criteria used in evaluating environmental performance by its relevant authorities, businesses and business organizations, non-governmental organizations, and other interested persons involved in the development of such criteria.

Institutional arrangements

Each Party must designate a national contact point in order to facilitate communication between the Parties in the implementation of the Chapter (Article 20.11.1).

Consultations and dispute resolution

The Chapter establishes a three-step consultation process in Article 20.20 to address any matter that might affect its operation.

Step 1 - Environmental Consultations: In the first step, a Party (the requesting party) may request consultations with any other Party (the responding party) by delivering a written request to the responding Party's contact point. Any other TPP Party that considers it has a significant interest in the matter (a participating party) may participate in the consultations.

Consultations must begin promptly, unless agreed by the relevant Parties, and the Parties must make every effort to arrive at a mutually satisfactory resolution to the matter, which may include appropriate cooperative activities. The consulting Parties may seek advice or assistance from any person or body they consider appropriate.

Step 2 - Senior Representative Consultations: If the consulting parties fail to resolve a matter in the first step, a consulting party may request that the matter be considered by Committee representatives from the consulting parties.

Step 3 - Ministerial Consultations: If the consulting Parties have failed to resolve the matter in the second step, a consulting Party may refer the matter to the relevant Ministers of the consulting Parties who shall try to resolve the matter.

Dispute resolution

If the consulting Parties fail to resolve the matter in accordance with the three steps summarised above, the requesting Party may request either consultations or establishment of a panel under Chapter 28 (Dispute Settlement). However, for a dispute arising under Article 20.17.2 (Conservation and Trade) a panel convened under Chapter 28 (Dispute Settlement) must, if appropriate, seek technical advice or assistance from an entity authorised under CITES to address the particular matter, and provide the consulting parties with an opportunity to comment on any technical advice or assistance received. The panel must give due consideration to any interpretive guidance it receives.

Before a Party initiates dispute settlement for a matter arising under Article 20.3.4 or 3.6 (General Commitments), it must consider whether it has an environmental law in force that is very similar to the environmental law that would be the subject of the dispute. If a Party requests consultations on a matter arising under Article 20.3.4 or 3.6 (General Commitments), and the responding Party considers that the requesting Party does not maintain an environmental law that is very similar to the environmental law that would be the subject of the dispute, the Parties must discuss the issue during the consultations.

5.21 Cooperation & Capacity Building

This Chapter provides for the Parties to establish and strengthen cooperation and capacity-building activities to implement the Agreement, to enhance each Party's ability to take advantage of the

economic opportunities created by the Agreement, and promote and facilitate trade and investment between the Parties.

The Parties are required to work to provide the appropriate financial or in-kind resources for cooperation and capacity building activities carried out under the Chapter, subject to the availability of resources. Also, the different levels of development of the Parties and the comparative capabilities that different Parties possess to achieve the goals of this Chapter must be recognised.

The Chapter establishes a Committee on Cooperation and Capacity Building which is to meet within one year after the Agreement enters into force, and after that as necessary. This Chapter is not subject to the Dispute Settlement mechanism in Chapter 28.

5.22 Competitiveness & Business Facilitation

The Chapter establishes a Competitiveness and Business Facilitation Committee and sets out activities for the Committee to undertake in order to develop and strengthen supply chains. This Chapter is not subject to the Dispute Settlement mechanism in Chapter 28.

5.23 Development

The Development Chapter affirms the Parties' commitment to provide and strengthen an open trade and investment environment that seeks to improve the welfare, reduce poverty, raise living standards and create new employment opportunities in support of development. It establishes a Development Committee, with functions that include:

- Facilitating the exchange of information on matters relating to the Chapter.
- Discussing proposals for future joint development activities and inviting non-governmental entities to participate in those activities, as appropriate.
- Considering the implementation of the Chapter, with a view to enhancing the development benefits of the Agreement.

This Chapter is not subject to the Dispute Settlement mechanism in Chapter 28.

5.24 Small and Medium Enterprises

Under this Chapter the Parties are obliged to establish or maintain a publicly accessible website with information (that must be kept up to date) about the Agreement. The Chapter sets out what information should be provided - in particular, information relevant for SMEs doing business within or trading with the Party.

The Chapter establishes a Committee on SME Issues, which is to meet within one year after the Agreement enters into force, and after that as necessary.

This Chapter is not subject to the Dispute Settlement mechanism in Chapter 28.

5.25 Regulatory Coherence

For each Party, the obligations in the Regulatory Coherence Chapter only apply to those regulatory measures identified by that Party as being *covered regulatory measures*. In identifying what are covered regulatory measures for it, a Party must “aim to achieve significant coverage” (Article 25.3).

Each Party must endeavour to have processes or mechanisms to facilitate effective inter-agency coordination and review of proposed *covered regulatory measures*. A national coordinating body is suggested, along with the types of characteristics that a Party’s processes and mechanisms should have (Article 25.4).

The Parties must cooperate to implement the Chapter and maximise its benefits (Article 25.7).

A process is set out in the Chapter under which Parties must notify, at specific intervals, the steps it has taken, or plans to take, to implement the provisions of this Chapter. The Committee may review these notifications, and may ask questions of or seek discussion with the Parties about their notifications (Article 25.9).

This Chapter is not subject to the Dispute Settlement mechanism in Chapter 28.

5.26 Transparency and Anticorruption

5.26.1 Transparency section

Article 26.2 requires Parties to ensure that laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by the Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them. Parties are required, to the extent possible, to publish these kinds of measures in advance of their adoption and to provide interested persons and other Parties with a reasonable opportunity to comment on them. The Article also sets out rules relating to how advance publication of proposed regulations and opportunity for comment on those proposals are to be provided.

The transparency section also imposes procedural requirements with a view to ensuring that Parties administer measures covered by the Agreement in a consistent, impartial, and reasonable manner. Article 26.3 imposes obligations on the Parties with respect to their domestic administrative proceedings applying laws, regulations, procedures and administrative rulings to a particular person, good or service of another Party in specific cases. These obligations are to ensure that, in any such proceeding:

- Whenever possible, a person of another Party that is directly affected by a proceeding is provided with reasonable notice of when a proceeding is initiated.
- A person of another Party that is directly affected by a proceeding is afforded a reasonable opportunity to present facts and arguments in support of that person’s position prior to any

final administrative action, when time, the nature of the proceeding and the public interest permit.

- The procedures are in accordance with its law.

Article 26.4 requires each Party to establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures in order to review final administrative actions regarding matters covered by the Agreement. Each Party must also ensure that, with respect to such tribunals or procedures, the Parties to a proceeding have the right to a reasonable opportunity to support or defend their respective positions; and a decision based on the evidence and submissions of record or, where required by its law, the record compiled by the relevant authority. Subject to appeal or further review as provided for in a Party's law, such decision must be implemented by, and govern the practice of, the office or authority with respect to the administrative action at issue.

Article 26.5 deals with provision of information. If a Party considers that any proposed or actual measure may materially affect the operation of the Agreement or otherwise substantially affect another Party's interests under the Agreement, it has an obligation, to the extent possible, to inform that other Party of the proposed or actual measure. If requested by another Party, a Party must promptly provide information and respond to questions pertaining to any proposed or actual measure that the requesting Party considers may affect the operation of the Agreement.

5.26.2 Anticorruption section

Measures to combat corruption: The central focus of the anticorruption section of Chapter 26 is Article 26.7 (Measures to Combat Corruption). Paragraph 1 requires Parties to adopt or maintain criminal offences with respect to various acts of bribery and corruption, including giving bribes to domestic and foreign public officials; the solicitation or acceptance of bribes by public official; and aiding, abetting, or conspiracy in the commission of the aforementioned offences. Those offences must be subject to sanctions that take into account the gravity of the offence (Article 26.7.2). Countries' laws must provide for the liability of both natural and legal persons (Article 26.7.3).

A Party may not allow a person subject to its jurisdiction to deduct from taxes expenses incurred in connection with the commission of an offence described in Article 26.7.1.

Article 26.7.5 requires Parties to adopt or maintain measures with respect to the maintenance of books and records, financial statement disclosures and accounting and auditing standards. These measures are required as necessary to prohibit specified acts (including establishment of off-the-books accounts and the making of inadequately identified transactions) carried out for the purposes of acts of bribery and corruption.

A provision aimed at promoting whistle blowing laws requires Parties to consider adopting or maintaining measures to protect persons against any unjustified treatment where they report facts concerning bribery and corruption offences to the competent authorities (Article 26.6).

Promoting Integrity Among Public Officials: Article 26.8 requires Parties to endeavour to adopt or maintain a number of measures in order to promote integrity, honesty and responsibility among public officials; and to adopt or maintain measures to strengthen integrity, and to prevent opportunities for corruption, among members of the judiciary in matter affecting trade and investment. The latter obligation is without prejudice to judicial independence.

Application and Enforcement of Anti-corruption Laws: Pursuant to Article 26.9, a Party must not, as an encouragement for trade and investment, through a sustained or recurring course of action or inaction, fail to effectively enforce its laws or other measures adopted or maintained to comply with the obligation in Article 26.7. The text clarifies that each Party retains the right for its law enforcement, prosecutorial and judicial authorities to exercise their discretion with respect to the enforcement of its anticorruption laws; and that each Party retains the right to take legitimate decisions with regard to the allocation of resources.

Participation of Private Sector and Society: Each Party must take appropriate measures, within its means and in accordance with fundamental principles of its legal system, to promote the active participation of individuals and groups outside the public sector, such as enterprises, civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption in matters affecting international trade or investment, and to raise public awareness regarding the existence, causes and gravity of, and the threat posed by, corruption (Article 26.10).

In addition, each Party must endeavour to encourage private enterprises, taking into account their structure and size, to develop and adopt sufficient internal auditing controls to assist in preventing and detecting acts of corruption in matters affecting international trade or investment; and to ensure that their accounts and required financial statements are subject to appropriate auditing and certification procedures.

Each Party must take appropriate measures to ensure that its relevant anti-corruption bodies are known to the public and must provide access to those bodies, if appropriate, for the reporting, including anonymously, of any incident that may be considered to constitute an offence described in Article 26.7.1.

Dispute Settlement: The Dispute Settlement Chapter applies to the Transparency and Anticorruption Chapter, with the exception of Article 26.9. When a dispute is brought, there are some slight differences in procedure from other disputes under the TPP. In particular, Parties engaging in consultation are required to involve officials of their relevant anticorruption authorities in the consultations.

5.26.3 Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices

The obligations in the Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices apply to a Party to the extent that the Party's national health care authorities

operate or maintain procedures for listing new pharmaceutical products or medical devices for reimbursement purposes, or setting the amount of such reimbursement, under national health care programmes operated by the national health care authorities. The term “national health care authorities” is defined individually for each Party, and for New Zealand is defined as meaning “the Pharmaceutical Management Agency (PHARMAC), with respect to PHARMAC’s role in the listing of a new pharmaceutical⁸⁵ for reimbursement on the *Pharmaceutical Schedule*, in relation to formal and duly formulated applications by suppliers in accordance with the *Guidelines for Funding Applications to PHARMAC*”.

The following obligations would therefore apply with respect to New Zealand.

Timing for consideration of proposals: A Party must ensure that ensure that consideration of all formal and duly formulated proposals for listing of pharmaceutical products or medical devices for reimbursement is completed within a specified period of time. If a Party’s national healthcare authority is unable to complete consideration of a proposal within a specified period of time, then the Party is required to disclose the reason for the delay to the applicant and provide for another specified period of time for completing consideration of the proposal.

Disclosure of rules etc: A Party must disclose procedural rules, methodologies, principles, and guidelines of general application used to assess proposals for listing of pharmaceutical products or medical devices for reimbursement.

Opportunities for applicants to comment: A Party must afford applicants, and where appropriate, the public, timely opportunities to provide comments at relevant points in the decision-making process.

Information for applicants: A Party must provide applicants with written information sufficient to comprehend the basis for recommendations or determinations regarding the listing of new pharmaceutical products or medical devices for reimbursement by its national healthcare authorities.

Review process: A Party must make available to applicants a review process which may be either independent or internal. An internal review may be conducted by the same expert or group of experts that made the recommendation or determination, provided that such a review process includes, at a minimum, a substantive reconsideration of the application. Important clarifications that limit the scope of the review process have also been agreed.

Information for the public: A Party must provide written information to the public regarding its recommendations or determinations (subject to protection of confidential information).

Each Party must permit a pharmaceutical product manufacturer to disseminate to health professionals and consumers through the manufacturer’s website registered in the territory of the

⁸⁵ For the purposes of New Zealand, pharmaceutical means a “medicine” as defined in the Medicines Act 1981 as at the date of signature of this Agreement on behalf of New Zealand.

Party (and on other websites registered in the Party's territory that are linked to that site), truthful and not misleading information regarding its pharmaceutical products that are approved for marketing in the Party's territory. This obligation only applies to information that is permitted to be disseminated under the Party's laws, regulations, and procedures.

Consultations: Each Party must give sympathetic consideration to, and afford adequate opportunity for, consultation regarding a written request by another Party to consult on any matter related to the Annex. Consultations have to take place within three months of the delivery of the request, except in exceptional circumstances or unless the consulting Parties otherwise agree. Consultations are to involve officials responsible for the oversight of the national healthcare authority or officials from each Party responsible for national healthcare programmes and other appropriate government officials.

This Annex is not subject to the Dispute Settlement mechanism in Chapter 28.

5.27 Administrative and Institutional Provisions

Having established the Trans-Pacific Partnership Commission (Commission), this Chapter sets out those functions of the Commission that are mandatory and those that are non-mandatory. Mandatory functions include to:

- Review the economic relationship and partnership among the Parties within three years of entry into force of the Agreement, and at least every five years thereafter. In doing so, the Commission must ensure that the disciplines contained in the Agreement remain relevant to the trade and investment issues and challenges confronting the Parties.
- Consider any proposal to modify or amend the Agreement.
- Supervise the work of committees and working groups established under the Agreement.

Non-mandatory functions include to:

- Establish, refer matters to, or consider matters raised by, any *ad hoc* or standing committee or working group.
- Consider and adopt any modifications of the tariff schedules, rules of origin, or the lists of entities and covered goods and services in the Government Procurement Chapter.
- Issue interpretations of the Agreement.
- Seek the advice of non-governmental persons or groups on any matter falling within the Commission's functions.

Article 27.3 requires the Commission (and subsidiary bodies established under the Agreement) to take all decisions by consensus, except as otherwise provided in the Agreement, or as the Parties decide otherwise. Consensus will be deemed to exist where no Party present at any meeting when a decision is taken formally objects to the proposed decision.

The Commission is required to meet within one year of the date of entry into force of the Agreement and thereafter as the Parties may decide, and this may be in person or, if agreed, by technological means (Article 27.4).

The Chapter provides for each Party to designate a contact point or points to facilitate communications (Article 27.5); and, in Article 27.6, requires each Party to designate an office to provide administrative assistance to arbitral tribunals established under Chapter 28 (Dispute Settlement) for proceedings in which it is a disputing Party.

5.28 Dispute Settlement

The first step in bringing a state-to-state dispute under TPP is to request formal consultations as provided for in Article 28.5. If the disputing Parties are unable to resolve the matter through those consultations, the Party that requested consultations may request the establishment of a panel to make findings and determinations on the issue. The disputing Parties may also request that the panel make specific recommendations regarding resolution of the dispute (Article 28.8).

