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

4.10.2 Disadvantages to entering TPP, Financial Services

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

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

4.11 Temporary Entry

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

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

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

4.11.1 Advantages of entering TPP, Temporary Entry

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

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

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

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

4.11.2 Disadvantages of entering TPP, Temporary Entry

No net disadvantages for New Zealand would stem from this Chapter. New Zealand's country-specific temporary entry commitments in TPP are based on existing commitments in New Zealand's FTAs with ASEAN and Malaysia, and are consistent with current policy settings related to business visitors, intra-corporate transferees, installers of services and independent professionals. New Zealand's market access commitments under TPP would not affect New Zealand's specific licensing and other requirements (i.e. professional codes of conduct) for business people from TPP countries. The Chapter specifically provides that there is no recourse to dispute settlement under TPP for refusal to grant temporary entry.

4.12 Telecommunications

Further to other Chapters that would apply to the provision of telecommunication services (for example the Cross-Border Trade in Services and Investment Chapters), the TPP Telecommunications

Chapter sets out regulatory disciplines to underpin effective market access and competitive markets in telecommunications services in the TPP area.

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

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

The chapter contains commitments providing for:

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

4.12.1 Advantages of entering TPP, Telecommunications

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

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

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

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

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

4.12.2 Disadvantages of entering TPP, Telecommunications

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

4.13 Electronic-Commerce

New Zealand recognises the potential of electronic commerce to generate opportunities for economic growth and development, and has included e-commerce chapters in four previous FTAs. The TPP Electronic Commerce Chapter aims to promote the adoption of domestic frameworks capable of building confidence among e-commerce users, as well as avoiding the imposition of unnecessary barriers to the use and development of e-commerce.

TPP provisions concerning the establishment of domestic legal frameworks governing electronic transactions are consistent with internationally developed model frameworks and support consumer confidence in e-commerce. The Chapter also contains provisions covering electronic authentication and signatures, online consumer protection, the protection of personal information of the users of e-commerce, unauthorised commercial electronic messages, and which recognise the value of cooperation on cybersecurity matters. A second group of provisions aims to minimise unnecessary barriers to e-commerce: encouraging the adoption of paperless trading, prohibiting customs duties

on electronic transmissions between the Parties, requiring non-discriminatory treatment of digital products and minimising unnecessary barriers relating to the cross-border transfer of information by electronic means, the location of computing facilities, and access to source code.

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

4.13.1 Advantages to entering TPP, E-commerce

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

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

The Chapter includes clear acknowledgement of the importance of consumer protection, the protection of personal information of users of electronic commerce, and ensures Parties will have measures in place to deal with unsolicited commercial electronic messages (SPAM). In New Zealand's case, we already meet these obligations through our broader regulatory framework covering privacy, consumer protection and problems associated with SPAM. New Zealand would benefit from joining TPP in this area through the signalling effect of the importance placed on key principles in these areas, as some of the other TPP Parties have different approaches to these issues. These provisions also benefit New Zealand exporters through helping to build public confidence in the use of e-commerce.

There are new provisions in the Chapter on cross-border transfer of information by electronic means and on location of computing facilities that contain important principles recognising the value of information flows and the development of new technologies and services such as cloud computing, for the growth of innovative and cost-effective approaches to the delivery of business services. This

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

4.13.2 Disadvantages to entering TPP, E-Commerce

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

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

4.14 Government Procurement

The TPP Government Procurement[30] Chapter sets out rules by which companies can compete for government contracts. Its aim is to provide open, transparent and competitive procurement whereby companies from other TPP countries are afforded treatment equal to the treatment given to domestic suppliers in bidding for government procurement contracts covered by the chapter.

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

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

TPP includes a commitment to undertake further negotiation three years after the Agreement comes into force with a view to achieving expanded coverage. Under this commitment, TPP Parties may agree that these future negotiations include sub-central coverage[31] (although it is possible that for Parties that administer the kinds of procurement at the central level of government that other Parties may administer by sub-central entities, these negotiations may involve commitments at the central level of government rather than at the sub-central level).

4.14.1 Advantages to entering TPP, Government Procurement

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

The most significant new opportunities for New Zealand exporters would be in the four countries with which we do not have existing government procurement commitments[32]: Malaysia, Mexico, Peru and Viet Nam. Malaysia and Viet Nam have typically not included government procurement in their FTAs, so TPP would allow New Zealand companies to be amongst the first international suppliers to secure preferential access to these markets. (With the exception of "Other Covered Entities" in Section C of Mexico's schedule, which would not be offered to New Zealand. This is reciprocal; Section C of New Zealand's schedule would not be offered to Mexico.) TPP also builds on the opportunities New Zealand businesses secured under the WTO Agreement on Government Procurement (GPA), with some modest improvements to access in Canada, Japan, Singapore and the US (e.g. additional entities and coverage of private-public-partnerships). With respect to Australia, the GP Chapter would give New Zealand suppliers clearly defined access to covered procurement and rights of challenge that are not spelled out in the existing non-treaty level arrangement, the Australia New Zealand Government Procurement Agreement.

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

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

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

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

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

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

4.14.2 Disadvantages to entering TPP, Government Procurement

New Zealand would not be required to change its current procurement practice or regulatory framework on entering TPP, as the obligations for New Zealand are consistent with New Zealand's *Government Rules of Sourcing*. New Zealand's schedule does not include any additional commitments beyond those already made in other agreements, in particular the World Trade Organization Agreement on Government Procurement (GPA). In other words, New Zealand would simply extend the commitments that are already in place for many other countries, including a number of TPP Parties.

TPP would place the same restrictions on certain policy options as several of New Zealand's existing trade agreements (including the GPA), for example the ability to compel government agencies to "buy local" under preferential procurement policies. In addition to the fact such obligations are

reciprocal and therefore bring net benefit to New Zealand businesses and the economy, TPP would not constrain the Government's ability to support local suppliers in other ways than through preferential procurement policy. As an example the Ministry of Business, Innovation and Employment (MBIE) and New Zealand Trade and Enterprise (NZTE) have been working closely to help support New Zealand businesses to develop their tendering capability so that they can be competitive both domestically and in foreign markets. These and other initiatives to support local businesses, such as through access to research grants or other incentives, are not precluded by the Government Procurement Chapter.

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

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

4.15 Competition

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

4.15.1 Advantages to entering TPP, Competition

Should New Zealand enter TPP, the benefits to New Zealand of increased flows of goods and services under the TPP could potentially be compromised by cross-border anti-competitive practices in other TPP countries. Competitive distortions, such as anti-competitive conduct, have the potential to restrict trade and investment, and negate the benefits that might otherwise accrue to New Zealand. The TPP Competition Chapter mandates the establishment of strong competition regimes in all TPP Parties (including those that may not have had them previously), which would provide New Zealand businesses operating in these countries with an increasingly stable and predictable business environment as these regimes are developed. The cooperation provisions of the chapter should also assist in the development of these regimes.

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

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

4.15.2 Disadvantages to entering TPP, Competition

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

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

4.16 State-Owned Enterprises

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

The SOE provisions apply to companies more than 50 percent owned or controlled by the Government and which have a commercial focus – not those which operate principally on a not-for-profit or cost-recovery basis. For New Zealand, this would include some of the companies subject to the New Zealand *State-Owned Enterprises Act 1986* and other commercially focused companies in which the Government owns a majority share (e.g. Air New Zealand).

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

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

An exception to the Chapter excludes SOEs and monopolies with annual revenues below SDR 200 million[34] (currently around NZ$400 million). TPP Parties will adjust this threshold every three years. In New Zealand, the entities defined as SOEs for the purposes of TPP above this threshold[35] would be Air New Zealand, KiwiRail, New Zealand Post, Genesis Energy, the Lotteries Commission, Meridian Energy, Mighty River Power, Solid Energy, and Transpower. (Of these, only KiwiRail, New Zealand Post, Solid Energy and Transpower are covered by New Zealand's SOE Act 1986.)

