

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

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:
 - o Necessary to secure compliance with laws and regulations that are not inconsistent with the TPP;
 - o Necessary to protect human, animal or plant life or health; or
 - o Related to the conservation of living or non-living exhaustible natural resources;

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

- 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 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-

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".

⁷² Note that these Annexes (Annex I and II) apply to both the Investment Chapter and the Cross Border Trade in Services Chapter.

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

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:

- 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

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

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 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 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.

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.

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

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 its Schedule of Specific Commitments), as modified by Appendix A.

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.

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

- 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.
- 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.

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

- 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).

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

- 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).
- 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.

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.

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

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

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 9.28.2 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

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.

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

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.
- 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;

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

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

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

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).

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.

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

- 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).

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.

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.

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

- * 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 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.

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

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

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).

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.

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

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:
 - o Insurance of risks relating to maritime shipping and commercial aviation and space launching and freight; and goods in international transit.
 - o Reinsurance and retrocession.
 - o Services auxiliary to insurance.
 - o 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.

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

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:

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

- * 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

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

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

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

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 | A business person who is an installer or servicer of machinery or | Entry for periods not |

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

| Category | Description of Category | Conditions and Limitations |
|---------------------------|---|--|
| Servicers | equipment, if installation or servicing by the supplying company is a condition of the machinery or equipment's purchase. | 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),

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

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.

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

- * *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.

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).

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.

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

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

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

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).

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

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 13.19.1).

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

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

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.

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

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:

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

- *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

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

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 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.

⁸² A Limited Tendering process is one whereby the procuring entity contracts a supplier or suppliers of its choice, without an open, competitive process.

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

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

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

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

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

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:

| | |
|-----------------------|--------------|
| 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

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.

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

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.

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

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

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

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.

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

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

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

- 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 17.3.2).

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

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.

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

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.

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.

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

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).

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

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;

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

- (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

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

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

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

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.

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

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

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

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.

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

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.

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

- 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:

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

- 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.

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

- 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.

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

- 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.

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

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.

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

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

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

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

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

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 exercised 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.

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

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:

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

- 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.

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

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.

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

- 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.

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

- 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.

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

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.

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

- 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

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

- * 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.