At any time during the dispute settlement process, the disputing Parties may agree to utilise an alternative method of dispute resolution such as good offices, conciliation or mediation to try and find a solution to their dispute (Article 28.6). The disputing Parties may agree to suspend or terminate the dispute settlement procedures as a result of using such alternative methods. Alternatively, they may operate alternative methods of dispute resolution in parallel with the procedures provided for in the Chapter. The availability of alternative methods of dispute settlement provides the broadest range of possibilities for resolving a dispute.

In order to ensure fairness and independence of the panel, each of the disputing Parties has the opportunity to appoint one panellist, with the third panellist (the chair) chosen by agreement of the Parties where possible. The chair cannot be a national of the disputing Parties. If the Parties cannot agree on appointment of the chair, there are a series of backup options in place to ensure that no Party can block composition of the panel. These include that the two panellists already appointed have an opportunity to appoint the chair, and that if they cannot agree, then selection can be made from the Roster (a list of highly qualified individuals of non-Parties whom all the TPP Parties will agree on in advance) (Article 28.9).

There are provisions in the Chapter that set out qualification and independence requirement for all panellists (Article 28.10). In addition, where disputes arise in certain areas, there are additional requirements that panellists have specific expertise in the area in question (Financial Services, Labour, Environment, Anticorruption) (Article 28.9).

When a panel makes findings and determinations that a measure is inconsistent with a Party's obligations under the Agreement, that a Party has otherwise failed to carry out its obligations under the Agreement, or a measure is causing nullification or impairment, the responding Party is required to, whenever possible, eliminate the non-conformity or nullification or impairment. The responding

Party must do so within a reasonable period of time if it is not practicable for it to comply immediately (Article 28.19.2). The disputing Parties must endeavour to agree on a reasonable period of time, but if they are unable to do so, the matter may be referred to the panel chair to determine a reasonable period through arbitration (Article 28.18.4).

If there is disagreement as to whether the relevant Party has complied with the findings and determinations within a reasonable period of time, then the complaining Party may request negotiations with the responding Party to develop mutually acceptable compensation. If the disputing Parties cannot agree on such compensation, then steps are set out that allow a complaining Party to suspend benefits of equivalent effect (Article 28.19). If the responding Party is unable to bring its measures into compliance, it may, as an alternative to accepting retaliation, give notice that it intends to pay a monetary assessment. If the disputing Parties cannot agree on the amount of the assessment, then it will be set at a level, in US dollars, equal to 50 percent of the level of the benefits the panel has determined to be of equivalent effect or that the complaining Party has proposed to suspend. A monetary assessment may only be paid in lieu of accepting suspension of benefits for a maximum of twelve months.

There is provision for the panel to be reconvened if the responding Party considers that the level of benefits that the complaining Party is proposing to suspend is manifestly excessive, or if it considers that it has eliminated the non-conformity or nullification or impairment (Article 28.19.5).

5.29 Exceptions

The Exceptions chapter provides exceptions that allow TPP Parties to justify actions that would otherwise violate the obligations in the Agreement.

General Exceptions: Article 29.1 applies the General Exceptions that are found in Article XX of GATT and Article XIV of GATS to those chapters in the TPP for which these exceptions are relevant. (Note that in the TPP this does not include the Investment Chapter, reflecting a different approach than New Zealand's existing trade agreements.) The effect of such incorporation is that provided such measures are not used for trade protectionist purposes, the TPP will not prevent any Party from taking measures (including environmental measures) necessary to protect human, animal or plant life or health, or public morals. The same applies with respect to measures to prevent deceptive practices, protect national works, items or specific sites of historical or archaeological value, or to conserve living and non-living exhaustible natural resources (Article 29.1).

Security Exception: The security exception in Article 29.2 provides that a TPP Party cannot be required to provide or allow access to any information where it determines that to do so would be contrary to its essential security interests. In addition, the exception ensures that a TPP Party may apply any measure that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.

Temporary Safeguard Measures

Article 29.3 allows a Party to have restrictive measures with regard to:

- Transfers or payments for current account transactions, in the event of serious balance of payments and external financial difficulties (or the threat of such).
- Payments or transfers relating to the movements of capital;
 - In the event of serious balance of payments and external financial difficulties (or the threat of such); or
 - If, in exceptional circumstances, such payments or transfers cause or threaten to cause serious difficulties for macroeconomic management.

Such restrictive measures cannot be applied to payments or transfers relating to foreign direct investment.

The Article sets out a number of conditions that a Party must comply with in adopting or maintaining the types of restrictive measures set out above. Specifically, any such measure must:

- Not be discriminatory.
- Be consistent with the Articles of Agreement of the International Monetary Fund (IMF).
- Avoid unnecessary damage to other Parties' commercial, economic and financial interests.
- Not exceed what is necessary to deal with the circumstances.
- Not be inconsistent with the expropriation obligation in Chapter II (Investment).
- In the case of restrictions on capital outflows, not interfere with an investor's ability to earn a market rate of return on any restricted assets in the Party's territory.
- Not be used to avoid necessary macroeconomic adjustment.
- Be temporary and be phased out progressively as the situation improves – in practice this means that a measure cannot be in place for more than eighteen months, except in exceptional circumstances, and absent objections from more than half of the Parties.

A Party putting in place a restrictive measure as set out above must endeavour to provide that the measure is price-based. If the measure is not price-based then the Party must explain the rationale for using quantitative restrictions.

Article 29.3 also incorporates Article XII and the *Understanding on the Balance of Payments* provisions of the GATT 1994.

Finally, a number of requirements are imposed on Parties with respect to notification and publication of any restrictive measures permitted under Article 29.3.

Taxation exception

The taxation exception in Article 29.4 works on the premise that nothing in the Agreement applies to taxation measures unless it is stated explicitly in Article 29.4 that it will apply.

Obligations that apply to direct taxes

The following obligations apply to *direct taxes* (referred to in the exception as taxation measures on income, capital gains, taxable capital of corporations, or the value of an investment or property):

- Article 10.3 (National Treatment in the Cross-Border Trade in Services Chapter).
- Article 11.6.1 (the Cross-Border Trade obligation in the Financial Services Chapter).
- Article 14.4 (the Non-Discrimination obligation in the Electronic Commerce Chapter).

However, these obligations only apply if the taxation measure in question relates to the purchase or consumption of a particular service and, in the case of electronic commerce, to the purchase or consumption of a particular digital product.

Obligations that apply to indirect taxes

The following obligations apply to *indirect taxes* (referred to in the exception as taxation measures other than direct taxes, or taxes on estates, inheritances, gifts or generation-skipping transfers):

- Articles 9.4, 10.3, and 11.3 (National Treatment in the Investment, Cross-Border Trade in Services, and Financial Services Chapters).
- Articles 9.5, 10.4, and 11.4 (Most-Favoured Nation in the Investment, Cross-Border Trade in Services, and Financial Services Chapters).

There are a number of exceptions that apply to the obligations set out above. These include:

- A grandfathering provision for any non-conforming taxation measure in place at the date of entry into force of TPP (or the continuation or prompt renewal of such a measure), or an amendment to such a non-conforming provision to the extent that the amendment does not decrease the measure's conformity with the relevant obligation; and
- The adoption or enforcement of any new taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes.

Obligations that apply to all taxes

The following obligations apply in respect of all taxation measures:

- Article 2.3 (the National Treatment obligation in the Goods Chapter).
- Article 2.16 (the Export Duties prohibition in the Goods Chapter).
- Article 9.9 (the Performance Requirements obligation in the Investment Chapter).
- Article 9.12 (the Expropriation Obligation in the Investment Chapter).

Tax conventions (aka Double Tax Agreements)

If there is a provision in a tax convention that conflicts with the TPP, the provision in the tax convention will prevail. If there is an issue as to whether there is an inconsistency, then the procedure in Article 29.4.4 must be followed which requires the Parties' respective taxation authorities to consult and make a determination as to the existence and extent of the inconsistency.

Tobacco

Article 29.5 allows any Party to elect to deny the benefits of the investor state dispute settlement section of the Investment Chapter with respect to claims challenging a tobacco control measure. If a Party elects to do so, then no claim can be submitted to arbitration under the investor state dispute settlement mechanism (or if it has been submitted, it has to be dismissed). A Party can make such an election at any time prior to a claim being submitted, or during proceedings if a claim is brought before a claim submitted.

A tobacco control measure is defined as being “a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure”.

Treaty of Waitangi

The effect of the Treaty of Waitangi exception is that, provided measures are not used for trade protectionist purposes, TPP will not prevent New Zealand from taking measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by TPP, including in fulfilment of its obligations under the Treaty of Waitangi. The text also specifies that interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of the Agreement (Article 29.6).

Disclosure of information

Article 29.7 ensures that nothing in TPP requires a country to provide or allow access to information where to do so would be contrary to its domestic law, or would impede law enforcement, or otherwise be contrary to the public interest, or would prejudice the legitimate commercial interests of particular enterprises.

5.30 Final Provisions

The Final Provisions Chapter provides for the following aspects of the Agreement. It:

- Clarifies that annexes, appendices, and footnotes constitute integral parts of the Agreement.
- Provides for the Parties to consult on whether to amend TPP if a provision of the WTO Agreement that has been incorporated into the TPP is itself amended.
- Makes provision for amendment of TPP, as well as for withdrawal by Parties (requires six months’ notice).
- Provides that the English, Spanish, and French texts of the Agreement are all authentic, but that if there is a divergence between them, the English text will prevail.
- Establishes New Zealand as the Depositary for the Agreement and sets out the functions of that role.

In addition, this Chapter sets out the procedures for Entry into Force of the Agreement.

There are various ways in which TPP may enter into force, provided for in Article 30.5. The first option is that if, within two years of the date of signature, all countries that signed the Agreement (the 'signatories') have notified the Depositary that they have completed their applicable legal procedures (in other words, that they are 'ready') then the Agreement will enter into force 60 days after notification by all countries. However, if all signatories have not notified their readiness within two years, then the second option is that the Agreement will enter into force 26 months after signature if at least six of the signatories have notified the Depositary that they are ready, provided that those six signatories account for at least 85 percent of the combined GDP of the original signatories in 2013. The third option will apply if the Agreement has not entered into force under either the first or second options. In those circumstances, it will enter into force 60 days after the date on which at least six of the original signatories have notified the Depositary that they are ready. Again, these must be six signatories that together account for at least 85 percent of the combined GDP of the original signatories in 2013.

Once the Agreement has entered into force, there is a procedure for later entry into force for a signatory that was not ready earlier and for which the Agreement has therefore not already entered into force. Such a signatory is required to notify the Parties that it is ready to become a Party to the Agreement. The Commission then has 30 days to determine whether the Agreement will enter into force for that signatory and, if the Commission decides in the affirmative, then the Agreement will enter into force for them 30 days later.

5.31 Side Instruments to TPP

All Parties have also agreed a number of separate letters or other instruments alongside TPP. These are separate to TPP but some have 'agreement' status. A very limited number can be enforced through TPP's dispute settlement mechanism. For New Zealand, these instruments cover the following subject areas:

- Letters which confirm the relationship between TPP and existing New Zealand FTAs: with Australia (also see below), Brunei, Chile, Malaysia, Singapore and Viet Nam.
- An agreement with Australia covering: relationship between TPP and CER and the Australia-ASEAN-New Zealand FTA; agreement that TPP's investor-state dispute settlement and trade remedies provisions will not apply between New Zealand and Australia; and agreement limiting the circumstances in which New Zealand can subsidise an SOE for air services in the Trans-Tasman market.
- Agreements with Canada, Mexico and the US – at their request – to protect certain 'distinctive products'⁸⁶ to the extent already provided for under the Australia New Zealand Food Standards Code.

⁸⁶ Canada: Canadian Whisky, Canadian Rye Whisky; Mexico: Mezcal, Tequila, Bacanora, Charanda and Sotol; US: Bourbon Whiskey, and Tennessee Whiskey.

Section 5: Legal obligations which would be imposed on New Zealand by the treaty action,
the position in respect of reservations to the treaty, and an outline of any dispute
settlement mechanisms

- An understanding with Japan on the interaction between the copyright term provisions of TPP and the concessions it agreed under the World War II peace treaty (Article 15, Treaty of Peace 1951).
- Understandings, agreed at their request and appropriately high-level in nature, with Malaysia and Peru on biodiversity and traditional knowledge.
- An agreement that provides Viet Nam with some flexibility in how it implements a TPP obligation which requires Parties to allow the cross-border provision of electronic payment services (a provision of the financial services chapter). The content reflects flexibility Viet Nam has negotiated with large exporters of financial services exporters (e.g. the US, Australia, Japan). Conditions set out in this letter can be enforced through TPP's dispute settlement provisions.
- An agreement with Chile that provides greater flexibility in the rules of origin for textiles and apparel trade between New Zealand and Chile.

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

Most of the obligations in TPP would be met by New Zealand's existing domestic legal and policy regime. In summary, this is because New Zealand already has an open economy that places few barriers in the way of trade and investment. Additionally, New Zealand's independent, fair and effective judicial system and efficient administrative system together provide the kinds of procedural guarantees for foreign businesses that are required under some of the chapters in TPP. This is evidenced by the fact that New Zealand consistently ranks as one of the easiest countries in the world to do business in.

However, a number of legislative and regulatory amendments would be required to align New Zealand's domestic legal regime with certain obligations under TPP, and thereby enable New Zealand to ratify the Agreement.

6.1 Changes Required

The following changes have been identified as being required (unless otherwise stated, all legislative changes would be enacted by passage of a Trans-Pacific Partnership Agreement Bill):

6.1.1 National Treatment and Market Access for Goods Chapter

- New Zealand would implement an export license allocation system for the country specific quota access received for dairy products in TPP for the US market. Depending on the mechanism decided, this may require an amendment to the Dairy Industry Restructuring Act 2001 (including Schedules 5A and 5B) and the Dairy Industry Restructuring (Transfer of Export Licences) Regulations 2007.
- An amendment to the Tariff Act 1988 to enable Orders in Council to be made to: identify the TPP countries for the purposes of the Tariff Act; and amend the 'Tariff' (as defined in that Act) to enable the application of the preferential tariff rates agreed in TPP. Those Orders in Council would then be made. This is the same process used for New Zealand's previous plurilateral FTAs.

6.1.2 Rules of Origin and Origin Procedures Chapter

- An amendment to the Customs and Excise Regulations 1996 to implement the agreed rules of origin and product specific rules for goods imported from TPP countries. These amendments

would include the rules of origin for textile and apparel goods under the Textile and Apparel Goods Chapter, along with a variation in treatment for textile and apparel goods from Chile, provided for in a side letter to the Agreement between New Zealand and Chile.

6.1.3 Textile and Apparel Goods Chapter

- As noted above, an amendment to the Customs and Excise Regulations 1996 to implement the agreed rules of origin and product specific rules for goods imported from TPP countries will include textile and apparel goods.
- An amendment to the Tariff Act 1988 to provide for the emergency action (safeguards) mechanisms and associated timeframes under the Textile and Apparel Goods Chapter.

6.1.4 Customs Administration and Trade Facilitation Chapter

- An amendment to the Customs and Excise Act 1996 to provide for the provision of advance rulings on valuation under the Customs Administration and Trade Facilitation Chapter.