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

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

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

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

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

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

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

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

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

- Government procurement is excluded from the scope of the SOEs chapter (which will ensure flexibility around government purchases involving SOEs, including procurement through public-private partnerships).
- Sovereign wealth funds (such as the New Zealand Superannuation Fund) and independent pension funds are excluded from scope.

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

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

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

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

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

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

4.17 Intellectual Property

The TPP Intellectual Property (IP) Chapter sets out a number of obligations for TPP countries. These obligations cover copyright, patents, data protection for pharmaceutical products, plant variety

rights, trade marks, geographical indications, industrial designs, domain names, enforcement of intellectual property rights and internet service provider liability. The Chapter also contains provisions on traditional knowledge, traditional cultural expressions and genetic resources.

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

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

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

4.17.1 Advantages of entering TPP, Intellectual Property

Geographical indications

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

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

Taken together, these obligations would benefit New Zealand exporters who use common names to market their goods overseas. TPP would help them guard against the risk that a GI receives

protection when they consider that the protection would be unwarranted, which could limit their use of a trade mark or a generic term in a TPP market. There are currently no international law obligations on GIs that require this type of due process.

Consistent enforcement procedures

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

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

Traditional knowledge

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

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

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

Grace period for patent filing

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

TPP would require Parties to provide a 12-month grace period to New Zealand nationals seeking patent protection in that Party. This may be of benefit to New Zealand inventors seeking to market

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

their inventions.[37] It would allow them to make their invention known to others without first seeking confidentiality agreements. This can be useful to determine the commercial viability of an invention or seek investment capital before incurring the expense of a patent application. Academics could also benefit. It could allow them to publish their research without needing to wait for a decision on whether to file a patent application based on that research. These benefits will accrue mainly to inventors and researchers. It has not been possible to quantify the benefits of this provision.

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

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

4.17.2 Disadvantages of entering TPP, Intellectual Property

Loss of policy flexibility

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

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

Data protection for pharmaceuticals

Pharmaceuticals cannot be marketed unless they have received regulatory approval to do so. In New Zealand, obtaining this approval involves providing the New Zealand Medicines and Medical Devices Safety Authority (Medsafe) with data concerning the safety, quality and efficacy of the pharmaceutical. As this data can be costly to produce, generic pharmaceutical manufacturers

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

wanting approval to market generic versions of pharmaceuticals already approved by Medsafe generally seek to rely on the data submitted by the original manufacturer of the pharmaceutical. Under the Medicines Act 1981, Medsafe does not consider applications relying on this data until five years after the date of approval of the new pharmaceutical. This is the 'data protection' period, which is provided independently of patent protection and applies to all pharmaceuticals, including biological pharmaceuticals ('biologics').

Data protection provides a period of protection against competition from generics[38]. If no data protection was provided, the manufacturer of a generic version of a pharmaceutical could obtain approval and (assuming there was no patent, or the patent had expired[39]) market the generic soon after the new pharmaceutical entered the market. Under these circumstances, manufacturers of new pharmaceuticals may be unwilling to invest resources in bringing a new pharmaceutical to the New Zealand market. New Zealand's current practice meets an existing obligation under the TRIPS Agreement to protect the data submitted with the new pharmaceutical from disclosure or unfair commercial use.

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

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

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

TPP would also require New Zealand to provide five years' data protection to new small molecule (but not biologic) pharmaceutical products that contain a both new and a previously approved active

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

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

ingredient. This would not require a change to New Zealand law but entails a loss of policy flexibility in the future for small molecule pharmaceuticals.

Patent term extensions

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

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

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

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

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

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

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

There are two ways this obligation could impose costs on New Zealand. It could impose new administrative costs on IPONZ in monitoring the time an application was taking to keep track of

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

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

when an extension would be required to be granted.[42] It could also impose costs if any extensions were in fact required to be granted as New Zealand businesses and consumers would face higher costs for access to the technology protected by the patent.

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

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

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

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

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

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

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

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

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

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

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

Patent linkage for Pharmaceuticals

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

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

[44] Biologic pharmaceuticals often carry high costs, in some cases well over NZ$100,000 for a year of treatment.
[45] See section 8 of this National Interest Analysis (The costs to New Zealand of compliance with the treaty) for more details.
[46] These costs would be incurred regardless of whether any extensions were granted.

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

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

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

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

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

Increased data protection for agricultural chemical products

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

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

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

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

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

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

Copyright term extension

New Zealand law currently protects copyright for 50 years[49]. Under TPP, New Zealand would be required to extend the copyright term to 70 years. The extension only applies to works that are still within their current 50 year term of protection. Works that have already fallen into the public domain would remain in the public domain.

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

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

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

Some New Zealand copyright owners would benefit from a 70 year copyright term in TPP countries. Works protected by copyright are generally priced higher than works not protected by copyright to allow for royalty payments to the creator. Extending the term therefore increases the time consumers must pay – and copyright owners can benefit from – this higher price.

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

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

The benefits to New Zealand copyright owners from copyright term extensions in other TPP countries resulting from transfers from foreign consumers to New Zealand copyright owners have been estimated at NZ$86 million in present value terms over a 2009 to 2118 timeframe in respect of books and NZ$31.4 million in present value terms over a 2009 to 2078 timeframe in respect of recorded music.[53] The benefits of extension for the other types of copyright works have not been modelled.

The costs to New Zealand from transfers from New Zealand consumers to foreign copyright owners have been conservatively estimated at NZ$300 million in present value terms over a 2009-2018 timeframe for books, and at NZ$240 million in present value terms over a 2009 to 2078 timeframe for recorded music.[54] This is because extending the copyright term would mean New Zealand consumers would forego savings they otherwise would have made if the books and music they purchase had fallen into the public domain earlier. Only transfers from New Zealand consumers to

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

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

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

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

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

foreign rights holders have been included in these estimated costs.[55] New Zealand consumers in this context include personal and business end-users, organisations like libraries, universities, schools and museums and people who use copyright-protected works to create new products and services, including new copyright-protected works.

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

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

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

Increased protection for technological protection measures

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

New Zealand law is already consistent with many of the obligations in respect of TPMs. The main changes the Agreement would require are new civil and criminal sanctions against a person who circumvents a TPM directly. (New Zealand's Copyright Act currently only prohibits providing a

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

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

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

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

device, service or information to *enable* circumvention.) Some minor changes would also be required to current prohibitions on providing devices and services to enable circumvention.

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

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

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

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

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

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

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

The enhanced TPM protections will enable copyright owners to better enforce digital locks or usage restrictions put on copyright works, to the extent that a civil or criminal prohibition is a deterrent to

circumvention. This may have some advantages for New Zealand copyright owners whose works are protected by TPMs in other TPP Parties:

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

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

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

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

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

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

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

Internet Service Provider liability

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

Parallel importing

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

Performers' rights

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

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

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

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

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

New Zealand if the outcome involved a greater flow of royalties, investment or other similar benefit to New Zealand from overseas.

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

Giving performers new rights is unlikely to incentivise an increase in the number of performances, an increase in the number of sound recordings created from performances, or in the distribution and sale of sound recordings in the New Zealand market. The New Zealand market is a small market by world standards. Most performers are therefore likely to base their production and distribution decisions on the conditions in large overseas markets like the US and Europe rather than on the regulatory conditions in the New Zealand market.

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

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

4.17.3 Intellectual Property: Other Treaties

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

- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended on September 26, 1980 (the Budapest Treaty).
- WIPO Copyright Treaty, done at Geneva, December 20, 1996 (the WIPO Copyright Treaty, WCT)

- Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, July 24, 1971 (the Berne Convention).[60]
- WIPO Performances and Phonograms Treaty, done at Geneva, December 20, 1996 (the WIPO Performances and Phonograms Treaty, WPPT).