6.1.5 Trade Remedies Chapter

- An amendment to the Tariff Act 1988 to provide for the transitional safeguard mechanism under the Trade Remedies Chapter.

6.1.6 Technical Barriers to Trade Chapter

- An amendment to the Hazardous Substances and New Organisms Act 1996 to provide that the 30 day time period for receipt of submissions, referred to in section 59(1)(c) of that Act, may be extended by the 'Authority' (as referred to in section 59) as and when necessary. This amendment is necessary to give the 'Authority' the flexibility necessary to comply with the requirements of the TBT Chapter of TPP which requires Parties to provide a 60 day comment period on a proposed technical regulation that has been notified to the WTO TBT Committee.
- The introduction of a standard requiring that exports designated as 'ice wine' be made from grapes naturally frozen on the vine (as opposed to wine made from grapes frozen using modern technology), as provided by Annex 8-A (Wine and Distilled Spirits) of TPP. This is an export standard only and the footnote in the Annex gives New Zealand three years from entry into force of TPP to comply with the standard. Currently the standard is expected to be implemented through changes either to regulations under the Wine Act 2003, or to the Wine Act itself.

6.1.7 Investment Chapter

- Amendments to the Overseas Investment screening regime to increase, for non-government investors from a TPP Party, the threshold above which approval must be obtained to invest in "significant business assets" in New Zealand from NZ\$100 million to NZ\$200 million, as provided for by Annex I (Non-Conforming Measures, Schedule of New Zealand).
- This change will engage MFN commitments under certain existing agreements (including China, Hong Kong, Chinese Taipei and Korea) that would also be reflected in the Overseas Investment screening regime.

6.1.8 Intellectual Property Chapter

- Amendments to the Plant Variety Rights Act 1987 to enable New Zealand to comply with its obligation under Article 18.7.2 and Annex 18-A, within three years of entry into force of TPP, to either:
 - Accede to the most recent 1991 version of the International Convention for the Protection of New Varieties of Plants (UPOV 91); or
 - Under a New Zealand specific approach, implement a plant variety rights system that gives effect to UPOV 91.

When implementing this obligation, New Zealand would be able to adopt any measure that it deemed necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi (and this is not subject to the dispute settlement provisions in TPP). The amendments to the Plant Variety Rights Act 1987 would be enacted by passage of implementing legislation after New Zealand brings TPP into force (i.e. separate legislation to the Trans-Pacific Partnership Agreement Bill).

- Amendments to the Copyright Act 1994 to provide for:
 - New rights for performers (such as musicians) to comply with Section H of the Intellectual Property Chapter and the World Intellectual Property Organization Performances and Phonograms Treaty (New Zealand would be required to accede to that treaty under Article 18.7.2). This would give performers new economic and moral rights in their performances, similar to those of other copyright owners, including the right to authorise any copying of the sound recording of their performance, the selling of the sound recordings, the communication of their performance to the public, as well as the right to be identified as the performer and to object to derogatory treatment of their performances and sound recordings of their performances.
 - Extension of the copyright term from 50 to 70 years as referred to in Article 18.63 and Article 18.83(4)(d)⁸⁷. The extension applies to new works created in the future, and existing works that are still within their current 50 year term of protection, but not existing works for which the 50 year term of protection has already expired (i.e. works already in the public domain).
 - Additional protections for technological protection measures (TPMs, digital 'locks' that protect copyright works) as referred to in Article 18.68, including protection for technological protection measures used in relation to performances. The main change would be to provide new civil and criminal remedies against people circumventing TPMs. During implementation TPP Parties are able to determine exceptions to ensure people can circumvent TPMs for legitimate purposes, such as those that do not infringe copyright.

⁸⁷ Annex 18.83(4)(d) would enable New Zealand to transition to a 60 year term before moving to a 70 year term within eight years after entry into force.

- Additional protection for rights management information (referred to as copyright management information under the Act) as referred to in Article 18.62. This would require expanding the definition of copyright management information to include any numbers or codes that represented ownership information or licensing terms and conditions. It would also require amendment of prohibitions on commercial dealing in works subject to copyright management information interference to include communicating such works to the public).
 - Border protection measures against the export of suspected pirated copyright works and to provide the New Zealand Customs Service with ex officio powers, to allow it to act on its own initiative to temporarily detain suspected pirated copyright works without having first received a notice from copyright owners under Article 18.76.5.
 - Extending the protection of encrypted program-carrying satellite and cable signals as required by Article 18.79, including providing criminal offences for manufacturing or trafficking devices or systems knowing they are intended to be used to decode such signals and for knowingly assisting a person to fraudulently receive such signals.
- Amendments to the Trade Marks Act 2002 to provide for:
 - Authority of Courts to award additional damages for trade mark infringement referred to in Article 18.74.7. This would align damages provisions for infringement of registered trade marks with those for copyright infringement.
 - Requiring the Courts, in trade mark infringement cases, to order the destruction of counterfeit trade mark goods, except in exceptional circumstances.
 - Border protection measures against the export of suspected trade mark infringing goods and to provide the New Zealand Customs Service with ex officio powers to allow it to act on its own initiative to temporarily detain suspected infringing goods without first having received a notice from a trade mark owner under Article 18.76.5.
- Amendments to the Patents Act 2013 to provide for:
 - The twelve month 'grace period' referred to in Article 18.38. This would mean that if inventors make or consent to public disclosures of their invention, that disclosure would not result in their patent application for that invention being declined provided the application is filed within twelve months of the disclosure. Under current New Zealand law, such a disclosure would result in the patent application being declined (on the grounds the invention is not novel).
 - Patent term extension referred to in Articles 18.46 and 18.48. New Zealand would be required to extend the term of a patent to compensate if there were unreasonable delays (as prescribed in TPP) in the Intellectual Property Office of New Zealand (IPONZ) granting the patent. Similarly, New Zealand would need to extend the term of a patented pharmaceutical product to compensate if there were an unreasonable curtailment of the term as a result of Medsafe's marketing approval process for pharmaceutical products. These obligations would only apply to patent applications made after entry into force of TPP.

- Amendments to the Agricultural Compounds and Veterinary Medicines Act 1997 to extend current data protection from five to ten years, for data provided in support of an application for marketing approval for a new agricultural chemical product, as required by Article 18.47.

(Note that in the following areas no change would be required to legislation or regulations:

- The TPP outcome on data protection for pharmaceuticals (including biological pharmaceuticals) can be met within New Zealand's current policy settings and practice. Article 18.52 provides two avenues for a TPP Party to meet the obligation to provide "effective market protection" for biologic pharmaceuticals. One, a government could provide at least eight years data protection. Two, a government could provide at least five years of data protection, together with other measures, to provide effective market protection (these other measures could include the patent protection period available to biologics and the time associated with completing other regulatory requirements). New Zealand would implement TPP through this second approach. New Zealand already provides five years data protection. This, together with measures like patent protection for biologics and the processing time for Medsafe's regulatory approval process for biosimilars, as well as other market circumstances, provide effective market protection for biologic pharmaceuticals in New Zealand.
- New Zealand would be required to provide a 'patent linkage' system that notifies the holder of a pharmaceutical patent previously approved by Medsafe, that a generic version of that patented product has been submitted to Medsafe for regulatory approval, as provided by Article 18.51. Implementing this obligation would not require any change to current law or practice. The obligation can be met by Medsafe's existing practice of publishing the details of all new generic applications (including the applicant and active ingredient) on its website soon after receipt.)

6.1.9 Labour Chapter

- New Zealand would promote initiatives, focussed on the provision of information to importers, in order to discourage the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour, as provided by Article 19.6 of the Labour Chapter. Any initiatives would be likely to be administrative or procedural in nature.

6.1.10 Environment Chapter

- New Zealand would provide information, possibly in the form of a gazetted notice, to importers in order to deter the trade of wild fauna and flora taken or traded in violation of New Zealand's law or "another applicable law" (as defined by the Agreement), as provided by Article 20.17.5 of the Environment Chapter.

6.1.11 Transparency and Anti-corruption Chapter

- New Zealand may be required to take certain steps in order to fully comply with the obligations in the Transparency and Anti-corruption Chapter to promptly publish, in a single website or official journal of national circulation, regulations of general application concerning any matter

covered by the Agreement and, where appropriate, include with the publication an explanation of the purpose of and rationale for the regulations. Existing mechanisms already provide for the prompt publication of regulations. Implementation will therefore likely be limited to extending existing practices (with changes where necessary to the statutory publication requirements contained in the Legislation Act 2012) to ensure that all covered regulations are published and, where appropriate, accompanied by an explanation of their purpose and rationale.

- The Organised Crime and Anti-corruption Legislation Bill is currently passing through the legislative process. The Bill contains several amendments that will enable New Zealand to ratify the United Nations Convention against Corruption (UNCAC). These amendments will introduce new offences to strengthen New Zealand's anti-corruption framework, increase the penalties for private sector bribery and corruption, and clarify that no bribes are tax deductible. Passage of the Bill and subsequent ratification of UNCAC will take place irrespective of TPP, but will have the effect of ensuring New Zealand complies with the obligation contained in the Transparency and Anti-corruption Chapter of TPP to ratify UNCAC.

6.1.12 Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices Annex (annex to Transparency and Anti-corruption Chapter)

- An administrative change to PHARMAC's practice and procedure to introduce a "specified period of time" within which funding applications must be considered as provided by the Transparency Annex of TPP. PHARMAC would be able to determine this timeframe, and would have flexibility to extend the period so long as it provided a reason for doing so to the applicant.
- An administrative change to PHARMAC's practice and procedure to establish a review mechanism as provided by the Transparency Annex of TPP. The mechanism may be independent (from the decision-maker) or internal (run by the decision-maker), with the Government intending to choose the latter option. The review process does not need to change a decision, can be limited in scope (the reviewer does not need to consider assessments related to other proposals for funding), and can be implemented in a cost-efficient way (e.g. an amendment could be made to the Public Health and Disability Act 2000 allowing PHARMAC to recover its costs in relation to such reviews).

6.2 Trans-Pacific Partnership Agreement Bill

The Ministry of Foreign Affairs and Trade (MFAT) would seek Cabinet approval to include the Trans-Pacific Partnership Agreement Bill in the 2016 and if necessary the 2017 legislative programme. Cabinet had previously agreed that the Trans-Pacific Partnership Agreement Bill be included in the 2015 legislative programme as a Category 5 Bill (to be referred to a Select Committee in 2015), but TPP negotiations concluded towards the end of that period in October 2015.

The Trans-Pacific Partnership Agreement Bill would be drafted in compliance with the Cabinet Manual and go through normal Parliamentary procedures before it is passed, including debate in Parliament, Select Committee scrutiny, public submissions, and a series of votes by Parliament. Any changes to,

or new, regulations would also be made in compliance with the Cabinet Manual. All legislative instruments will be printed, published, and notified in the New Zealand Gazette.

The Trans-Pacific Partnership Agreement Bill and the regulatory changes outlined above would be expected to be passed within two years of signature of TPP to allow entry into force of TPP. Any changes to New Zealand's domestic legal regime to implement its obligations in relation to UPOV 91 (Annex to Article 18.7.2) would be implemented within three years of TPP entering into force for New Zealand.

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

This section of the NIA assesses the overall costs and effects of entering TPP for New Zealand. It draws on the advantages and disadvantages outlined in Section 4 above, costs identified in Section 8 below, as well as economic modelling of the impact of TPP.

7.1 Economic effects

7.1.1 Introduction, economic effects of TPP

The overall impact of TPP on the New Zealand economy will be the result of a complicated inter-action of the different aspects of the Agreement (as outlined in Section 4 of this NIA). Section 7.1 of this NIA finds that the overall economic costs and effects of joining TPP are as follows:

- Economic modelling commissioned by the New Zealand Government estimates that once fully in effect, TPP would result in New Zealand's GDP being about one percent larger than if TPP had not existed, adding NZ\$2.7 billion to New Zealand's GDP (in 2007 dollars) by 2030.
- TPP would also carry some costs for New Zealand, estimated at up to NZ\$79 million each year. This cost includes two components: fiscal costs (e.g. foregone tariff revenue for the Government, and costs associated with the implementation of TPP) estimated at up to NZ\$24 million (outlined below in Section 8), and the wider net economic effect of extending copyright period conservatively estimated at an average of NZ\$55 million a year (outlined below in Section 7.1.4).

From the first year of entry into force, TPP would almost certainly be of net benefit to New Zealand⁸⁸. This net benefit would grow substantially as the benefits from TPP come on line. Total benefits after three years are predicted to be ten times larger than costs, with the gap continuing to widen as the economic benefits of greater export opportunities were made available to New Zealand businesses.

⁸⁸ While not appropriate for a direct comparison, the costs listed here would be less than for example the NZ\$137 million of tariffs that would be eliminated from New Zealand goods exports at TPP's entry into force (in addition to which New Zealand would see improved market access from removal of NTMs in goods, services and investment).

Table 7.1: Summary of Benefits and Costs

Area	Annual Net Cost / Benefit (NZ\$)	Description	Reference
Reductions in tariffs and quota barriers on goods trade. (Economic benefit.)	\$624 million	Additional GDP for the New Zealand economy by 2030 (CGE modelling). Around half of tariff elimination for New Zealand exports is from entry into force.	Section 7.1.3
Reductions in non-tariff measures (NTMs) on goods trade. (Economic benefit.)	\$1.46 billion	Additional GDP for the New Zealand economy by 2030 (CGE modelling).	Section 7.1.3
Improved trade facilitation measures. (Economic benefit.)	\$374 million	Additional GDP for the New Zealand economy by 2030 (CGE modelling).	Section 7.1.3
Reductions in barriers on services trade. (Economic benefit.)	\$250 million	Additional GDP for the New Zealand economy by 2030 (CGE modelling).	Section 7.1.3
Copyright term extension. (Economic cost.)	- \$55 million	Net cost over long term, based on economic modelling. Actual cost will increase gradually over first twenty years.	Section 7.1.4
Foregone tariff revenue. (Fiscal cost.)	- \$20 million	This maximum is reached after seven years.	Section 8.2
TPP Institutional arrangements and outreach activities. (Fiscal costs.)	- \$1 million	Participation in on-going TPP committees etc. and public engagement.	Sections 8.3.1 and 8.3.3
Administrative costs. (Largely fiscal cost.)	- \$3.2 million	Costs for implementing certain TPP obligations (primarily, the fiscal cost in relation to new administrative procedures PHARMAC would implement, and impact of any extensions to pharmaceutical patents). Note also one-off costs to PHARMAC of NZ\$4.5 million, and Customs of NZ\$0.4 million.	Section 8.3.2

7.1.2 Background: General impact of trade on economic performance

Trade makes a significant contribution to New Zealand's economic performance. Exports of goods and services account for around 29 percent of New Zealand's GDP, and imports for around 30 percent. Exporting allows New Zealand businesses to access larger markets, benefit from economies of scale, and to specialise in areas they have an advantage in. Connections to international markets, including importing goods and services, also allow New Zealand to access resources, knowledge and ideas that can boost our productivity and stimulate innovation.

Extensive economic research has demonstrated that trade and growth are positively related. The long-term evidence from a wide range of OECD countries suggests that a 10% increase in trade openness – the share of exports plus imports to GDP – was associated with a 4% increase in output per working-

age person⁸⁹. In New Zealand's case, this is particularly true – as a smaller economy, trade openness allows a focus on areas of comparative advantage, encouraging for example greater participation in global value chains.

Improved market access for goods, services and investment under an FTA, such as the lowering of tariffs and non-tariff measures and removal of barriers to services exports and investment, can enable existing New Zealand exporters to achieve net increases in the value of their exports. Lower costs and new opportunities can also result in new businesses entering export markets. It would be extremely unusual for these increases not to translate directly into higher GDP, job growth and income. Moreover, the opportunity for local companies to increase market size through greater exports can increase productivity and efficiency through economies of scale. This may be achieved, for example, by the introduction of new processing technologies to service the larger market. These effects – particularly for trade in goods following the removal of tariff and non-tariff measures – are often described as “static gains” or “first-order effects”.

A second source of economic benefit from FTAs is “dynamic productivity gains” or “second-order effects”. These effects are harder to quantify. They accumulate over time and may be attributable to the downstream effects of trade agreements, rather than the immediate impacts driven by tariff removal and improvements in market access alone. Trade and investment may be stimulated through improvements in the regulatory framework brought about by the FTAs, which increase transparency, fairness and predictability for businesses. As a result of the facilitation of increased trade and investment flows, companies are more exposed to competition, innovation, international benchmarking and develop stronger links with international business partners. Such exposure helps drive production and maintain New Zealand companies at the leading-edge in terms of best-practice across a range of issues (innovation, technology, knowledge, research and product/service development, etc). Spillovers from this process into the domestic economy can include the generation of ongoing productivity improvements (dynamic productivity gains) across the wider economy.

In the short term, it is possible for the sudden removal of import barriers – such as tariffs – to lead to adjustment costs as resources are diverted from that particular sector to other areas of the economy. This can be accentuated in sectors where a country has maintained particularly high barriers, although there are ways to minimise sudden changes in an FTA (e.g. through phase-in periods). These effects tend to be minimal for New Zealand, however, given our already largely open economy. On the whole, domestic liberalisation of tariffs and other trade and investment barriers leads to economic gains – for example as lower domestic prices benefit consumers and producers. An increase in openness to trade helps spur productivity increases and growth within a country through more efficient allocation of resources, the stimulation of innovation and the transfer of knowledge and technology between countries.

⁸⁹ OECD. 2003. *The Sources of Growth in OECD Countries*, Paris.

7.1.3 Estimated gains from trade and investment

The overall impact of TPP on the New Zealand economy would be the result of an interaction of the different aspects of the Agreement (as outlined in Section 4 of this NIA). Economists seek to capture the effects of changing trade barriers on GDP, trade flows, national welfare and other variables with sophisticated Computable General Equilibrium (CGE) models. CGE models link different sectors in different countries together using, in this case, the Global Analysis Trade Project (GTAP) trade data and input output tables. CGE modelling estimates changes to variables within the TPP group of countries, and for almost all countries outside of the TPP. CGE models rely on assumptions and data limitations, and hence are better suited to indicating the size and direction of effects rather than providing precise estimates. We are confident that the CGE modelling reported on here is of the highest standard possible. This modelling does not, however, capture the full potential economic impact of TPP in New Zealand – for example, in relation to the Intellectual Property Chapter. These further effects are considered separately below.

CGE modelling can potentially underestimate change in trade following an FTA. For New Zealand's FTA with China, GTAP modelling predicted that after twenty years New Zealand's exports to China would be 20 to 39 percent greater than they would have been without the FTA. In the event, New Zealand's exports had nearly quadrupled by 2015, after just seven years, with the FTA coinciding with China's dramatic economic rise.

The Ministry of Foreign Affairs and Trade (MFAT) commissioned a comprehensive study into the impact of TPP, focussed on New Zealand. In this study, Strutt et al⁹⁰ looked at the impact of TPP on trade in goods and services. The study estimated how New Zealand's economy would evolve under TPP compared to how it would grow in a world without TPP (the "baseline"). Based on the model by Strutt et al, the New Zealand Government assesses that the overall impact of TPP on New Zealand's economy, once all trade liberalising measures were assessed to have come into place by 2030, would be an increase of about one percent to New Zealand's GDP (corresponding to at least an additional NZ\$2.7billion of GDP in 2007 dollars)⁹¹.

These predicted gains to New Zealand's GDP compare the impact of TPP against the scenario where there is no TPP. In reality, TPP will almost certainly enter into force regardless of whether New Zealand joins, so it can be more appropriate to compare the difference between TPP with and TPP without New Zealand.

New Zealand exporters have direct experience of this kind of competitive displacement caused by being on the outside of preferential access enjoyed by competitors. For example:

⁹⁰ Anna Strutt, Peter Minor and Allan Rae, "A Dynamic Computable General Equilibrium (CGE) Analysis of the Trans-Pacific Partnership Agreement: Potential Impacts on the New Zealand Economy", 28 September 2015. Available at www.tpp.mfat.govt.nz.

⁹¹ Strutt et al reported a 1.4% increase, corresponding to an additional NZ\$4.1 billion to GDP. As outlined below, for the purposes of this NIA the contribution of the removal of non-tariff measures reported by Strutt et al has been halved.

- Since the entry into force of the Australia-Japan FTA, New Zealand beef exports to Japan have dropped by over 25 percent, with New Zealand exporters losing market share to their Australian competitors who are only beginning to enjoy tariff preferences under the FTA.
- Following the entry into force of the Korea-US FTA, US beef exports increased 25%. New Zealand exports declined by almost NZ\$50 million. The US' share of the Korean cheese import market has also grown from 41% to 74%.
- Until the entry in force of the New Zealand-Korea FTA, kiwifruit exporters paid a 45% tariff on kiwifruit. Their Chilean competitors enjoy duty-free access.
- Prior to the NAFTA agreement being signed by Canada, Mexico and the US in the 1990s, New Zealand was a significant supplier of dairy products to Mexico. Since Mexico eliminated tariffs for US dairy products, New Zealand's share of Mexico's cheese imports declined from 20% to 4%, and our share of milk powder imports from 25% to less than 10%.

Strutt et al modelled the economic impact of TPP by first estimating how New Zealand's economy would be expected to develop as part of the global economy in the absence of TPP, and comparing this to the case where TPP liberalised trade in goods and services in four areas. The result of the CGE model takes account of the complicated adjustments that might take place in an economy following new trade flows and resource allocation. The four ways in which TPP was assumed to liberalise trade were:

- Reductions in tariffs and quota barriers on goods trade.
- Reductions in non-tariff measures on goods trade.
- Improved trade facilitation measures.
- Reductions in barriers on services trade.

Each of these four areas is considered below.

Modelled gains: Reductions in tariffs and quota barriers

New Zealand exported NZ\$20 billion of goods to the TPP region in 2014, NZ\$8.7 billion of which went to countries for which TPP would be New Zealand's first FTA. These countries account for a significant proportion of the new market access for New Zealand under TPP (as outlined in Section 4 of this NIA), particularly in terms of the removal of tariff barriers. Increased goods export earnings would be of direct economic benefit for New Zealand, including revenue for export businesses and increased employment that would flow to the wider economy.

Strutt et al found that the effect of the lowering of tariff and quota barriers was predicted to result in 15% of the estimated GDP gains for New Zealand under TPP once fully implemented, corresponding to an additional GDP of NZ\$624 million for the New Zealand economy by 2030. This figure corresponds to the economic benefit that would accrue to New Zealand from improved market access into TPP markets due to lower tariffs. The model captures gains from allocative efficiency as relative prices adjust encouraging a shift in New Zealand towards areas where we have the greatest competitive advantages. It would also account for increased value for the New Zealand economy from lower

domestic tariffs, although this effect would likely be relatively low given New Zealand's already low tariff structure.

The magnitude of these estimated GDP gains due to lowering of tariff and quota barriers corresponds well with the proportion of tariff savings that would take place under TPP. As outlined in Section 4.1, based on 2014 exports to the region, NZ\$274 million of tariffs would be eliminated on New Zealand products. The removal of these tariffs allow New Zealand exporters to improve their competitiveness within a TPP market and thereby grow market share, and/or return a proportion of the tariff savings to New Zealand as profits. The net economic impact of greater competitiveness, increased exports, and improved profit margins for goods exports would be expected to flow on to the New Zealand economy as a whole.

Table 7.2: Estimated Tariff Savings per annum by Country (Table 4.1)⁹²

Country	New Zealand exports	Estimated tariff savings at entry into force		Estimated tariff savings once fully implemented ^B	
	NZ\$, millions	NZ\$, millions	% of exports ^A	NZ\$, millions	% of exports ^A
<i>Parties where New Zealand has no existing FTA</i>					
Japan	3,430	83	75.24%	207	90.63%
US	4,417	45	97.19%	52	99.61%
Mexico	418	3.1	73.70%	6.6	81.42%
Canada	645	4.8	99.16%	5.2	99.89%
Peru	135	0.9	99.65%	0.9	100.00%
<i>Parties with existing FTAs with New Zealand^C</i>					
Malaysia	1,035	0.1		1.6	
Vietnam	468	0.6		0.8	
Overall	10,550	137		274	

^A Percentage of exports that would benefit from tariff elimination. Where New Zealand exports are not subject to elimination, most would benefit from new quota access.

^B Almost all (99.5%) tariff savings would be realised within sixteen years. The remaining tariff savings would be realised over 20 or 30 years.

^C Tariffs that would be eliminated under TPP that were excluded from the ASEAN-Australia-New Zealand and Malaysia-New Zealand FTAs (e.g. wine, liquid milk etc).

Modelled gains: Non-tariff measures on goods trade

The lowering of tariffs is the simplest mechanism by which countries agree under an FTA to improve market access for trade in goods. TPP also includes comprehensive coverage of other areas of trade, for example through the obligations to address the simplification of rules, sector-specific annexes, disciplines on import licensing systems, etc. Collectively, these are known as "non-tariff measures" (NTMs). The removal or lessening of NTMs can represent the most significant outcomes of an FTA, and the impact of NTMs on global trade is well-documented. Numerous attempts have been made in institutions such as the WTO, World Bank, EU, OECD, United Nations Conference on Trade and

⁹² The table shows total annual tariff savings from TPP, including the elimination/reduction of in-quota tariffs for trade under existing WTO tariff quotas, as applicable. Values are in NZ\$, representing average exports over the period 2012-2014.

Development (UNCTAD) and ASEAN to mitigate their effects. In general, the use of NTMs to achieve legitimate objectives is recognised, but they should not be implemented in such a way to pose unnecessary obstacles to trade or have specific protectionist measures.

A number of studies have found substantial economic gains from significant reduction or elimination of the incidence of NTMs. A 2012 review of existing studies by the WTO (reviewed by the APEC Secretariat in 2013) cited one study that found that reducing ad-valorem equivalents (AVE)⁹³ of NTMs from 10% to 5% would increase trade by 2% to 3%. Another study cited by the WTO found that behind-the-border measures, including NTMs, implemented during the global financial crisis, reduced trade flows by 7%. A separate study by 2012 UNCTAD found that NTMs contribute more than twice as much as tariffs to overall market access trade restrictiveness.

Strutt et al's model included an analysis of the extent to which the liberalisation of these NTMs would influence trade-flows within the TPP region. The model used the World Bank Overall Trade Restrictiveness Indexes for each TPP country in two areas, "agriculture and food" and "manufactures". Strutt et al assumed that TPP would "equalise" higher than average NTMs, so that countries with indexes higher than the TPP average would reduce their NTMs to the TPP mean for the two areas. While a high-level assumption, this reflects the general approach taken in an FTA like TPP to apply a consistent level of commitments to different countries.

As would be expected given their significant impact on goods trade, Strutt et al found that the reduction of NTMs under TPP would have a significant impact on trade flows, and hence significant economic gains for New Zealand. TPP was predicted to result in steady contributions to New Zealand's economy based on the reduction of NTMs on goods trade, cumulating in an additional NZ\$2.91 billion to GDP after fifteen years. For the purposes of evaluating the costs and effects of TPP for New Zealand, we have taken a cautious approach and assumed that gains from addressing NTMs on goods would be at least half of this predicted value, i.e. NZ\$1.46 billion. Based on international studies of NTMs and New Zealand's experience under previous FTAs, it is quite possible that the actual outcome could exceed this modelled result for NTMs.

TPP goes further than any other New Zealand FTA in seeking to tackle NTMs. The following all represent specific outcomes that should reduce compliance costs for business: elimination of export duties; rules around the administration of tariff quotas; rules of origin procedures that allow for transshipment and streamlined procedures for traders to claim tariff preferences; science and risk-based sanitary and phyto-sanitary (SPS) provisions, including new rules for audits and import checks; and specific technical barriers to trade (TBT) regulatory provisions that should benefit New Zealand wine, pharmaceutical, medical device and cosmetic exporters. The Agreement's prohibition on the use of agricultural export subsidies on TPP trade will also consolidate the competitiveness of New Zealand products in the region.

⁹³ AVE is a method for quantifying the impact of an NTM on trade, by estimating what level of tariff on that product would have the same trade-restricting effect.

These specific outcomes are supplemented by new regulatory coherence disciplines in TPP that should, over time, lead to more consistent and transparent approaches to regulation when trade and investment liberalisation is taken into account.

Modelled gains: Improved trade facilitation

Strutt et al further considered the additional impact of TPP on trade facilitation, namely commitments aimed at facilitating the flow of goods across borders, including through ensuring customs procedures and practices are transparent and consistent, and expediting certain forms of trade. Strutt et al modelled the impact of a 25% reduction in the average time for goods to clear customs, run through the model for individual sectors. This was found to add NZ\$374 million to New Zealand's GDP after fifteen years.

Several of the outcomes in relation to NTMs listed above also have the potential to streamline border processes, for example SPS and TBT provisions relating to import checks. In addition, the Customs Chapter requires each Party to ensure its customs procedures are applied in a way that is predictable, consistent and transparent. This should lead to a lower cost of trade, simplified customs procedures for traders, and the expeditious clearance of goods.

Modelled gains: Trade in services and investment

TPP is of particular economic importance for New Zealand's trade in services and investment – nearly half our services exports (NZ\$8.3 billion in 2014) and about three quarters of both inwards and outwards direct investment are from or to TPP member countries. As outlined in Section 4, TPP would further liberalise trade and investment flows across a range of areas that would be expected to benefit New Zealand (as outlined in Section 4 of this NIA – see particularly, the Investment, Cross-Border Trade in Services, Financial Services, Temporary Entry, and Telecommunications Chapters). Estimating the impact of TPP on these areas is difficult, particularly given the multi-faceted relationship of domestic regulation and law, and differences in practice and culture between countries, as related to services sectors and investment.

As with goods NTMs, Strutt et al recognised that while lowering barriers to services trade could result in large economic effects, the modelling itself is difficult. The model took a published assessment of the level of barriers to trade in a number of services sectors for each TPP country, and assumed that countries with high NTMs in a service sector would reduce to the TPP-mean for that sector.⁹⁴ The model found that after fifteen years, this level of liberalisation in services would contribute an additional NZ\$250 million to New Zealand GDP by 2030.