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

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

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

4.18 Intellectual Property: UPOV 91

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

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

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

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

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

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

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

The justification behind the grant of PVRs is that they give plant breeders an opportunity to make a return on the investment in developing a new plant variety. This provides an incentive for the development of new varieties that might not otherwise be developed. Without PVR, any new variety could easily be copied by anyone who could gain access to propagating material of the variety (seeds, tubers, etc), and breeders would earn little revenue.

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

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

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

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

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

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

4.18.2 Disadvantages of accession or alignment with UPOV 91

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

The enhanced exclusive rights provided for PVR owners under UPOV 91 may result in some increased costs for growers as they may have to pay higher license fees than is currently the case in order to use protected varieties, which may be passed on to consumers. These additional costs are unlikely to be large, though, as protected varieties would be competing with other protected varieties, as well as varieties that are no longer protected.

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

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

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

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

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

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

4.19 Intellectual Property: Other IP Treaties

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

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

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

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

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

No disadvantages have been identified.

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

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

WCT Parties that are also members of the WTO already have obligations to provide most of the rights under the WCT to New Zealand creators and distributors under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[61] New Zealand creators and distributors also enjoy these rights in most key markets as a matter of practice. Acceding to the WCT would, however, provide additional assurance that the rights New Zealand creators and distributors of content currently enjoy would not be removed.

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

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

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

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

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

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

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

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

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

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

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

4.20 Labour

The Labour Chapter of TPP constitutes the strongest outcome on trade and labour contained in any FTA negotiated by New Zealand to date, in terms of both the scope and nature of its provisions. Key commitments given by the Parties in the Chapter include their agreement to adopt and maintain the internationally-recognized labour rights stated in the 1998 *International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work* in their laws and practice[63], as well as to adopt and maintain laws governing 'acceptable conditions of work' with respect to minimum wages, hours of work, and occupational safety and health, as determined by each Party.

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

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

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

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

4.20.1 Advantages of entering TPP, Labour

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

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

4.20.2 Disadvantages of entering TPP, Labour

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

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

4.21 Environment

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

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

- Three multilateral environmental agreements (MEAs) – Montreal Protocol on Substances that Deplete the Ozone Layer; London Protocol to the International Convention for the Prevention of Pollution from Ships; and the Convention on Trade in Endangered Species;
- The conservation and sustainable use of biodiversity, and sharing the benefits arising from the utilisation of genetic resources;

- Reducing carbon emissions;
- The conservation and sustainable management of marine fisheries, including combating illegal, unregulated and unreported fishing, and the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity;
- Promoting conservation and combating the illegal take of, and illegal trade in, wild flora and fauna;
- Liberalising trade in environmental goods and services;

  Encouraging the use of voluntary mechanisms (such as auditing and reporting, labelling) to protect natural resources and the environment.

4.21.1 Advantages of entering TPP, Environment

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

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

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

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

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

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

4.21.2 Disadvantages of entering TPP, Environment

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

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

4.22 Cooperation and Capacity Building

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

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

4.22.1 Advantages to entering TPP, Cooperation and Capacity Building

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

4.22.2 Disadvantages to entering TPP, Cooperation and Capacity Building

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

4.23 Competitiveness and Business Facilitation

The Competitiveness and Business Facilitation Chapter is a cross-cutting chapter that seeks to support increased economic integration, job creation and competitiveness of TPP Parties' economies. The Chapter is novel to TPP, among trade agreements negotiated globally. It provides a framework for the development and strengthening of supply chains in the free trade area and is a response to the increased importance that supply chains and regional production networks[64] play in international trade and investment. The Chapter would establish a Committee to explore opportunities to take advantage of trade and investment opportunities under TPP, and to identify and explore best practices and experiences relevant to the development and strengthening of supply chains. This would include direct engagement with interested business stakeholders.

4.23.1 Advantages of entering TPP, Competitiveness and Business Facilitation

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

[64] Supply chains – are focused on the movement of an input, product or service from a supplier to a customer and the systems to support this. They cover raw materials, production and delivery to the customer. Supply chains can be local, regional or global depending on the extent of their geographic coverage.
Value chains – include supply chains, but cover the full range of activities for a particular product or service, and on the value added at each stage of development or production. Value chains cover activities from conception, research, development, design, sourcing raw materials and intermediate inputs, production, marketing, distribution, sales and customer support.
Production networks – relate to a particular lead firm's network of suppliers across their product lines, and how they organise network(s). Production networks may include multiple value chains.

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

4.23.2 Disadvantages of entering TPP, Competitiveness and Business Facilitation

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

4.24 Development

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

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

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

[65] http://stats.oecd.org/

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

4.24.1 Advantages to entering TPP, Development

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

4.24.2 Disadvantages to entering TPP, Development

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

4.25 Small and Medium Enterprises

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

4.25.1 Advantages of entering TPP, SMEs

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

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

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

4.26 Regulatory Coherence

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

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

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

4.26.1 Advantages to entering TPP, Regulatory Coherence

Greater transparency of rulemaking in TPP Parties would benefit New Zealand businesses trading with or investing in these countries by providing greater certainty about the regulatory environment in which they are operating. It is difficult to estimate the size of the benefits transparency in rule making brings, but research[67] indicates that transparency lowers the barriers to enter a market, benefitting businesses wanting to trade with or invest in countries and resulting in benefits to both the exporting and importing economies. The research indicated that if other APEC economies improved the transparency of their trade-related regulation, New Zealand exports could increase by approximately five percent (based on an analysis in 2009).[68] It should be noted, however, that trade-facilitating regulatory improvements in other TPP countries would for the most part benefit TPP members and non-members alike. This benefit of the Chapter, therefore, would likely accrue whether or not New Zealand entered TPP.

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

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

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

4.26.2 Disadvantages to entering TPP, Regulatory Coherence

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

4.27 Transparency Chapter – Pharmaceuticals Annex

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

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

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

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

The Annex is legally binding. But unlike most outcomes in TPP, implementation of the Annex's provisions cannot be enforced or challenged by TPP's dispute settlement mechanisms, nor under ISDS.

4.27.1 Advantages of entering TPP, Pharmaceuticals Annex

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

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

4.27.2 Disadvantages of entering TPP, Pharmaceuticals Annex

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

Commitment to consider applications within a specified period of time

Currently, PHARMAC is under no obligation (to suppliers) to make decisions within any timeframe. TPP would require PHARMAC to consider formal applications within a "specified period of time". Importantly, PHARMAC would be able to determine this timeframe, and an exception to this obligation has been included that allows this timeframe to be extended provided the reason for the extension is disclosed. This exception is noteworthy given PHARMAC may assess applications over multiple budget cycles or defer a final decision until funding is available.

Consultation and provision of information to suppliers and the public

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

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

Review mechanism

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

The mechanism may be independent (from the decision-maker) or internal (run by the decision-maker). The review process is limited in scope, and the Government would have broad freedom to design and implement the review process, including drawing from existing practice and design principles used internationally such as cost-recovery. Importantly, when reviewing an application,

the reviewer does not need to consider assessments related to other proposals for listing and the review cannot challenge the prioritisation decision.

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

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

The total estimated impact of implementing the Annex is:

- NZ$4.5 million one-off establishment costs, made up mostly of legal costs but also some personnel resource involved in developing and considering implementation options.
- NZ$2.2 million ongoing per year costs, comprised of additional personnel costs involved in considering applications within a specified period of time, any supplementary consultation and notification processes needed, and operating a review mechanism (if such costs were not charged to applicants on a cost-recovery basis).