New services market access, over and above existing WTO commitments, has been secured from Canada, Japan, Malaysia, Mexico, Peru, Viet Nam and the US, including in sectors where New Zealand services exporters have capability and expertise (education, professional services, agricultural-related services, environmental services and auxiliary air services). In making these commitments, some Parties have agreed to relax laws, regulations or policies to make it easier to export services to those markets. Others have agreed to bind existing laws or open access.

⁹⁴ Again, this was done by representing Services NTMs as AVE barriers.

Strutt et al did not undertake specific modelling on the impact of a number of individual chapters in TPP that would be expected to contribute to further export growth and hence economic benefit for New Zealand. (For example, the Government Procurement, SOEs, Competition and Electronic Commerce obligations, all of which are anticipated to be of significant net benefit for New Zealand exporters, as outlined in Section 4 of this NIA).

Economic effects of investment liberalisation

As outlined in Section 4 of this NIA, the investment provisions in TPP are considered to be to New Zealand's net advantage. Joining TPP would benefit New Zealand investors, by providing improved conditions when making investments and doing business in other TPP countries for many sectors, and encourage inward investment flows into New Zealand within a robust policy framework. These commitments would be the first time New Zealand had entered into investment commitments with Canada, Japan, Mexico, Peru and the US, and also improve on the partial investment arrangements with several other TPP Parties including Brunei, Chile, Malaysia, Singapore and Viet Nam. Quantifying the impact of this improved access is difficult and requires assuming returns to capital, so quantified benefits from investment are not separately captured by Strutt et al, or in the cost benefit analysis in this NIA. The empirical literature suggests that FDI boosts productivity, however.

7.1.4 Estimated impact of copyright provisions

As outlined in Section 4 of this NIA, TPP would require a number of changes to New Zealand's intellectual property regime that would diverge from our preferred approach, and introduce some on-going costs. This included costs associated with changes to New Zealand's copyright law that would be expected in theory to incur to the wider economy as a whole.

In the context of launching TPP negotiations, the Government commissioned a study on the effect to New Zealand of raising a number of IP protections in New Zealand⁹⁵. This included a quantification of the impact of raising New Zealand's copyright term from 50 to 70 years, an outcome that was ultimately reflected in TPP. Ergas et al found that New Zealand was a "very substantial net importer of IP protected goods (e.g. books, recorded music, films, software, pharmaceuticals)". The study looked at the potential costs of term extension in terms of its effect on the price and usage of copyright-protected content in New Zealand, as well as the potential benefits on New Zealand exports in this area. The study estimated that the cost of copyright term extension for books and recorded music,⁹⁶ corresponding to an average annual real cost of NZ\$21 million and NZ\$17 million respectively. The resulting costs therefore reflect the net cost to New Zealand of an extension to copyright term under TPP (although creative markets have changed during this time, as a result of digitisation and consumer trends).

⁹⁵ Jennifer Orr, Jason Soon, Henry Ergas. "Economic Impact of Potential Changes to New Zealand's IP Laws as a Result of Trade Negotiations", September 2009 (copyright term extension results available at www.tpp.mfat.govt.nz).

⁹⁶ The study also sought to quantify the impact of patent term extension for pharmaceuticals, an outcome that was not ultimately reflected in TPP. The Government undertook separate analysis of the impact of TPP's more likely outcome on pharmaceuticals separately, see Section 8 of this NIA.

While not included in the Ergas et al model, copyright extension would also have an important effect for audio-visual works, including films and television. The net economic impact for audio-visual works is estimated to be roughly equivalent to the annual cost of recorded music. The real annual cost of TPP on these three areas of copyright has been conservatively estimated to be NZ\$55 million annually.

Note that this figure of NZ\$55 million is the average cost over the very long term, including the initial 20-year period. Ergas et al assumed transitioning immediately from a 50 to 70 year copyright term. In fact, TPP would allow New Zealand to provide a 60 year term for works that would otherwise have fallen into the public domain during the first eight years after TPP entered into force, and a 70 year term for all other works after that. The result of this would be lower net costs, particularly in the first twenty years.

7.1.5 Fiscal compliance costs (from NIA Section 8)

There would be some additional costs associated with joining TPP that could be seen as operational costs for the New Zealand Government. Many of these would enable New Zealand to derive expected further benefit from the Agreement. For example, funding New Zealand's participation in the institutional arrangements (such as Committees) that will oversee the trade and economic framework envisaged under TPP. Others will be additional costs for New Zealand. These fiscal costs are outlined in Section 8 of this NIA, and are estimated to total a maximum of NZ\$24 million annually (see Table 7.3 below).

The majority of this figure comes from foregone annual tariff revenue of NZ\$20 million, once New Zealand's tariff commitments are fully implemented seven years after TPP enters into force. This cost represents foregone revenue for the Government. From an economic perspective, however, it is in New Zealand's interests to move towards a tariff-free structure. This would lead to more efficient allocation of the economy's resources. While this foregone tariff revenue is treated as a cost, the net economic effect for New Zealand is likely to be positive as a result of cheaper goods for consumers and businesses, and flow on effects due to increased competition.

The institutional and outreach costs identified here also represent a cost for the Government that would be expected to result in a net economic benefit for New Zealand, in this case as an investment in activities that would allow New Zealand to realise greater benefit from TPP.

Table 7.3: Fiscal Costs of TPP, New Zealand dollars

Area	Annual cost	Description
Foregone tariff revenue	\$20 million	This maximum is reached after seven years.
TPP Institutional arrangements	\$0.5 million	Participation in on-going TPP committees etc.
Administrative costs	Estimated at NZ\$3.2 million	Largely on-going, includes a number of transparency-related obligations including for PHARMAC.

Area	Annual cost	Description
Outreach activities	\$0.495 million	Likely be around this level until the entry into force of TPP, then lessen
Total	NZ\$24 million	

Administrative costs include a range of obligations that New Zealand would be required to implement under TPP. Some of these would result in net economic benefit for New Zealand, while others would represent a net cost. Most significant amongst these is the estimated NZ\$2.2 million of on-going operational costs for PHARMAC.

These fiscal costs are all assessed in greater detail in Section 8 below.

7.2 Social effects

The net economic benefit of TPP for New Zealand would be expected to translate into a corresponding net benefit to New Zealand society, for example through improved employment and wages, and greater resource to spend on health, welfare and cultural outcomes.

TPP would have few implications for New Zealand's ability to develop social policy – as noted in the preamble to the Agreement, and analysed throughout Section 4 to this NIA, TPP resolves to “maintain each Party's right to regulate to meet domestic public policy objectives, including to safeguard public welfare”. TPP's labour commitments are the strongest contained in any of New Zealand's FTAs, and are consistent with New Zealand's existing domestic approach. TPP would have minimal impact on immigration. While closer economic ties with other TPP members may result in new patterns of movement of people, TPP does not affect New Zealand's immigration policy framework. TPP would have no effect on human rights in New Zealand.

7.2.1 Employment

The economic effect of an FTA like TPP is expected to have a corresponding effect on employment, for example changes to overall wage and employment levels, or changes in relative levels of employment between sectors that experience expansion or contraction due to the FTA.

TPP is estimated to result in a net benefit for New Zealand employment, reflecting the net economic benefit for New Zealand outlined in Section 7.1. There may be, however, a degree of variance between different sectors of the economy. For sectors where New Zealand has a comparative advantage over its trading partners, new export opportunities or cheaper inputs following TPP's entry into force would be expected to result in increased productivity and positive employment effects for that sector. Export-oriented industries receiving the greatest economic benefit under TPP (such as new access to an export market) would be expected to see improved employment opportunities (such as higher wages or number of jobs) that could, in turn, attract workers from other parts of the economy.

While some individual sectors may be expected to see longer-term employment shifts to other sectors, no sectors in New Zealand are expected to experience sudden declines in average wages or job numbers as a consequence of TPP. As outlined in Section 7.1, while in theory highly-protected sectors can experience increased competition following the sudden liberalisation of protective barriers (such as tariffs or other restrictions on imports), New Zealand has very few if any such protected sectors.

7.2.2 Health impacts

TPP will set rules to address a significantly broader range of ‘behind-the-border’ regulatory and administrative practices than New Zealand’s previous FTAs, some of which would have some small impact on the health system. TPP seeks to address this by balancing these rules with the need to ensure that such rules do not constrain a jurisdiction’s ability to regulate for legitimate public policy purposes, particularly in the health sector.

The TPP will require changes to some domestic health policy and operational settings but, importantly for New Zealand, the outcomes relating to pharmaceuticals in the Intellectual Property (IP) Chapter and the pharmaceutical transparency provisions (Transparency and Anti-corruption Chapter) represent a balance that would not undermine New Zealand’s prerogative to manage its health system in New Zealand’s best interests. TPP also preserves the applicability of Article 31 of the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which permits compulsory licensing for pharmaceuticals as well as the flexibilities on public health under the Doha Declaration.

There were a number of areas that could potentially have had an impact on health outcomes for New Zealand, but that were not raised or were knocked back in negotiations. For example:

- TPP Parties would not be obliged to extend patent protection to cover methods of medical treatment of humans under TPP, which could have imposed significant costs for New Zealand. (See Section 4.16.)
- TPP countries would not be obliged to offer data protection for new uses of existing products. Instead, TPP would require New Zealand to provide five years’ data protection to new small molecule (but not biologic) pharmaceutical products that contain both a new and a previously approved active ingredient. (See Section 4.16.)
- TPP’s requirements for “effective market protection” for biologic pharmaceuticals can be met within New Zealand’s existing policy settings and practice by providing at least five years of data protection together with other measures. (See Section 4.16.)
- The TPP outcome for ‘patent linkage’ would impose no additional costs or delay access to generic medicines for New Zealand, given that as a matter of practice Medsafe already publishes on its website the details (including the applicant) of all new medicine applications it receives. (See Section 4.16.)

- The TPP State Owned Enterprises (SOEs) Chapter would not affect future Governments' choices about the design of the health system. The scope of disciplines on commercial activities would not apply to public health institutions and service delivery models. (See Section 4.16.)
- The commitments in the TPP sectoral annex to the Technical Barriers to Trade (TBT) Chapter covering the regulation of medicines and medical devices are consistent with international good practice and would not require changes to how New Zealand regulates these products. (See Section 4.7.)

During negotiations, concerns were raised by some stakeholders about the potential implications for the health system of dispute settlement provisions in TPP, particularly Investor State Dispute Settlement (ISDS). As outlined in Section 4.8, TPP would not change the Government's existing ability to regulate for legitimate public policy purposes, including public health objectives, in the way that it considers best for all New Zealanders. Importantly, ISDS has only limited application (as outlined in Section 4.8). It would not apply to any of the obligations discussed in this section that could potentially impact on the health system. The pharmaceutical transparency provisions (Transparency and Anti-Corruption Chapter) are additionally not subject to the Government-to-Government dispute settlement provisions in the agreement. The Investment Chapter also expressly recognises that non-discriminatory actions of the Government that are designed and applied to protect public health, are very unlikely to be covered by the TPP obligations on expropriation. Further exceptions and safeguards are also provided for in the Agreement to ensure this, including New Zealand specifically listing health as a social service to fall outside of core cross border trade in services and investment obligations. The wording of these exceptions in TPP differs from previous New Zealand FTAs, which have incorporated the WTO exceptions. The overall implication for health policy, however, is that TPP accords an equivalent level of protection.

Additionally, tobacco control measures are covered in Article 29.5 of the Exceptions chapter, under a provision that allows the Government to elect to rule out ISDS challenges over tobacco control measures. The Government intends to exercise this provision. This would offer additional protection for New Zealand's proposed introduction of plain packing measures as it would make it clear that an investor could not submit a claim to arbitration in respect of such measures. (See Section 4.8.)

Costs related to health

The provisions regarding patent term extension for delays in marketing approval under the Agreement could conceivably result in additional costs to the health system. However, as outlined in Section 4.16, based on Medsafe and IPONZ's track record of processing times for marketing approvals and patents very few unreasonable delays are expected to occur in New Zealand, and only in exceptional circumstances. Based on the time taken to process pharmaceutical marketing approval applications in New Zealand over the past five years, the annual cost to New Zealand (averaged over the long term) is estimated to be NZ\$1 million. The risk of this cost occurring will need to be managed by ensuring that New Zealand's patent and regulatory approval processes remain efficient thereby not exposing New Zealand to claims that support compensatory patent term extensions.

The PHARMAC model would remain unchanged if New Zealand entered TPP, including PHARMAC's ability to prioritise what pharmaceuticals get listed for reimbursement (subsidisation) and its negotiating practices. As outlined in Section 4.27, there would, however, be some additional transparency requirements associated with PHARMAC's processes and these would involve additional costs.

First, PHARMAC would be required to make a decision on every application within a set timeframe that PHARMAC can determine. The timeframe may be extended – an exception that was specifically included in the Agreement at New Zealand's request to ensure more flexibility. Nevertheless, this requirement is likely to mean that PHARMAC would be required to formally decline some applications rather than the current practice of keeping them on the books for possible consideration when funding becomes available.

PHARMAC would also have to provide, at the applicant's request, for a review of a 'decline' decision. This could be an internal review conducted by PHARMAC. The review would not require PHARMAC to remake its original decision on priorities for listing and reimbursement, nor would it require consideration of assessments related to other proposals for funding. These changes would not undermine the PHARMAC model.

The total cost to the Government of these requirements is estimated in Section 8 (up to NZ\$4.5 million in one-off establishment costs for PHARMAC, and NZ\$2.2 million per year in operating costs).

The relatively small magnitude of the health-related costs associated with TPP and their mostly operational nature means that the distributional impacts of these costs on the community would be minimal.

Health benefits

There are no quantifiable direct economic benefits to the health portfolio from TPP. The Agreement would, however, be expected to deliver economically significant benefits and support accelerated economic growth, enabling New Zealand to continue to invest in the health system.

Some stakeholders had suggested a more transparent regime under TPP would promote investment and research and development in the New Zealand pharmaceutical sector. These benefits are assessed to be marginal, as the commitments in TPP would be unlikely to change the key factors that influence these decisions (i.e. the speed with which a company can have clinical trials completed so that the medicine gets to market faster and the population size and cost of doing the trials etc.). Furthermore, there was no evidence of increased investment when Australia made changes similar to those required under TPP.

7.2.3 Social regulation

New Zealand's social regulation frameworks would not be affected by TPP. In the first instance, the obligations and chapters in TPP were each negotiated so as not to impair the ability of countries to regulate and make legitimate public policy. New Zealand sought appropriate flexibility in key areas

and obligations. However, in the unusual situation where government action (or inaction) would breach an obligation, then the Exceptions Chapter provides a further safety net of exceptions to ensure legitimate public policy would be allowed (as outlined in Section 4.28). If a country is shown to have violated an obligation, then that government may seek to demonstrate that a relevant exception applies. The exceptions cover a range of areas including national security, health, environment, national treasures of artistic, historic or archaeological value, and situations involving serious balance of payments difficulties.

TPP would not affect New Zealand's ability to continue to form robust labour law and regulations, and the TPP labour commitments are consistent with New Zealand's existing domestic legal settings and international legal commitments. TPP would set enforceable bottom lines on labour obligations in TPP countries, as outlined in Section 4.20. The inclusion of binding dispute settlement applicable to labour commitments, with the potential of trade sanctions or monetary compensation for breaches, would in theory reduce policy space and create some risks for the Government in potentially dealing with unfounded actions. The public submissions and procedural matters commitments also provide opportunities for external parties to raise concerns about domestic implementation issues. However, New Zealand's practice in this area, and the design of the relevant disciplines and dispute settlement mechanism, means these risks are very low.

7.2.4 Immigration

TPP would not require any changes in New Zealand's immigration policy or legislation. The only specific commitments related to the movement of people are the short-term commitments for business travel in the Temporary Entry Chapter, as outlined in Section 4.11 of this NIA. This Chapter would result in no substantial change to people flows in New Zealand, as it falls within commitments New Zealand has already made to other FTA partners, and because the Chapter does not apply to categories of visitors related to immigration (for example people seeking employment in New Zealand or to immigration matters, such as citizenship or permanent residency applications).

The promotion of trade and investment opportunities under TPP and subsequent rise in New Zealand's profile in the region may, however, encourage interest in immigration to New Zealand (including by skilled migrants) and vice versa. This would take place within the immigration policy settings determined by the Government, which would not be affected by TPP.

7.2.5 Human Rights

TPP includes no inconsistencies with the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990. Its implementation would have no effect on human rights in New Zealand. As outlined in Section 4.20, the strong labour obligations in TPP could result in improved human rights situations in other TPP countries (for example, given obligations to address forced and child labour).

7.3 Cultural effects

7.3.1 Treaty of Waitangi

As the founding document of New Zealand, the Treaty of Waitangi is fundamental to the on-going relationship between the Government and Māori. All of New Zealand's FTAs have ensured that the unique relationship between the Crown and Māori is provided for. This outcome has been achieved by ensuring that the obligations in New Zealand's FTAs do not impede the Crown's ability to fulfil its obligations under the Treaty of Waitangi and, since 2001, by including a Treaty of Waitangi exception in all FTAs.

The Treaty of Waitangi exception in New Zealand's FTAs provides additional clarity that the Crown will be able to continue to meet its obligations to Māori, including under the Treaty of Waitangi. It is designed to ensure that successive governments retain flexibility to implement domestic policies that favour Māori without being obliged to offer equivalent treatment to overseas entities. New Zealand's approach of including the Treaty of Waitangi exception in its FTAs is unique, and reflects the constitutional significance of the Treaty of Waitangi to New Zealand.

New Zealand continued this approach with TPP, securing the same outcome as with previous FTAs. New Zealand also secured provisions on traditional knowledge that have not been included in any previous New Zealand FTAs. With respect to an obligation in TPP regarding plant variety rights, New Zealand secured a New Zealand-specific outcome that will give the Government sufficient time to undertake consultations on implementation of this obligation and sufficient flexibility to fulfil any obligations under the Treaty of Waitangi.

As a result of these outcomes, nothing in the TPP prevents the Crown from meeting its obligations to Māori, including under the Treaty of Waitangi. These outcomes were achieved in line with long-standing Government positions in FTA negotiations, and after consultations with Māori and other stakeholders (outlined in Section 9 of this NIA).

Specific obligations and General Exceptions

The specific obligations contained in TPP have been designed so as not to impair the ability of governments to make legitimate public policy and to take measures to implement that policy, as outlined elsewhere in this NIA. This general flexibility afforded to the Government will also help ensure that it is able to take measures that are in the interests of Māori. New Zealand's TPP obligations are addressed at Sections 4 and 5 of this NIA.

The TPP Exceptions Chapter sets out a number of exceptions that describe the areas where governments maintain the ability to adopt or retain policies and to regulate regardless of the obligations contained in the TPP (see Sections 4.28 and 5.29). Those exceptions cover a range of areas including national security, public order, safety, health, environment, non-renewable resources, national treasures of artistic, historic or archaeological value, and situations involving serious balance of payments difficulties. Some of these areas are likely to be of specific relevance to Māori interests.

Treaty of Waitangi exception

Article 29.6 contains New Zealand's Treaty of Waitangi exception. This exception specifically refers to the Treaty of Waitangi, and applies to the entire Agreement. It allows New Zealand to adopt any measure that it deems necessary to accord more favourable treatment to Māori in respect of the matters covered by the Agreement. This includes trade in goods and services, investment, environment, labour, intellectual property and all other matters dealt with in the Agreement. This is the principal explicit means (though as discussed above, not the sole means) by which the Treaty of Waitangi is recognised in TPP. In addition to the policy flexibility retained in TPP, the exception removes any doubt that New Zealand will be able to meet its obligations to Māori, including under the Treaty of Waitangi. The legal effect of this exception is addressed at Section 5.29.

The chapeau contained in Article 29.6 requires New Zealand to avoid adopting measures that are "arbitrary or unjustifiable discrimination" or "disguised restriction[s] on trade". WTO jurisprudence narrowly construes the nature of unjustifiable discrimination to mean measures where the discrimination cannot be reconciled with, or where there is no rational connection to, the policy objective of the measure. New Zealand is confident that any measures which are carefully designed to fulfil obligations to Māori are unlikely to be found to be an "unjustified discrimination" against persons of a Party to the TPP.

The chapeau contained in Article 29.6 provides an important reassurance to our trading partners that New Zealand will only seek to invoke this exception for legitimate purposes related to Māori and the Treaty of Waitangi. To date, none of our FTA partners has brought a formal claim against New Zealand for arbitrary or unjustifiably discriminatory behaviour with respect to the Treaty of Waitangi exception, i.e. no country has felt aggrieved over any of the measures that the Government has taken since 2001 to uphold Treaty of Waitangi obligations, including in relation to Treaty settlements.

In addition to the Treaty of Waitangi exception, Article 29.6.2 and Annex 18-A to Article 18.7.2 ensure that the interpretation of the Treaty of Waitangi will remain the exclusive domain of New Zealand Courts and Tribunals, by providing that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of the TPP. TPP dispute settlement panels and ISDS tribunals may interpret the Treaty of Waitangi exception provision, but not the Treaty of Waitangi itself.

Intellectual property and the Treaty of Waitangi

Under Article 18.16, TPP Parties recognise the relevance of traditional knowledge to intellectual property systems, and commit to work together on traditional knowledge issues. Article 29.8 allows the TPP Parties, subject to their international obligations, to take measures to respect, preserve and promote traditional knowledge and traditional cultural expressions. This Article preserves New Zealand's policy flexibility when considering the extent to which traditional knowledge and traditional cultural expressions should be protected.

Under Article 18.16.3, the Parties also agree to pursue quality patent examination, which may include taking into account information related to traditional knowledge, providing an opportunity to inform

patent offices of TPP Parties that a claimed invention is not new and therefore not patentable, using databases or digital libraries containing information on traditional knowledge and cooperating in the training of patent examiners on how to deal with applications related to traditional knowledge. Formal recognition of the relationship between the intellectual property system (in particular the patent system) and traditional knowledge associated with genetic resources is an important step forward for the protection of traditional knowledge, including Māori traditional knowledge.

As outlined in Section 4.18, Annex 18-A to Article 18.7.2 of the Intellectual Property Chapter gives New Zealand the option of, within three years of entry into force of TPP, either acceding to the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 91), or alternatively, under a New Zealand specific approach, adopting a plant variety rights system that gives effect to UPOV 91 (Section 4.17 of this NIA addresses UPOV 91). The scope of plant variety rights in New Zealand was considered in Waitangi Tribunal report *Ko Aotearoa Tēnei* (WAI 262), and the Tribunal's recommendations are under consideration by the Government.⁹⁷ Annex 18-A preserves flexibility in this area by providing that when implementing this obligation, New Zealand is able to adopt any measure that it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi (and this is not subject to the dispute settlement provisions in TPP). The Annex also provides New Zealand with an additional three year period from the date of entry into force of the Agreement for New Zealand, and therefore gives the Government time to undertake consultations on implementation of the obligations.

In areas where change is required to New Zealand law to implement its TPP obligations (as summarised in Section 6 of this NIA), consultation will be undertaken. This will include consultation with Māori (for example, on implementation of New Zealand's obligation concerning UPOV 91). In this way, consultation will inform the implementation of New Zealand's TPP obligations.

7.3.2 Cultural

TPP is not expected to have any effect on the Government's ability to pursue cultural policy objectives, such as supporting the creative arts, and in relation to cultural activities. As outlined in Section 4.28, TPP incorporates the relevant WTO general exceptions (from GATT and GATS). For clarity, TPP incorporates the WTO General Agreement on Tariffs and Trade (GATT) Article XX exception (GATT Article XX (f)) that Parties may take measures necessary to protect national treasures of artistic, historic or archaeological value, providing that such measures are not used for trade protectionist purposes.

The only significant cultural impact of TPP would be potentially due to the extension of copyright terms, delaying the point at which creative works would enter the public domain from 50 to 70 years⁹⁸ (as outlined in Section 4.17). This would have two key cultural effects: consumers and second-

⁹⁷ An inter-departmental task force has reviewed the recommendations of the report but the Government's response is still being developed.

⁹⁸ The copyright term for films and sound recordings (including recorded music) is calculated from the date on which they were made or published. The copyright term for books, screenplays, music, lyrics and artistic works is calculated from the death of the author.

generation creators would need to wait longer before works were freely available (i.e. in the public domain), while copyright holders would be able to derive benefit from works for longer. For most consumers, this will be of significance primarily in delaying by twenty years the point at which of works still popular long after they were made enter the public domain. Note that TPP includes an exceptions framework, which the Government intends to use to provide exceptions for situations where use of a copyright work either does not infringe copyright in the first place, or is otherwise permitted because there is a copyright exception under New Zealand law. The overall effects are likely to be felt more keenly by institutions that hold large quantities of works that would have entered the public domain without the term extension, such as libraries and universities. (Although TPP would not affect the copyright exceptions that currently exist in New Zealand for these kinds of institutions.) Some of these institutions may respond to the extension by reducing the number of works they hold or by passing on the higher overall costs of retaining them.

The extension of copyright terms is estimated to have tangible implications. Not taking account of New Zealand's eight-year transition period, this is estimated to be an average net economic cost of NZ\$55 million annually (see Section 7.1.4), but would be expected to have an minimum effect on New Zealand's culture – TPP would not mean works could not be accessed at all, but only affect the point at which they could be accessed from the public domain with certainty.

7.3.3 Digital economy and culture

The digital economy increasingly affects the way New Zealanders connect economically and socially to the world - connectivity is also a crucial driver of New Zealand's economic growth, and can also have significant cultural effects. TPP could potentially influence New Zealand's digital culture and digital economy, particularly given the increasing consumption of cultural products online and TPP's intention to establish a regional framework of all areas of trade. The preamble to TPP resolves to "promote trade and investment in innovative products and services, including in those relating to the digital economy and green technologies", and the Electronic Commerce Chapter in particular seeks to establish a regional framework in this area.

As outlined in Section 4, TPP's Electronic Commerce Chapter could be expected to foster e-commerce in a way that would deliver economic benefit for New Zealand exporters and consumers, through creating an environment capable of making it easier to sell and purchase goods and services online, and facilitating the growth of new products. TPP also includes provisions that relate to the regulation of aspects of the way New Zealanders interact with particular online or electronic products. As outlined in Section 4, these include consumer protection, privacy, SPAM, information flows, source code, location of computer facilities, and measures to promote e-commerce (in the Electronic Commerce Chapter).

The overall effect of the Electronic Commerce Chapter is expected to support New Zealand's digital culture – helping create an environment conducive to the growth of weightless exports and other forms of e-commerce, and increasing the uptake of new online products and services (for example through promoting protection of personal information for New Zealand users of e-commerce based in other TPP countries, supporting security and confidentiality safeguards, and helping address SPAM).

Across the Electronic Commerce Chapter, New Zealand has ensured that TPP would enable New Zealand to continue current policy settings designed to support the growth of New Zealand's digital culture and connectivity. Importantly, New Zealand also ensured the obligations of the Chapter would not cut across New Zealand's current policy settings to encourage creativity and cultural expression – including an exception in the Electronic Commerce Chapter that government subsidies or grants to support digital cultural works would not be affected, enabling New Zealand to continue its targeted use of government grants to encourage New Zealand creative content.

Aspects of the Intellectual Property Chapter could also have a potential impact on New Zealand's digital culture. The internet has led to much greater accessibility of music and audio-visual products, for example, but the extension to copyright outlined above would delay by twenty years the point at which New Zealand works were able to be freely utilised (note that 70 year copyright already applies to many overseas works, especially from the US). Enhanced technological protection measures (TPMs) would enable copyright owners to better enforce digital locks or usage restrictions put on copyright works, to the extent that a civil or criminal prohibition is a deterrent to circumvention. While this could potentially result in reduced accessibility for legitimate use of works, as outlined in Section 4.17, New Zealand will be able to provide exceptions to enable TPMs to be circumvented to enable legitimate uses of copyright work. TPP would also allow the Government to ensure non-profit libraries, museums, archives, educational institutions, and public non-commercial broadcasters can also be exempted from criminal liability, and from civil liability if the relevant act was done in good faith without knowing the conduct was prohibited.

7.4 Environmental effects

New Zealand has long recognised the links between trade and the environment. One of the aims of New Zealand's trade agreements is to ensure that the outcomes contribute to sustainable development and environmental objectives. TPP includes provisions that recognise the important role that trade liberalisation can play in supporting environmental improvements and the role that improved environmental performance can play in underpinning economic development. TPP is New Zealand's third trade agreement to include a substantive chapter on the environment (the others being ANZTEC and the New Zealand-Korea FTA), and is the most comprehensive of these. TPP aims to promote sustainable development and higher standards of environmental protection in the TPP region.

TPP contains legally binding commitments on trade and environment, requiring Parties to effectively enforce their environmental laws, and not to derogate from them in order to encourage trade or investment. TPP also contains specific commitments intended to help address global environmental issues such as trade in illegally harvested wild fauna and flora, IUU (illegal, unregulated and unreported) fishing and harmful fisheries subsidies.

7.4.1 Regulatory effects

TPP would not inhibit the New Zealand Government's ability to regulate for environmental protection. Its general exceptions are consistent with those provided for in existing international agreements

(GATT and GATS) that are designed to provide policy space for Governments for public interest purposes, such as protection of natural resources. As outlined in Section 4.27, TPP incorporates the relevant WTO general exceptions (from GATT and GATS). The core obligations in the Environment Chapter put some limitations on Parties' ability to reduce environmental protection through derogation from existing environmental measures, or non-enforcement of them. The TPP provisions on cooperation provide an avenue for enhanced dialogue and engagement on environmental matters, which could potentially provide value to New Zealand environmental policy development.

TPP would not restrict New Zealand from applying existing or future environmental laws, policies and regulations, provided they are applied to meet a legitimate objective and are not implemented in a manner which would constitute a disguised restriction on trade. New Zealand has a suite of relevant existing legislation that is designed to address potential adverse environmental outcomes of economic activity, including the Resource Management Act 1991, the Hazardous Substances and New Organisms Act 1996, the Ozone Layer Protection Act 1996, the Soil Conservation and Rivers Control Act 1941, the Energy Efficiency and Conservation Act 2000, the Climate Change Response Act 2002, the Aquaculture Reform (Repeals and transitional Provisions) Act 2004, the Biosecurity Act 1993, the Conservation Act 1987, the Crown Minerals Act 1991, the Fisheries Act 1949 (amended 1993), the Forests Act 1949 (amended 1993), and the Wildlife Act 1953. New Zealand also encourages multinational firms to promote environmental management systems through its support of the OECD's Guidelines on Multinational Enterprises.