4.28 Legal and Institutional Issues

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

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

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

4.28.1 Advantages of entering TPP, Legal and Institutional Issues

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

TPP's Initial Provisions would mean the advantages from TPP for New Zealand exporters would be in addition to existing trade agreements. Where New Zealand has another FTA with one of the TPP Parties, the provision in the Initial Provisions Chapter on relation to other agreements clarifies that exporters are entitled to take advantage of the Agreement which provides the most favourable treatment for goods, services, investment, and persons. Furthermore, TPP would not undermine any of New Zealand's rights under the WTO Agreements.

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

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

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

environment, security, taxation, and the Treaty of Waitangi. Key aspects of the Chapter text are as follows:

- The TPP General Exceptions Chapter adopts in part the WTO approach to preserving public policy space, which is consistent with the obligations New Zealand and most other countries already have in place. It does so by incorporating the GATT and GATS general exceptions, including for example, that provided a measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, nothing in the Agreement shall be construed to prevent countries from adopting measures necessary to protect public morals, human, animal or plant life or health; those related to the conservation of exhaustible natural resources, and a number of other areas;[69]
- The Security Exception would allow a TPP member to take any action which it considered necessary for the protection of its essential security interests;
- The Temporary Safeguard Measures exception provides policy flexibility in the case of serious balance of payments and external financial difficulties. The policy flexibility provided is, however, more limited than in New Zealand's previous FTAs. It places limitations on when New Zealand could put in place restrictive measures on transfers or payments for current account transactions, and on payments or transfers relating to the movements of capital. Under TPP, such measures cannot be applied to payments or transfers relating to foreign direct investment, must not exceed what is necessary to deal with the circumstances, must not be used to avoid necessary macroeconomic adjustments, and in the case of capital outflows, must not interfere with an investor's ability to earn a market rate of return on any restricted assets in New Zealand. Further, a measure should be phased out after eighteen months, except in exceptional circumstances, and absent objections from more than half of the Parties. The Taxation Exception sets out the scope of application of the Agreement's obligations to taxation measures and provides various exceptions and policy space for governments in this area;
- A provision relating to Tobacco gives New Zealand certainty that it would not face arbitration under the investor state dispute settlement mechanism with respect to "tobacco control measures". The provision would allow any Party to elect to deny the benefits of the investor state dispute settlement section of the Investment Chapter with respect to claims challenging a "tobacco control measure". If a Party elected to do so, then no claim could be submitted to arbitration under the investor state dispute settlement mechanism (or if a claim had already been submitted, then it would have to be dismissed). The Government intends to make such an election.

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

- TPP includes a Treaty of Waitangi Exception that would allow New Zealand to take measures it deemed necessary to accord more favourable treatment to Māori in respect of matters covered by TPP, including in fulfilment of its obligations under the Treaty of Waitangi. It also states that the interpretation of the Treaty of Waitangi is not subject to TPP Dispute Settlement. (See Section 7.3.)

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

4.28.2 Disadvantages of entering TPP, Legal and Institutional Provisions

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

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

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

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

5.1 Initial Provisions and General Definitions

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

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

5.2 National Treatment and Market Access for Goods

5.2.1 Section A: Definitions and Scope

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

5.2.2 Section B: National Treatment and Market Access for Goods

National Treatment and customs duties

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

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

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

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

Waivers of customs duties

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

Application of customs duties

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

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

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

- Professional equipment necessary for carrying out the business activity, trade or profession of a person who qualifies for temporary entry under the laws of the importing Party;
- Goods intended for display or demonstration;
- Commercial samples and advertising films and recordings;
- Goods admitted for sports purposes; and
- Containers and pallets in use or to be used in the shipment of merchandise or goods in international traffic (Article 2.8.1 and 2.8.4).

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

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

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

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

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

Import and export restrictions

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

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

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

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

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

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

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

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

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

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

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

5.2.3 Section C: Agriculture

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

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

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

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

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

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

Export restrictions – food security

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

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

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

Committee on Agricultural Trade

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

Trade in products of modern biotechnology

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

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

In order to reduce the likelihood of trade disruptions from LLP occurrences, each exporting Party must also, again consistent with its domestic laws, regulations and policies, endeavour to encourage

technology developers to submit applications to TPP Parties for authorisation of plants and plant products of modern biotechnology. Parties that authorise plant and plant products derived from modern biotechnology shall endeavour to allow year-round submission and review of applications for authorisation of the plants and plant products and to increase communications between TPP Parties relating to any new authorisations.

A working group on products of modern biotechnology will also be established under the Committee on Agriculture. This working group, open to those Parties that choose to be part of it, will provide a forum for information exchange and cooperation on trade-related matters associated with products of modern biotechnology.

5.2.4 Section D: Tariff rate quota administration

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

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

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

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

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

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

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

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

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

5.3 Rules of Origin and Origin Procedures

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

5.3.1 Section A: Rules of Origin

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

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

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

- Change in tariff classification (CTC): under this approach, a good will qualify as originating if all non-TPP materials used in its production have undergone a specified change of tariff classification. All products under the TPP except for certain motor vehicles have an applicable CTC rule.

- Regional value content (RVC): this approach, which is provided as an alternative option primarily for industrial products, is based on the value added by producers within the TPP region.

When a recovered material that is derived in the territory of one or more of the Parties is used in the production of, and incorporated into, a remanufactured good, then that recovered material is required to be treated as originating (Article 3.4). A 'recovered material' is one that results from the disassembly of a used good into individual parts; and the cleaning, inspecting, testing or other processing of those parts as necessary for improvement to sound working condition.

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

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

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

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

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

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

Under Article 3.12, each Party is required to provide that a fungible good or material is treated as originating based on either its physical segregation or the use of any inventory management method

recognised in the Generally Accepted Accounting Principles, provided that the inventory management method selected is used throughout the fiscal year of the person that selected the inventory management method.

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

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

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

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

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

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

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

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

5.3.2 Section B: Origin procedures

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

Each Party must allow an importer to make a claim for preferential tariff treatment based on a 'certification of origin' which may be completed by the exporter, producer or importer (Article 3.20). There are rules that set out the information on which certification may be based, which depend on whether the certification is completed by the exporter, producer or importer (Article 3.21). Also, Annex B sets out certain elements that must be included in a certification of origin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.4 Textile and Apparel Goods

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

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

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

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

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

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

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

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

5.5 Customs Administration and Trade Facilitation

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

- Ensuring customs procedures and practices are predictable, consistent, and transparent (e.g. providing customs valuations, using internationally accepted tariff classifications, and providing advanced rulings) to ensure efficient administration and the expeditious clearance of goods (Articles 5.1, 5.3, 5.6, 5.7 and 5.10).
- Encouraging the use of international best practice on customs and facilitating the use of automated systems, express consignments and providing for the electronic submission of

import requirements in advance of the arrival of the goods, to expedite the procedures for the release of goods (Articles 5.6 and 5.9). In the normal course of events, customs administrations are required to release originating products within 48 hours of arrival (Article 5.10) and in the case of express consignments within six hours of arrival (Article 5.7).

- Encouraging cooperation between customs agencies of the Parties and provide contact points and consultations to discuss any issues which might arise (Article 5.2).
- Providing advice or information on customs related requirements for the importation of goods under the Agreement (Article 5.4).
- Adopting or maintaining penalties for violations of our customs laws, regulations and procedural requirements and ensuring that those procedures avoid conflicts of interest in the assessment and collection of penalties and duties (Article 5.8).

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

5.6 Trade Remedies

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

Global safeguards

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

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

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

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

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

5.7 Sanitary and Phytosanitary Measures

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

Regional conditions

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

An importing Party must, in addition to recognising the equivalence of an individual measure, to the extent feasible and appropriate, recognise the equivalent of an exporting Party's group of measures or its measures on a systems-wide basis. Equivalence must be recognised if the exporting Party objectively demonstrates that its measure achieves the same level of protection as the importing Party's measure, or has the same effect in achieving the objective as the importing Party's measure.

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

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

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

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

Equivalence

Article 7.8 sets out obligations with respect to the concept of equivalence. A Party must apply equivalence to a group of measures or on a systems-wide basis, to the extent feasible and appropriate. In determining the equivalence of a specific sanitary or phytosanitary measure, group

of measures or on a systems-wide basis, each Party is required to take into account the relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

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

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

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

Science and risk analysis

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

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

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

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

The Article sets out certain requirements that each Party must adhere to when conducting a risk analysis, which include requirements to:

- Take into account relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.
- Consider risk management options that are not more trade restrictive than required to achieve the level of protection that the Party has determined to be appropriate.
- Select a risk management option that is not more trade restrictive than required to achieve the sanitary or phytosanitary objective, taking into account technical and economic feasibility.
- Conduct the analysis in a manner that that is documented and that provides interested persons and other Parties with an opportunity to comment.
- Implement any measure adopted as a result of the risk analysis that allows trade to commence or resume within a reasonable period of time.
- On request of the exporting Party, provide information on the progress of a specific risk analysis request, and of any delay that may occur during the process.

Audits

Article 7.10 provides that any audit must be systems-based and designed to check the effectiveness of the regulatory controls of the exporting Party's competent authorities. When an importing Party undertakes an audit, it must take into account relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

Prior to commencing an audit, there is a requirement for the importing and exporting Party to discuss the rationale and decide on the objectives and scope of the audit, the criteria or requirements against which the exporting Party will be assessed, and the itinerary and procedures for conducting the audit.

There are also various process requirements that an importing Party must follow when conducting an audit, including to give the audited Party an opportunity to comment on the findings of the audit and take any comments into account, and to ensure that any decisions or actions taken as a result of the audit are supported by objective and verifiable evidence and data. Both Parties must ensure that procedures are in place to prevent the disclosure of confidential information acquired during the auditing process.

Import checks

Article 7.11 requires each Party to ensure that its import programmes are based on the risks associated with importations, and that its import checks are carried out without undue delay. It also imposes further obligations, including to:

- Make available to another Party, on request, information regarding its import procedures and its basis for determining the nature and frequency of import checks, as well as the analytical methods, quality controls, sampling procedures and facilities that it uses to test a good.

- Ensure that any testing is conducted using appropriate and validated methods in a facility that operates under a quality assurance programme that is consistent with international laboratory standards.
- Maintain physical or electronic documentation regarding the identification, collection, sampling, transportation and storage of the test sample, and the analytical methods used on the test sample.
- Ensure that its final decision in response to a finding of non-conformity with the importing Party's sanitary or phytosanitary measure is limited to what is reasonable and necessary, and is rationally related to the available science.

If an importing Party prohibits or restricts the importation of a good of another Party on the basis of an adverse result of an import check, then it must provide a notification (that meets the requirements set out in the Article) about the adverse result to at least one of the importer or its agent, the exporter, the manufacturer or the exporting Party. In this situation, an importing Party must also provide an opportunity for review of the decision and consider any relevant information submitted to assist in the review. An importing Party must provide available information on goods of an exporting Party that were found not to conform to an importing Party's SPS measure, if the exporting Party so requests.

The importing Party must notify the exporting Party if it determines that there is a significant, sustained or recurring pattern of non-conformity with a sanitary or phytosanitary measure.

Certification

Article 7.12 sets out requirements that an importing Party must meet if it requires certification for trade in a good, including that the Party must: ensure that the requirement is applied only to the extent necessary to protect human, animal or plant life or health; take into account relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations; and limit attestations and information it requires on certificates to essential information that is related to its sanitary or phytosanitary objectives.

Parties must promote the implementation of electronic certification and other technologies to facilitate trade.

Transparency

The SPS Chapter sets out transparency requirements that apply in addition to the general transparency obligations in the Transparency and Anti-corruption Chapter. Key obligations in this regard include that each Party must notify any proposed sanitary or phytosanitary measure that may have an effect on the trade of another Party. This includes any measure that conforms to international standards, guidelines or recommendations. Notification is to be achieved by using the WTO SPS notification submission system and must comply with the requirements in Article 7.13. Proposed measures must also be made available to the public by electronic means, along with the legal basis for the measure, and the written comments (or a summary of those comments) that have been received from the public on the measure. Except in cases of urgency, notification is to be

followed by a period for interested persons and other Parties to provide written comments on the proposed measure.

A Party is required to discuss with another Party, on request and if appropriate and feasible, any scientific or trade concerns that the other Party may have regarding a proposed measure, and the availability of alternative, less trade-restrictive approaches for achieving the objective of the measure.

In implementing its transparency obligations, each Party must take into account the relevant guidance of the WTO SPS Committee and international standards, guidelines and recommendations.

If a Party proposes an SPS measure that does not conform to an international standard, guideline or recommendation, it must provide, on request by another Party, and to the extent permitted by confidentiality and privacy requirements of its law, the relevant documentation that it considered in developing the proposed measure.

Article 7.13 also sets out obligations for notification of final sanitary or phytosanitary measures, including that such measures must be notified to other Parties through the WTO SPS notification submission system, and published, preferably electronically, in an official journal or website. The text or notice of the final measure must specify the legal basis for the measure and the date on which it takes effect. If a final measure is substantively altered from the proposed measure, a Party must include in the published notice an explanation of the objective and rationale of the measure and how the measure advances that objective and rationale, as well as any substantive revisions that it made to the proposed measure. Further, if requested by another Party, and to the extent permitted by confidentiality and privacy requirements, a Party must make available any significant written comments and relevant documentation received during the comment period that was considered to support the measure.

Each Party has an obligation to provide to another Party, on request, all SPS measures related to the importation of a good into that Party's territory.

There is a requirement in paragraph 11 for an exporting Party to notify an importing Party in a timely and appropriate manner of the following:

- If it has knowledge of a significant sanitary or phytosanitary risk related to the export of a good from its territory;
- Urgent situations where a change in animal or plant health status in the territory of the exporting Party may affect current trade;
- Significant changes in the status of a regionalised pest or disease;
- New scientific findings of importance that affect the regulatory response with respect to food safety, pests or diseases; and

- Significant changes in food safety, pest or disease management, control or eradication policies or practices that may affect current trade.

Emergency measures

Under Article 7.14, a Party that adopts an emergency measure must promptly notify the other Parties of that measure, and must take into consideration any information provided by other Parties in response to the notification. The Party adopting the measure must review the scientific basis of the measure within six months and make the results of the review available to any Party on request. If the measure is maintained after the review the Party should review it periodically.

Committee

The Chapter establishes an SPS Committee which, in addition to discretionary functions, has mandatory functions that include to provide a forum to enhance mutual understanding of each Party's sanitary and phytosanitary measures and the regulatory processes that relate to those measures; and exchange information on the implementation of the Chapter (Article 7.5).

Cooperation and information exchange

The Parties are required to explore opportunities for further cooperation, collaboration and information exchange between them on sanitary and phytosanitary matters of mutual interest, as well as to cooperate on SPS matters with the goal of eliminating unnecessary obstacles to trade between them (Article 7.15). Article 7.16 notes that a Party may request information from another Party on a matter arising under the Chapter, and obliges a Party that receives such a request to endeavour to provide available information to the requesting Party within a reasonable period of time, and if possible, by electronic means.

Cooperative technical consultations and dispute settlement

The Chapter sets out a mechanism for Cooperate Technical Consultations (CT Consultations). Use of this mechanism is a prerequisite for having recourse to dispute settlement under Chapter 28 (Dispute Settlement). A Party that has concerns regarding any matter arising under the SPS Chapter with another Party may use the CT Consultations mechanism in situations where it considers that the matter may adversely affect its trade and would not be resolved if they continued to use the other Party's administrative procedures, or bilateral or other mechanisms. If the conditions set out in Article 7.17 are met, the Party that requested CT Consultations may stop those consultations and use the procedures set out in the Dispute Settlement Chapter in order to resolve the matter.