TPP breaks new ground in relation to several environmental issues, which could support New Zealand's environmental policy priorities. It includes an obligation that requires each Party to adopt measures to address the trade of wild flora and fauna taken or traded in violation of that Party's law or another applicable law. In meeting this requirement, each Party has the right to exercise discretion in relation to the investigation of suspected violations and the allocation of enforcement resources. The Chapter includes disciplines and transparency requirements in relation to fish subsidies that contribute to overfishing and overcapacity and illegal, unreported and unregulated (IUU) fishing.

7.4.2 Product effects

Trade liberalisation under TPP is likely to lead to some changes in the mix of products that New Zealand exports and imports. More generally, trade liberalisation results in a more efficient use of resources, and the additional income that is generated by trade liberalisation can also be used – at least in part – to invest in new technology and production processes that can have positive environmental outcomes.

At the same time, changes in the composition of New Zealand's imports that arise from TPP's trade liberalisation provisions may present a possible increase in biosecurity risk. There could potentially be an increase in the amount of environmentally sensitive or hazardous items brought into New Zealand. These risks will need to be carefully monitored, but New Zealand's existing framework of environmental laws, regulations policies and practices are designed to address any such change in the risk profile of imported goods.

The liberalisation of trade in environmental goods and services under TPP – a rapidly growing export sector for New Zealand – will deliver both economic and sustainable development benefits.

7.4.3 Structural effects

Structural effects relate to the ways in which trade liberalisation can affect the production of goods and services that have environmental effects. If trade liberalisation leads to a shift in resources away from environmentally-damaging production processes or techniques (such as over-production or land degradation associated with primary production), these structural effects are likely to be a net positive for the environment. Negative structural effects can occur if domestic policy settings are not sufficiently robust to deal with a potential increase in the production of goods and services resulting from trade liberalisation that may damage the environment.

TPP is unlikely to have any discernible negative structural effects, given the degree of structural reform that New Zealand has experienced over the past four decades, natural resource and capacity constraints, the open nature of the New Zealand economy, and the environmental management legislation and systems already in place.

7.4.4 Scale effects

As economies expand as a result of trade liberalisation, there may be a risk of increasing pollution levels and other environmental impacts. This risk stems largely from the potential product and structural effects outlined above. However, this risk may be offset by the productivity improvements (and hence income gains) that are also associated with liberalisation. As a result of allocative efficiency gains, it may in fact be possible to produce more goods and services using the same amount of aggregate resources. Also, over time, technological improvements, which can be hastened by trade liberalisation and broader economic integration, are also likely to contribute to a more efficient use of natural resources.

Given New Zealand's existing environmental and resource management policy frameworks, and the provisions in TPP to promote capacity building on environmental issues, it is unlikely that scale effects resulting from TPP would result in a net increase in environmental degradation. The FTA is therefore not expected to have any negative effects on the environment in New Zealand that cannot be managed using existing policy frameworks. Its provisions may encourage improved productivity in the use of natural resources.

8 The costs to New Zealand of compliance with the treaty

8.1 Summary of Costs

The following costs to the Government (fiscal costs) of entering into TPP have been identified, and are described in more detail in this Section of the NIA. These costs are considered against the overall effect of TPP on New Zealand in Section 7 of this NIA.

Table 8.1: Fiscal Costs of TPP, New Zealand dollars⁹⁹

Area	Annual cost	Description	Reference
Foregone tariff revenue	\$20 million	This maximum is reached after seven years. (See Table 8.2.)	Section 8.2.
TPP Institutional arrangements	\$0.5 million	Participation in on-going TPP committees etc.	Section 8.3.1.
Outreach activities	\$0.495 million	This is the estimated annual cost for the initial period leading to entry into force (which is expected to happen within two years). Ongoing costs expected are to be significantly smaller.	Section 8.3.2.
Administrative costs (see Table 8.3)	NZ\$3.2 million	Costs for implementing certain TPP obligations (primarily, the fiscal cost in relation to new administrative procedures PHARMAC would implement, and impact of any extensions to pharmaceutical patents). Note also one-off costs to PHARMAC of NZ\$4.5 million, and Customs of NZ\$0.4 million.	Section 8.3.3.
Total	NZ\$24 million		

8.2 Tariff revenue

The elimination of tariff revenue on imports from other TPP members, according to New Zealand's TPP Schedule of Tariff Commitments, would result in a maximum amount of annual foregone tariff revenue of

⁹⁹ Note the cost of copyright term extension is an economic cost, and addressed in Section 7.

NZ\$20 million from the seventh year after TPP enters into force. Over half of this (NZ\$12 million) would be eliminated from the first year after entry force. These figures are based on dutiable imports in 2014.

Table 8.2: Foregone Tariff Revenue, by Year

	Foregone tariff revenue (NZ\$, millions)						
Year	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7 and out years
Foregone tariff revenue	12.0	14.8	16.2	17.5	18.9	19.2	19.5

New Zealand already has an FTA with six of the eleven other members of TPP, under each of which New Zealand eliminates tariffs on all tariff lines (for qualifying goods). The amount of duties that could potentially be foregone on imports therefore come entirely from imports from new FTA partners (i.e. the US, Japan, Mexico, Canada and Peru). This is a maximum figure, based on 2014 figures – in practice, the actual amount of duty foregone would be lower taking into account imports that were not originating (under the TPP rules of origin) or for which the importer did not seek preference.

Table 8.3: Foregone Tariff Revenue under TPP, by Country (based on 2014 imports)

Country of Origin	Total duty (excluding excise paid on excisable goods, NZ\$)
Canada	\$0.5 million
Japan	\$2.2 million
Mexico	\$0.8 million
Peru	\$0.5 million
US	\$15.8 million
Total	\$19.9 million

8.3 Costs to government agencies of implementing and complying with the FTA

8.3.1 TPP institutional arrangements

TPP establishes a framework for on-going consultations between Parties, comprised of a Joint Commission to oversee the implementation of the Agreement, under which eighteen committees and working groups would be responsible for specific Chapters of the Agreement. Such institutional arrangements are common practice for a large FTA, and are seen by New Zealand as an essential mechanism for delivering the intended benefit of the Agreement. It would allow Parties, for example, to enforce compliance of commitments under the Agreement, undertake the on-going work envisaged in the FTA, address any emergent issues, and manage future developments (such as new members). This can be of particular importance for smaller countries like New Zealand, as it provides a forum for advancing market access priorities under the framework of the Agreement – particularly in areas such as SPS, TBT, and Customs. Undertaking these activities has fiscal implications for the government departments involved.

The Agreement envisages that the many of the committees would meet annually, unless agreed otherwise. Other committees are likely to meet less frequently, and several provide for video- or tele-conferencing. New Zealand is likely to seek to engage substantially in TPP's institutional arrangements to maximise economic opportunities under the Agreement. Based on previous FTAs and other international meetings, it is almost

certain that TPP Parties would seek to hold many of these committees simultaneously, which can allow for reduced costs particularly for smaller countries like New Zealand (for example, where one official is able to cover more than one committee). On this basis, the likely annual cost of attending TPP implementation committees to the New Zealand Government is estimated to be NZ\$400,000¹⁰⁰. (This estimate includes the costs associated with attending committee meetings for the IP-related treaties to which New Zealand would need to accede under TPP; see Section 4.19.)

New Zealand may, on occasion, need to host implementation meetings following TPP's entry into force. The annualised cost of hosting the TPP Joint Commission or related committees is estimated to be NZ\$100,000, based on the assumption that the twelve TPP Parties would rotate in hosting a full annual meeting of the Joint Commission and all related committees¹⁰¹ (or the equivalent annual cost of hosting a smaller number of committees more frequently). The source of funding for such hosting would be considered on a case-by-case base.

Fulfilling TPP's institutional arrangements may in some cases require increased resource for agencies, such as time commitments for participation in committees, as well as time for preparation. Based on New Zealand's experience in other FTAs, many TPP committees would provide a useful forum for progressing New Zealand's core objectives – for example, a regular TPP committee meeting between technical experts could allow New Zealand to bolster efforts to engage trade partners on outstanding market access or regulatory issues. In these situations, TPP's institutional arrangements would provide a leveraging opportunity, or multiplier, for existing work by agencies. In other areas, however, attending TPP committees could introduce an additional requirement beyond an agency's core business. This would represent an additional cost for that agency.

Future negotiations relating to the expansion or amendment of TPP are not considered as part of this NIA – for example, with respect to a new member joining TPP, or the agreement to undertake further negotiations on government procurement. Such future negotiations would be considered by the Government of the day, and the cost of undertaking negotiations most likely be met from the Government's Trade Negotiations Fund (TNF).

8.3.2 TPP outreach costs

In the lead up to, and following, the entry into force of TPP, government agencies would work with the private sector and others to implement strategies to best leverage the opportunities arising from the FTA. This would include ensuring businesses are positioned to utilise opportunities presented by TPP, meeting the public interest in further information about particular areas of the agreement and its likely impact on New Zealand, and engaging with Māori and Māori business. Such activities are considered to represent an investment in the FTA, rather than a compliance cost.

The inter-agency Trade Negotiations Fund (TNF) has a funding pool available to provide departments with funding for “bedding-in” activities associated with the FTA, for a period up to eighteen months after the entry

¹⁰⁰ This assumes an annual meeting in the region, and is based on the historical costs associated with attending a TPP negotiating round.

¹⁰¹ Based on the historical costs of hosting similar meetings in New Zealand.

into force of the FTA. An initial NZ\$495,000 from the TNF has been allocated for initial implementation activities, which would likely include public communications of TPP's outcomes, roadshows and public events, and work to identify opportunities for New Zealand in TPP. This initial utilisation period is likely to run longer for TPP than New Zealand's previous FTAs, given the significance of TPP markets for New Zealand, the scope and complexity of the Agreement, and the fact that there will likely be at least two years following signature before TPP enters into force. Annual costs for outreach once activities settle into business as usual following TPP's entry into force are likely to be considerably less than for this initial period.

8.3.3 Administrative costs

A number of the obligations in TPP (as outlined in Sections 4 and 5) would require additional resource to implement. Many of these obligations come with reciprocal benefit for New Zealand – for example many obligations that will also be implemented by other TPP countries will benefit New Zealand exporters. Other obligations (particularly in relation to the Intellectual Property Chapter) represent a net cost to New Zealand. These administrative costs are summarised below. Each of these is analysed in more detail in Sections 4 and 5 above.

Table 8.4: Administrative Costs of TPP, New Zealand Government Agencies

Administrative Requirement	One-off cost	Annual cost	Net cost/benefit to New Zealand
<i>Transparency Chapter:</i> PHARMAC Administrative processes (transparency requirements, set timeframes, review process)	NZ\$4.5million (one-off establishment costs)	NZ\$2.2million.	No reciprocal benefit to New Zealand.
<i>Intellectual Property Chapter:</i> possibility of granting patent term extension		NZ\$1 million.	Little reciprocal benefit to New Zealand.
<i>Customs Chapter:</i> Advance Rulings	NZ\$400,000 (One-off implementation cost.)	On-going costs to be met from baseline funding or cost recovered.	Advance Customs Rulings in other TPP markets are expected to be of significant benefit to New Zealand exporters.
<i>Technical Barriers to Trade, State Owned Enterprises and Designated Monopolies, Regulatory Coherence, Temporary Entry Chapters:</i> Notification and publication requirements		Where additional requirements exist, these are unlikely to be burdensome and would be met within agency baseline funding.	As a whole, the reciprocal practice in other TPP markets will be of benefit to New Zealand exporters.
<i>Environment Chapter:</i> Environmental activities (monitoring and reporting; facilitating greater public participation; voluntary market mechanisms)		Obligatory activities would be met within baseline funding, and additional implementation activities would be considered against associated costs on a case-by-case basis.	This annual cost would likely be small in the initial period, but has the potential to grow (assuming that New Zealand looks to engage in best endeavours as well as obligatory activities).

Administrative Requirement	One-off cost	Annual cost	Net cost/benefit to New Zealand
<i>Final Provisions Chapter: TPP</i> Depository		Depository functions as currently proposed will be able to be met within agency baseline funding.	On-going cost for New Zealand, but with reputational benefit.
Total annual		NZ\$3.2 million	

In negotiating TPP, New Zealand sought outcomes that could be implemented in the most appropriate way in the domestic context. This was taken into account in developing New Zealand's mandate and negotiation position. As a result, in a large number of areas (and except where indicated otherwise in this NIA), relevant agencies have planned to fund work within existing departmental baselines. In cases where this is not possible, Cabinet approval for additional funding may be sought by the relevant department.

The three costs in Table 8.3 are:

- As outlined in Section 4.27, TPP provisions intended to promote transparency in listing and funding processes for government programmes that subsidise pharmaceuticals will apply to PHARMAC. The outcomes reflect many existing PHARMAC practices that support transparency, but will require PHARMAC to do some new things. Implementing these provisions is expected to involve up to NZ\$4.5 million in one-off establishment costs for PHARMAC, and NZ\$2.2 million per year in operating costs.
- As outlined in Section 4.16, the provisions regarding patent term extension for delays in marketing approval are associated with cost to the health system of approximately NZ\$1 million per annum (averaged over many years).
- The requirement on Customs valuation rulings is outlined in Section 4.4.

8.4 Costs to businesses of complying with the FTA

As outlined in Sections 4 and 8, the expected effect of TPP would be to reduce compliance and at the border costs for New Zealand businesses through trade facilitating outcomes in areas such as customs procedures, TBT and SPS issues. These outcomes will help reduce transaction costs from the outset of the FTA. Other outcomes are expected to develop and increase over time from the platform the FTA provides in areas such as TBT and SPS for enhanced regulatory co-operation to facilitate trade.

The only areas in which TPP would be expected to increase costs for New Zealand businesses would follow from changes in New Zealand's Intellectual Property regime, as outlined in Section 4. These include a likely net increase in patent and copyright costs (as New Zealand is a net importer of intellectual property), a one-off transaction costs for the recording industry in negotiating new contracts to cover rights under the new regime, a likely marginal increase in the cost of some agricultural chemicals, and possible limited increased costs for plant growers who use protected varieties.

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

9.1 Inter-departmental consultation process

The negotiation of TPP (and associated side letters) was conducted by an inter-agency team led by the Ministry of Foreign Affairs and Trade (MFAT). The inter-agency team comprised officials from the Ministry for Primary Industries, the Ministry of Business, Innovation and Employment, the Ministry of Health, the New Zealand Customs Service and the Ministry for the Environment.

Other relevant departments and agencies (including the Treasury) were also regularly consulted during the negotiations in the preparation of New Zealand's position.

The Department of the Prime Minister and Cabinet was regularly notified of developments on the negotiations and New Zealand's position.

9.2 Public consultation process

The consultation process for TPP has been among the most extensive a New Zealand Government has undertaken for any trade negotiation. Throughout the negotiation process the MFAT, together with other government agencies, has been active in engaging with a wide spectrum of stakeholders on TPP.

The objective of ongoing consultations on the TPP has been to provide the opportunity for stakeholders to seek information and offer their views so that their interests are taken into account. Regular stakeholder sessions have provided a forum to share information about the progress of negotiations and to seek stakeholder input on negotiating goals and approaches. The "TPP Talk" internet column (on MFAT's website) encouraged feedback on TPP from the public at any stage.