5.8 Technical Barriers to Trade

The TBT Chapter builds on New Zealand's existing rights and obligations under the WTO *Agreement on Technical Barriers to Trade* (TBT Agreement) (Article 8.2).

Certain key provisions of the TBT Agreement are incorporated into the Agreement, which means that those provisions may be relied on for the purposes of dispute settlement (Article 8.3).

International Standards, Guides and Recommendations: When a Party determines whether an international standard, guide or recommendation exists (within the meaning of Articles 2 and 5, and Annex 3 of the TBT Agreement), that Party must apply the *Decision of the TBT Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the [TBT] Agreement* (Article 8.4).

Conformity Assessment: Each Party is required to treat conformity assessment bodies located in the territory of another Party on a non-discriminatory basis. That is, the Party must accord the body with treatment no less favourable than it accords to conformity assessment bodies located in its own territory or in the territory of any other Party (Article 8.5.1).

Each Party must publish any procedures, criteria and other conditions that it uses as the basis for determining whether conformity assessment bodies are competent (Article 8.5.11).

If a Party accredits, approves, licenses or otherwise recognises bodies that assess conformity to a technical regulation or standard in its territory, and then it refuses to accredit, license, or otherwise regulate such a body in another Party's territory (or declines to use a mutual recognition arrangement), then it must, on request, explain the reasons for its refusal (Article 8.5.12).

If a Party does not accept the results of a conformity assessment procedure that has been conducted in another Party's territory, then it must, on request, explain the reasons for its decision (Article 8.5.13).

A Party must also explain the reasons for a decision to decline to enter into negotiations for an agreement for mutual recognition of conformity assessment procedures, or for declining to use an existing mutual recognition arrangement (Article 8.5.14).

The chapter contains other requirements relating to conformity assessment, including that:

- A Party must consider adopting measures to approve conformity assessment bodies that are accredited by a body that is a signatory to an international or regional mutual recognition arrangement (Article 8.5.8).
- A Party must not refuse to accept result from a conformity assessment body because they are accredited by a body that is non-governmental, a non-for profit, does not operate an office in the Party's territory, is domiciled in the territory of a Party that does not maintain a procedure for recognising accreditation bodies, or because it operates in the territory of a Party where there is more than one accreditation body (Article 8.5.9).

Transparency: The TBT Chapter contains some provisions that would go beyond New Zealand's WTO obligations, such as broadening the scope of proposed TBT measures that are notified to the WTO; placing proposals for, and final versions of, TBT measures on a single website; and making publicly available certain regulatory decision-making information (Article 8.6). To avoid duplication, Parties may use the existing WTO TBT Information Management System to comply with this obligation rather than being required to create a dedicated website.

Each Party must allow a person of another Party to participate in the development of technical regulations, standards and conformity assessment procedures by central government bodies, on terms no less favourable than those that it accords to its own persons, and encourage non-governmental bodies to do the same.

Parties are required to publish the following documents (for example, on the WTO website) from central government bodies, and take reasonable measures available to it to ensure that local government publishes:

- All proposals for new technical regulations and conformity assessment procedures.
- Proposals for amendments to existing technical regulations and conformity assessment procedures.
- All final technical regulations and conformity assessment procedures.
- Final amendments to existing technical regulations and conformity assessment procedures.

Each Party must ensure that all local government final technical regulations and conformity assessment procedures as well as final amendments to existing technical regulations and conformity assessment procedures, and to the extent practicable, proposals for the same, are accessible through official websites or journals, preferably consolidated into a single website.

Parties are also required to notify WTO Members of central government proposals for new technical regulations and conformity assessment procedures that may have a significant effect on trade through the procedures established in Articles 2.9 or 5.6 of the TBT Agreement. Parties must also endeavour to notify local government proposals. In determining whether there may be a "significant effect on trade", a Party must consider, among other things, the relevant *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995* (G/TBT/1)).

Notifications of proposed technical regulations or conformity assessment procedures published or filed in accordance with the TBT Chapter or the TBT Agreement must include an explanation of the objectives of the proposal, and be transmitted electronically to other Parties through their enquiry points established under the TBT Agreement. A Party must normally allow 60 days from the date of notification for written comments from another Party or interested persons from those Parties, and consider any reasonable requests for extending this comment period.

Each Party must endeavour to notify WTO Members of the final text of a technical regulation or conformity assessment procedure at the time the text is adopted or published, as an addendum to the original notification of the proposed measure.

A Party must, no later than the date of publication of a final technical regulation or conformity assessment procedure that may have a significant effect on trade, make publically available certain information, including:

- An explanation of the objectives and how the final technical regulation or conformity assessment procedure achieves them.
- The Party's responses to significant or substantive issues presented in comments received on the proposal for the technical regulation or conformity assessment procedure.

The following information must be made available if requested by another Party:

- A description of alternative approaches that the Party considered in developing the final technical regulation or conformity assessment procedure, if any, and the merits of the approach that the Party selected.
- A description of significant revisions, if any, that the Party made to the proposal for the technical regulation or conformity assessment procedure, including those made in response to comments.

A Party must make its central government standardising body's work programme, containing the standards it is currently preparing and the standards it has adopted, available through the central government standardising body's website.

Parties must endeavour to provide an interval of more than six months between the publication of final technical regulations and conformity assessment procedures and their entry into force, and provide suppliers with a reasonable period of time in the circumstances to demonstrate that their goods conform with the relevant requirements of the technical regulation or standard, endeavouring to take into account the resources available to suppliers.

Co-operation, trade facilitation, information exchange and technical discussions

The chapter includes a number of provisions relating to cooperation, trade facilitation and information exchange, including:

- The Parties shall strengthen their exchange and collaboration on mechanisms to facilitate the acceptance of conformity assessment results, to support greater regulatory alignment and to eliminate unnecessary technical barriers to trade in the region (Article 8.4).
- A Party shall, upon the request of another Party, explain the reasons why it has not accepted a technical regulation of that Party as equivalent (Article 8.6).
- A Party shall, on request of another Party, give due consideration to any sector specific proposal for cooperation under the chapter.
- The Parties shall encourage cooperation between their respective organisations responsible for standardisation, conformity assessment, accreditation and metrology, whether they be public or private, with a view to addressing issues covered by the chapter (Article 8.7).
- A Party receiving a request to provide information on any matter that arising under the chapter shall provide that information within a reasonable period of time, and where if possible, by electronic means (Article 9).
- A Party may request technical discussions with another Party to resolve any matter that arises under the TBT Chapter. The matter must be discussed within 60 days of the request, and

Parties must endeavour to resolve the matter as expeditiously as possible. Unless agreed otherwise, the discussions and information exchanged are to be confidential and without prejudice to the rights and obligations of the Parties under TPP, the WTO Agreement, or any other agreement to which both Parties are a party.

Committee on Technical Barriers to Trade: A Committee on Technical Barriers to Trade shall be established to promote and monitor the implementation and administration of the Chapter (Article 10). Through the Committee, the Parties shall strengthen their joint work in the fields of technical regulations, conformity assessment procedures and standards with a view to facilitating trade among the Parties. Parties must designate and notify a contact point for TBT matters, and promptly notify other Parties of any change of its contact point or relevant officials. Contact points have responsibilities including communicating with other Parties' contact points, facilitating discussions, request and information exchange, and coordinating the involvement of government agencies on relevant matters pertaining to the TBT Chapter.

5.8.1 Sectoral Annexes

A feature of the TBT Chapter that differs from our previous approach to TBT chapters is the inclusion of seven sectoral annexes to the Chapter: Cosmetics, Information and Communications Technology Products, Medical Devices, Organic Products, Pharmaceutical Products, Proprietary Formulas for Certain Food Products and Additives and Wine and Distilled Spirits. Each annex includes sector-specific obligations aimed at reducing unnecessary barriers to trade in these products.

Wine and Distilled Spirits Annex

The Wine and Distilled Spirits Annex includes a production standard for "ice wine" which limits this designation to wine made from grapes naturally frozen on the vine, as opposed to wine made from grapes frozen using modern technology. For New Zealand, this will be an export-only production standard, so domestic sales of ice wine will not be affected. New Zealand is already bound by this standard when exporting to other WWTG member countries but Wine and Distilled Spirits Annex will extend the standard to all exports.

Under this Annex, Parties are required to make publicly available information about their law and regulations concerning wine and distilled spirits. Mutual recognition of oenological practices is encouraged, and Parties must endeavour to assess other Parties' laws, regulations and requirements in respect of oenological practices, with the aim of reaching agreements that provide for the Parties acceptance of each other's mechanisms for regulating oenological practices, if appropriate.

This Annex contains various requirements relating to labelling, which include requirements for Parties to permit suppliers of wine or distilled spirits to:

- Indicate any required information on distilled spirits, or information on wine other than product name, country of origin, net contents and alcohol contents, on a supplementary label that is affixed to the distilled spirits or wine container, and affix the label after importation but prior to offering the product for sale.
- Use "wine" as a product name.

- Indicate the alcoholic content by volume on a wine or distilled spirits label by alc/vol and in percentage terms.
- Place a lot identification code on wine and distilled spirits containers, if the code is clear, specific, truthful, accurate and not misleading.

Parties must not require suppliers to indicate the date of production, manufacture, expiration, minimum durability or the sell by date on wine or distilled spirits containers, labels or packaging, unless, due to their packaging or the addition of perishable ingredients, the products could have a shorter date of minimum durability than would normally be expected by the consumer. Further, Parties must not require a supplier to place a translation of a trade mark or trade name on wine or distilled spirits containers, labels or packaging, or disclose an oenological (wine-making) practice on a wine label except to meet a legitimate human health or safety objective.

Unless a Party has entered into a pre-2003 agreement with another country or group of countries that requires that Party to restrict the use of such terms on labels of wine sold in its territory, a Party must not prevent imports of wine from other Parties only on the basis that the wine label includes certain descriptors or adjectives describing the wine or relating to wine-making, such as chateau, classic, clos, cream, ruby, special reserve, solera, or superior.

A Party must endeavour to base quality and identity requirements for any specific type, category, class, or classification of distilled spirits solely on minimum ethyl alcohol content and raw materials, added ingredients, and production procedures used to produce the distilled spirits.

Imported wine or distilled spirits must not be required by Parties to be certified by an official certification body regarding vintage, varietal, and regional claims (for wine or raw materials), and production processes (for distilled spirits), except for if a Party has a reasonable and legitimate concern about these characteristics and certification is necessary to verify claims such as age, origin or standards of identity.

Regarding certification, a Party must consider the Codex Alimentarius Guidelines for Design, Production, Issuance and Use of Generic Official Certificates (CAC/GL 38-2001) if it deems that certification of wine is necessary to protect human health and safety or to achieve other legitimate objectives. A Party must normally permit a wine or distilled spirits supplier to submit any required certification, test result or sample only with the initial shipment of the product. However, if a Party requires a supplier to submit a sample of the product in order to assess conformity with a technical regulation or standard, it must not require a sample quantity larger than is necessary to complete the relevant conformity assessment procedure.

A Party must not apply any final technical regulation, standard or conformity assessment procedure to wine or distilled spirits that have already been placed on the market when the measure enters into force (if the products are sold within their stipulated time period), unless problems of health and safety arise or threaten to arise.

Information and Communications Technology Products Annex

This annex applies to information and communication technology (ICT) products that use cryptography, the electromagnetic compatibility of information technology equipment (ITE) products and telecommunications equipment.

The Annex prohibits Parties from imposing or maintaining a technical regulation or conformity assessment procedures relating to products that use cryptography and are designed for commercial applications, which require a manufacturer or supplier of the product, as a condition of the manufacture, sale, distribution, import or use of the product, to:

- Transfer or provide access to a particular technology, production process, or other information that is proprietary to the manufacturer or supplier and relates to the cryptography in the product, to the Party or a person in the Party's territory;
- Partner with a person in its territory; or
- Use or integrate a particular cryptographic algorithm or cipher,
- Other than where the manufacture, sale, distribution, import or use of the product is by or for the government of the Party.

This prohibition also does not apply to requirements that a Party adopts or maintains relating to access to networks that are owned or controlled by the government, including those of central banks; or measures taken by a Party pursuant to supervisory, investigatory or examination authority relating to financial institutions or markets.

Pharmaceuticals, Cosmetics and Medical Devices Annexes

The Pharmaceuticals, Cosmetics and Medical Devices Annexes apply to the preparation, adoption and application of technical regulations, standards, conformity assessment procedures, marketing authorisation, and notification procedures of central government bodies that may affect trade in those products between the Parties.

Each Party is required to define the scope of the products subject to its laws and regulations for pharmaceutical and cosmetic products and medical devices, identify the agencies authorised to regulate those products in its territory, and make that information publicly available.

If more than one agency is authorised to regulate pharmaceutical products, cosmetic products or medical devices (respectively) within the territory of a Party, that Party shall examine whether there is overlap or duplication in the scope of those authorities and take reasonable measures to eliminate unnecessary duplication of any resulting regulatory requirements.

The annexes encourage collaborative efforts, through requirements that:

- Parties must endeavour to collaborate through relevant international and regional initiatives to improve the alignment of their respective regulations and regulatory activities for pharmaceutical and cosmetic products and medical devices.

- When developing or implementing regulations for cosmetic products or for the marketing authorisation of pharmaceutical products or medical devices, Parties must consider relevant scientific or technical guidance documents developed through international collaborative efforts.
- Parties must endeavour to apply scientific guidance documents that are developed through international collaborative efforts with respect to inspection of pharmaceuticals.
- Parties must endeavour to share, subject to their laws and regulations, information from post-market surveillance of cosmetic products, and on their findings regarding cosmetic ingredients.

Parties must comply with the obligations set out in Articles 2.1 and 5.1.1 of the TBT Agreement with respect to any marketing authorization or notification procedure that they prepare, adopt or apply for cosmetic products, pharmaceutical products and medical devices that do not fall within the definition of a technical regulation or conformity assessment procedure.

When developing regulatory requirements for pharmaceutical and cosmetic products and medical devices, a Party is required to consider its available resources and technical capacity in order to minimise the implementation of requirements that could inhibit the effectiveness of the procedure for ensuring the safety, efficacy or manufacturing quality of such products; or lead to substantial delays in marketing authorisation for the products.

Parties must adhere to the following procedural rules with respect to the marketing authorisation of pharmaceutical products, medical devices, and cosmetics, and must:

- Provide an applicant who requests a marketing authorisation with its determination within a reasonable period of time.
- In the event that a marketing authorisation application is declined, inform the applicant of the reasons for the decision.
- Ensure that any marketing authorisation determination is subject to an appeal or review process that may be invoked at the request of the applicant.

With respect to the marketing authorization of both pharmaceutical products and medical devices, Parties must:

- Make their determination whether to grant marketing authorisation for a specific product/device on the basis of information on the safety and efficacy and the manufacturing quality of the product/device, labeling information related to the safety, efficacy and use of the product, and any other matters that may directly affect the health or safety of the user of the product/device.
- Not require sale data or related financial data concerning the marketing of the product/device as part of the determination.