In undertaking consultations for TPP, the Government drew on an existing foundation of information from engagement with stakeholders over the course of previous FTA negotiations.

9.2.1 Submissions process

Throughout the negotiation there were two public calls for submissions. MFAT invited initial public submissions in October 2008 on entering into negotiations with the US to expand the P4 agreement. A second invitation for public comment was made in 2011 following the expressions of interest from

other countries to join the TPP negotiations (Canada, Japan and Mexico) to better understand the views and interests of New Zealanders with regards to these three economies.

MFAT received 65 responses to the initial invitation for submissions, which expressed a diverse range of views on the TPP:

- Strong support for the potential benefits of the negotiations was expressed by various industry associations such as Dairy NZ, Meat Industry Association and Federated Farmers NZ, as well as regional chambers of commerce.
- Submissions from some stakeholders, such as the Council of Trade Unions, highlighted perceived risks from negotiations with the US, for example through investor-state dispute settlement provisions. Other submissions, for example from the Library and Information Advisory Commission, flagged the need to defend the balance between intellectual property owners and users.
- Many submissions received, including from iwi, indicated the need to reference the Treaty of Waitangi, for Māori to be meaningfully involved in the negotiation process and for ongoing consultation throughout the process.

Following the second invitation for public comment in 2011, MFAT received fifteen responses. Thirteen were from business (including business councils) and industry organisations. Two were from other governments – Canada and Mexico.

- All of these submissions indicated ‘in principle’ support for one or more of the candidate countries joining TPP. The importance of Japan as New Zealand’s fourth largest trading partner received particular emphasis, while the potential to grow our trade with Canada and Mexico was also noted.
- A number of specific issues of particular interest to certain sectors or individual businesses were raised in the submissions. These included: elimination of agricultural tariffs, liberalisation in services and investment, removal of import quota systems, regulatory coherence, labelling practices, intellectual property, government procurement, and movement of business persons.
- The majority of submissions indicated that they would not want to see any expansion of the TPP membership result in a lowering of quality standards or slow the progress of negotiations between the existing nine. Several submissions advocated that TPP should remain open to expansion in order to fulfil its potential as a platform for an APEC-wide FTA.

9.2.2 Consultation programme

Extensive public outreach and consultation took place throughout the negotiation of TPP, using printed, emailed and website information, supported by extensive briefings, discussions and correspondence with key stakeholders on New Zealand’s negotiating objectives and process.

A primary portal of information on the negotiations was the MFAT website, and dedicated internet column, “TPP Talk”. TPP Talk was regularly updated with the status of negotiations. Both the website and column encouraged feedback on TPP from the public. In seeking views on TPP, the Government

sought to encourage debate on the issues, including links to groups holding a range of views on the MFAT website.

Stakeholder briefing sessions

Hundreds of meetings took place, including with business groups, iwi, local councils, health sector representatives, unions, NGOs, Members of Parliament and individuals to seek input on the TPP and to help ensure a high quality outcome that reflects stakeholders' interests.

The Government held regular presentations and briefing sessions on the negotiations with interested parties. These include meetings in Auckland and Wellington in May 2015 in order to provide an opportunity for stakeholders to meet with the Chief Negotiator, to receive an update on the negotiation and to ask questions about their areas of interest. Similar meetings have also been held in Hamilton and Tauranga in October 2012 and Wellington in November 2012; Wellington and Christchurch in July 2013, Nelson in March 2014, Dunedin in April 2014 and in Christchurch in June 2014. The Ministry also updated Members of Parliament from a range of parties on the negotiation, including prior to the conclusion of negotiations.

In a new initiative that reflected the level of public interest in TPP, MFAT also made provision for stakeholder engagement with regard to the two TPP negotiating rounds held in New Zealand. With regard to the round of negotiations held in Auckland in December 2012, the Ministry organised a stakeholder programme attended by 72 New Zealand participants as well as other stakeholders from overseas. The programme included a briefing from New Zealand's Chief Negotiator and other participants' Chief Negotiators, and presentations from other stakeholders on specific topics, including intellectual property, labour, environment, market access, and investment. Auckland also hosted a round of negotiations in 2010 and the Ministry ran a similar stakeholder outreach programme.

Other government agencies also undertook engagement in the areas for which they have the policy lead. For example, in November 2011 the Ministry of Business, Innovation and Employment (MBIE) updated its TPP intellectual property stakeholders, including Māori business organisations, on the progress of the TPP negotiations concerning intellectual property. In addition, the Ministry of Health, together with the MFAT and MBIE, met with clinician groups on health policy-related issues in TPP in November 2012 and April 2015.

Stakeholder meetings were supported by email correspondence with interested individuals, companies and sectoral organisations, as well as regular ad hoc meetings between negotiators and interested stakeholders on intellectual property issues.

Consultation with Māori

Māori consultation was undertaken in accordance with MFAT's Strategy for Engagement with Māori on International Treaties. This Strategy aims to ensure that issues of relevance to Māori in

international treaties are identified early, and that engagement with Māori on a particular treaty is appropriately tailored according to the nature, extent and relative strength of the Māori interest.¹⁰²

For TPP, MFAT engaged with Māori through a number of mechanisms in addition to the wider stakeholder activities. The Ministry engaged with the Māori Business Facilitation Service at Te Puni Kōkiri to confirm an approach for stakeholder engagement concerning FTAs, and applied this approach for TPP outreach. The Ministry has also reached out to the Federation of Māori Authorities to engage in consultation as well as to individual Maori business enterprises and specific iwi.

The Ministry of Foreign Affairs and Trade also distributed to iwi and Māori organisations a six monthly report on international treaties under negotiation as a means of ensuring that Māori were kept informed of developments in the various negotiations (this has recently been made available as an online database, 'New Zealand Treaties Online'). This list of international treaties contains information on TPP, including specific areas of the agreement of interest to Māori, like the Treaty of Waitangi exception. This distribution provided contact details for feedback on the negotiation from Māori addressees.

9.3 Issues covered in the consultation process

A wide variety of issues were covered in the consultation process, reflecting the broad spectrum of interests held by stakeholders and recognising the strong interest many New Zealanders have had in the TPP negotiation.

Amongst other areas, stakeholders have been consulted on the phase-out of tariffs, rules of origin, services and investment commitments, intellectual property provisions, labour and environment outcomes, rules governing state-owned enterprises and government procurement commitments. Areas of particular public interest raised by those consulted in the course of negotiations concerned issues such as the transparency of the negotiating process, recognition of the Treaty of Waitangi, the Investor-State Dispute Settlement (ISDS) provisions, and impacts on the health sector, including on the operation of PHARMAC.

Feedback from those consulted has informed New Zealand's negotiating objectives and, in many instances, has been taken directly into account though specific provisions negotiated in the text of the agreement. For example:

- *Specific Export Interests:* New Zealand's negotiating stance for outcomes in goods, services and investment reflected the areas of priority identified by various industry associations (for example, elimination of agricultural tariffs, prohibition on agricultural export subsidies, liberalisation in services and investment, removal of import quota systems, regulatory coherence, labelling practices, intellectual property, government procurement, and movement of business persons).

¹⁰² See: <http://mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/3--Engagement-with-Maori/index.php>

- *Transparency:* All TPP countries agreed to keep the draft text and related documents confidential while the negotiation process was ongoing. While this approach was consistent with the process followed by New Zealand Governments in past FTA negotiations, the Government sought to undertake an extensive public consultation process to enhance the transparency of the process and has been open to discussion of the issues under negotiation with stakeholders.
- *The Treaty of Waitangi:* New Zealand prioritised achieving a specific Treaty of Waitangi exception in TPP that would allow New Zealand to take measures that it deems necessary to accord more favourable treatment to Māori in respect of matters covered by TPP, including in fulfilment of its obligations under the Treaty of Waitangi. For more information on the Treaty of Waitangi exception, see Section 7.3.1.
- *Investor-State Dispute Settlement (ISDS):* TPP's Investment chapter contains a number of different safeguards to protect the New Zealand Government's right to regulate. One of the important safeguards for the New Zealand Government include, among others, protection of discriminatory regulatory actions taken by the New Zealand Government that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment. 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.
- *Health and PHARMAC:* The provisions of the Annex on pharmaceutical and medical device purchasing will apply to PHARMAC's consideration of applications to fund pharmaceuticals but will not impact on fundamentals of New Zealand's health system. Flexibilities have been included in a number of other provisions that accommodate current PHARMAC practice. The obligations will have no substantive impact on how PHARMAC funds, prioritises pharmaceuticals for listing for reimbursement, or how PHARMAC approves pharmaceutical funding. PHARMAC will continue to prioritise its funding options and negotiate with suppliers to ensure New Zealanders get the best possible health outcomes from the money the Government allocates for medicines funding.
- *Intellectual Property:* To take account of concerns on the potential negative impact of many of the changes to New Zealand's intellectual property regime, New Zealand has negotiated flexible approaches to implementation which mitigate these impacts. Many issues stakeholders raised concerns about during consultations were not included in the final Agreement. There are also provisions for exceptions and limitations. However, these changes will still entail costs for New Zealand. These need to be considered against the benefits of the Agreement as whole.

10 Subsequent protocols and/or amendments to the treaty and their likely effects

Article 30.2 in the Final Provisions Chapter makes provision for the Parties to amend the Agreement. An amendment can only be made if the Parties agree in writing, and would only enter into force after each Party had approved the amendment in accordance with its applicable domestic legal procedures. New Zealand would consider any proposed amendment on a case by case basis, and, as reflected in the text, any decision to accept an amendment would be subject to the usual domestic approvals and procedures for entering into a multilateral treaty.

A proposal for an amendment may come about as a result of work done by the Commission, or by a Committee or other subsidiary body established under the Agreement. The Commission itself has review functions which could lead to consideration of amendments, while the various committees established under the Agreement in some cases have specific functions related to amendments and in other cases have general functions that could lead to consideration of amendments. An example of the former is Article 8.12 of the Technical Barriers to Trade (TBT) chapter which envisages possible amendments to the Annexes to that chapter, or development of further Annexes.

In addition, the Administrative and Institutional Provisions Chapter includes a specific provision that allows the Commission to consider and adopt modifications of:

- The tariff elimination schedules, where this is due to a Party accelerating its tariff elimination.
- The rules of origin established in Annex 3-D (product-specific rules).
- The lists of entities and covered goods and services and thresholds contained in each Party's Annex to Chapter 15 (Government Procurement).

As with any other amendments, such modifications would only take effect once each Party had completed any applicable domestic legal procedures.



11 Withdrawal or denunciation provision in the treaty

Any Party may withdraw from TPP by providing written notice of withdrawal to the Depositary (Article 30.1.6). The withdrawal would take effect six months after notice is provided unless the Parties agreed on a different period. If a Party withdraws, the Agreement would remain in force for the remaining Parties (Article 30.6.2).



12 Agency Disclosure Statement

This extended NIA has been prepared by the Ministry of Foreign Affairs and Trade, in consultation with other relevant government agencies. The extended NIA identifies all the substantive legal obligations in the Trans-Pacific Partnership Agreement, some of which will require legislative implementation, and analyses the advantages and disadvantages to New Zealand in becoming a Party to the FTA.

Implementation of the obligations arising under TPP would not be expected to impose additional costs on businesses; impair private property rights, market competition, or the incentives on businesses to innovate and invest; or override fundamental common law principles.

Guide to TPP Chapters

TPP comprises thirty Chapters. In addition, there are four separate Annexes to the Agreement (I-IV). Many of the Chapters also have their own Annexes, which are identified by that Chapter number and a letter, e.g. “2-D”. These Chapter-specific Annexes are either included in the Chapter text (i.e. appear in the same document as the Chapter text), or are separate to the Chapter (i.e. are separate documents). The difference is presentational.

Below is a summary of the TPP Chapters and TPP Annexes, with a general guide to the area to which they apply. For specific information on the applicability of each Chapter, see the relevant sub-section in Sections 4 and 5 of this NIA.

Subject-Matter	TPP Chapter	Chapter-specific Annexes	TPP Annexes
LEGAL AND INSTITUTIONAL Chapters 0, 1, and 27-30 relate primarily to legal and institutional arrangements	0. Preamble	The Chapter includes one Annex.	
	1. Initial Provisions and General Definitions		
GOODS Chapters 2-8 relate primarily to trade in goods.	2. National Treatment and Market Access for Goods	The Chapter includes three Annexes. Separately, Annex 2-D includes a Tariff Schedule for each TPP Party, each of which is accompanied with further explanatory documents for that Party.	
	3. Rules of Origin and Origin Procedures	The Chapter includes three Annexes. A separate fourth Annex (3-D) covers Product Specific Rules (to which, there is a separate Appendix).	
	4. Textile and Apparel Goods	The Chapter includes one Annex, to which there is one Appendix.	

Subject-Matter	TPP Chapter	Chapter-specific Annexes	TPP Annexes
	5. Customs Administration and Trade Facilitation		
	6. Trade Remedies	The Chapter includes one Annex.	
	7. Sanitary and Phytosanitary Measures		
	8. Technical Barriers to Trade	The Chapter includes seven Annexes.	
SERVICES AND INVESTMENT Chapters 9-13 relate primarily to trade in services and investment.	9. Investment	The Chapter includes twelve Annexes.	TPP Annexes I and II apply in particular to the Services and Investment Chapters of TPP. Each TPP Party has separate schedules for both Annexes I and II ("Cross-Border Trade in Services and Investment Non-Conforming Measures"). Each TPP Party also has a separate schedule for Annex III ("Financial Services Non-Conforming Measures").
	10. Cross-Border Trade in Services	The Chapter includes three Annexes.	
	11. Financial Services	The Chapter includes five Annexes.	
	12. Temporary Entry for Business Persons	Annex 12-A, separate to the Chapter, includes a specific schedule for each Party.	
	13. Telecommunications	The Chapter includes two Annexes	
	14. Electronic Commerce		
GOVERNMENT PROCUREMENT	15. Government Procurement	Annex 15-A, separate to the Chapter, includes a specific schedule for each Party.	
	16. Competition Policy	The Chapter includes one Annex.	
STATE-OWNED ENTERPRISES	17. State-Owned Enterprises and Designated Monopolies	The Chapter includes six Annexes.	Each TPP Party, except Japan and Singapore, has a separate schedule for Annex IV ("State-Owned Enterprises and Designated Monopolies Non-Conforming Measures").
INTELLECTUAL PROPERTY	18. Intellectual Property	The Chapter includes six Annexes.	
	19. Labour		

Subject-Matter	TPP Chapter	Chapter-specific Annexes	TPP Annexes
LABOUR AND ENVIRONMENT	20. Environment	The Chapter includes two Annexes.	
	21. Cooperation and Capacity Building		
	22. Competitiveness and Business Facilitation		
	23. Development		
	24. Small and Medium-Sized Enterprises		
	25. Regulatory Coherence		
(The Annex to this Chapter applies to PHARMAC)	26. Transparency and Anti-corruption	The Chapter includes one Annex.	
LEGAL AND INSTITUTIONAL Chapters 0, 1, and 27-30 relate primarily to legal and institutional arrangements	27. Administrative and Institutional Provisions		
	28. Dispute Settlement		
	29. Exceptions		
	30. Final Provisions		