- Administer any marketing authorisation process in a timely, reasonable, objective, transparent, and impartial manner, and identify and manage any conflicts of interest in order to mitigate any associated risks.
- In the event that periodic reauthorization for a pharmaceutical product or medical device is required, allow the product or device to remain on its market under the conditions of the previous marketing authorization pending a decision on the periodic reauthorization, except where a Party identifies a significant health or safety concern.
- Not require that a pharmaceutical product or medical device receive marketing authorisation from the country of manufacture as a condition for the product to receive marketing authorisation.

Pharmaceutical Annex-Specific Obligations

With respect to the marketing authorization of pharmaceutical products, Parties must review the safety, efficacy and manufacturing quality information submitted by the person who seeks marketing authorisation in a format that is consistent with the principles found in the *International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use* Common Technical Document.

Each Party shall, with respect to the inspection of a pharmaceutical product within the territory of another Party:

- Notify the other Party prior to conducting an inspection, unless there are reasonable grounds to believe that doing so could prejudice the effectiveness of the inspection.
- If practicable, permit representatives of that Party's competent authority to observe that inspection.
- Notify that Party of its findings as soon as possible following the inspection and, if the findings will be publicly released, no later than a reasonable time before that public release. The inspecting Party is not required to notify the other Party of its findings if it considers that those findings are confidential and should not be disclosed.

Cosmetics Annex obligations

With respect to the marketing authorization of cosmetic products, Parties must:

- Not conduct a separate marketing authorisation process for cosmetic products that differ only with respect to shade extensions or fragrance variants, unless a Party identifies a significant health or safety concern.
- Not require the submission of marketing information, including with respect to prices or cost, as a condition for the product receiving marketing authorisation.
- Not subject a product that has been granted marketing authorisation to periodic re-assessment procedures as a condition of retaining its marketing authorisation.
- Consider replacing any marketing authorisation process with other mechanisms such as voluntary or mandatory notification and post-market surveillance.

- Not require a cosmetic product to be labelled with a marketing authorisation or notification number.
- Not require that a cosmetic product receive marketing authorisation from the country of manufacture as a condition for the product to receive marketing authorisation.
- Not require that a cosmetic product be accompanied by a certificate of free sale as a condition of marketing, distribution or sale in the Party's territory.
- Not require that a cosmetic product be tested on animals to determine the safety of that cosmetic product, unless there is no validated alternative method available to assess safety.
- Permit a manufacturer or supplier to indicate any required information by relabelling the product or by using supplementary labelling of the product in accordance with the Party's domestic requirements after importation but prior to offering the product for sale or supply in the Party's territory.
- Apply a risk-based approach to the regulation of cosmetic products, and take into account that cosmetic products are generally expected to pose less potential risk to human health or safety than medical devices or pharmaceutical products.

If a Party prepares or adopts good manufacturing practice guidelines for cosmetic products, it shall use international standards for cosmetic products, or the relevant parts of them, as a basis for its guidelines except when these would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.

Each Party shall endeavour to avoid re-testing or re-evaluating cosmetic products that differ only with respect to shade extensions or fragrance variants, unless conducted for health or safety purposes.

Medical Devices Annex-specific obligations

The Medical Devices Annex recognises that different medical devices pose different levels of risk, and requires that each Party classify medical devices based on risk, taking into account scientifically relevant factors. A Party must ensure that, if it regulates a medical device, it regulates the device consistently with the classification the Party has assigned to that device.

With respect to the marketing authorization of medical devices, Parties must permit a manufacturer or supplier to indicate any required information by relabelling the product or by using supplementary labelling of the product in accordance with the Party's domestic requirements after importation but prior to offering the product for sale or supply in the Party's territory.

Proprietary Formulas for Certain Food Products and Additives Annex

When gathering information relating to proprietary formulas in the preparation, adoption and application of technical regulations and standards, a Party is required to:

- Ensure that its information requirements are limited to what is necessary to achieve its legitimate objective.

- Ensure that the confidentiality of information gathered about products is respected in the same way as for domestic products and in a manner that protects legitimate commercial interests.

Organic Products Annex

A Party must enforce any requirement that it develops relating to the production, processing, or labelling of products as organic. New Zealand does not have a domestic organic products regime in place.

5.9 Investment

The obligations in the investment chapter of TPP should be read in the context of the broader Agreement, including the Preambular language noting the Parties' recognition of their inherent right to regulate and their resolve to preserve flexibility to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

The Investment Chapter does not apply to a Party's measures if and to the extent that those measures are covered by Chapter 11 (Financial Services). A Party requiring a service supplier to post a bond or other financial security does not result in the Investment Chapter applying to the supply of that service. Rather, the Investment Chapter applies to the extent that the bond or financial security qualifies as a "covered investment".

The Investment Chapter is divided into two sections: Section A sets out obligations that are owed by host governments to investors and investments of the other Parties; while Section B establishes a dispute settlement mechanism that provides investors with the ability to submit to arbitration a claim that a TPP government has violated one or more of the obligations in Section A, an investment agreement or an investment authorisation. The definitions set out in Section A also apply to Section B.

The obligations that the New Zealand Government owes to investors and investments under TPP are of two kinds: those in respect of which Parties may enter reservations; and those that are derived from obligations owed at customary international law and in respect of which Parties may not enter reservations. The key obligations of each type are described below.

Reservable obligations

National Treatment: Article 9.4 provides for non-discriminatory treatment of foreign and domestic investors and investments. It requires that each Party give investors and covered investments treatment no less favourable than the treatment it gives, in like circumstances, to its own investors and investments. Non-discriminatory treatment must be afforded during the establishment, acquisition, expansion, management, conduct, operation and sale phases of an investment.

Most-favoured-nation: Each Party must give investors and investments of other Parties, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments, treatment no less favourable than the treatment it gives, in like circumstances, to investors and investments from any other country (whether or not a Party to the TPP). This means that investors and investments from TPP Parties will receive the benefits of any additional liberalisation that New Zealand might provide to investors and investments from other countries under future agreements. However, the obligation does not encompass international dispute resolution procedures or mechanisms (Article 9.5).

There is a footnote against the term "in like circumstances" in both the National Treatment and Most-favoured-nation obligations of the Investment Chapter. This footnote says that whether treatment is accorded in "like circumstances" under these obligations depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

In addition, the Parties have agreed on a Drafters' Note regarding interpretation of the term "in like circumstances" which is used in both the National Treatment and Most-favoured-nation obligations. This Drafters' Note confirms the shared intent of the Parties to ensure that tribunals follow the existing approach set out in it when they determine whether or not investors or investments are in "like circumstances". The Drafters' Note confirms that these obligations do not prohibit all measures that result in differential treatment of investors or investments. Instead, they ensure that foreign investors and their investments are not treated differently on the basis of their nationality. The existing approach is one whereby comparisons are made only with respect to investors or investments on the basis of relevant characteristics. It is a fact-specific inquiry requiring consideration of the totality of the circumstances, which include not only competition in the relevant business or economic sectors, but also such circumstances as the applicable legal and regulatory frameworks and whether the differential treatment is based on legitimate public welfare objectives. The Drafters' Note explains the approach further as follows:

> "In considering the phrase "in like circumstances", NAFTA tribunals have held that investors or investments that are "in like circumstances" based on the totality of the circumstances have been discriminated against based on their nationality. See, e.g., Archer Daniels Midland, et al, v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, (21 November 2007), para. 197, (finding a breach of the national treatment obligation after taking into account "all 'circumstances' in which the treatment was accorded . . . in order to identify the appropriate comparator").
>
> NAFTA tribunals have also accepted distinctions in treatment between investors or investments that are plausibly connected to legitimate public welfare objectives, and have given important weight to whether investors or investments are subject to like legal requirements. See, e.g., Grand River Enterprises Six Nations Ltd., et al. v. United States of America, UNCITRAL, Award (12 January 2011), at paras. 166-167 ("NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether