



## SUBMISSION TO THE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE OF THE NEW ZEALAND PARLIAMENT

### INTERNATIONAL TREATY EXAMINATION OF THE TRANS PACIFIC PARTNERSHIP (TPP) AGREEMENT

MARCH 2016

#### Introduction and Summary

1. This submission is made on behalf of the NZ International Business Forum (NZIBF) whose members are listed at Annex A.<sup>1</sup> NZIBF is a forum of senior business leaders working together to promote New Zealand's engagement in the global economy. NZIBF has been a strong supporter of the Trans Pacific Partnership (TPP) negotiations between New Zealand and eleven other economies.<sup>2</sup> The achievement of FTAs with the United States and Japan – now realised through TPP – have been long-held ambitions for the private sector in New Zealand.
2. NZIBF warmly welcomes and supports TPP as a new framework for trade (in goods as well as services) and investment in the Asia Pacific region. NZIBF agrees entirely with the National Interest Analysis (NIA) which finds that TPP is a *“platform to support the integration of New Zealand business into regional supply chains and would provide consistency and certainty to traders and investors in TPP markets”*.<sup>3</sup> NZIBF also agrees that the counterfactual scenario – i.e. standing aside from TPP – *“risks marginalisation and decline for New Zealand in the region”*.<sup>4</sup>
3. NZIBF believes TPP will lead to new trade and investment opportunities between New Zealand and the five other economies in TPP with which New Zealand does not already have free trade arrangements (Canada, Japan, Mexico, Peru and the United States). TPP should also deliver an enhanced relationship with the other six economies with which New Zealand already has FTAs. The agreement can be expected to contribute to economic growth and job creation. While the estimation of future gains is invariably difficult, NZIBF believes a conservative approach has been

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<sup>1</sup> The views in this submission are those of NZIBF as a whole. Individual members may have different views on specific issues covered in this submission.

<sup>2</sup> Australia, Brunei, Chile, Canada, Japan, Malaysia, Mexico, Peru, Singapore, United States, Viet Nam

<sup>3</sup> NIA, page 8

<sup>4</sup> Ibid

taken in the NIA and notes that in other recent FTAs including China and Taiwan, the dynamic gains generated by those agreements has in fact far exceeded the original estimates.

4. While TPP is imperfect in the scope of the liberalisation achieved for the dairy sector and tariffs will remain on some other exports, including beef to Japan, the agreement improves the current situation for those sectors. For other key export industries, including horticulture, wine, forestry, seafood, textiles and manufactured products TPP is an excellent outcome which will materially benefit those industries. NZIBF also welcomes improvements for services exporters contained in TPP. In some cases these services outcomes are fairly modest but they serve as a first step in liberalising opportunities for the export education, professional services and transport, distribution and logistics sectors. The outcomes also support exports of services embedded in goods trade.
5. While public attention has been focused on the implications of TPP for New Zealand's sovereignty, NZIBF believes a balance has been maintained in the agreement through a series of safeguards, checks and balances. NZIBF does not believe TPP provides for unwarranted intrusion into domestic policy making on the part of TPP partners. Such access as TPP gives to other economies' citizens to comment on domestic regulations and legislation improves the quality of regulation by ensuring that trade implications are taken fully into account. Furthermore, our analysis of the FTA's provisions on investment highlights that TPP, while marking some changes in New Zealand's past practice, extends in important areas the high standards of previous agreements both in respect of the appropriate protection of investments and the continuing right of the Government to regulate in the public interest. NZIBF therefore supports these provisions including investor-state dispute settlement (ISDS), the operation of which is also limited and improved in TPP.
6. While intellectual property was a sensitive area in the negotiation, the TPP commitments require very little change to current practices in New Zealand, except in the area of copyright term and in relation to technological protection measures (TPMs). While these changes are considered as "costs" in the NIA, there are benefits to New Zealand creators and innovators from a more uniform approach to intellectual property across the twelve economies.
7. NZIBF welcomes TPP's provisions aimed at addressing next generation business issues as well as the agreement's environmental and labour measures. NZIBF believes TPP should be a living agreement and notes that future possible accessions to TPP by other economies would provide another opportunity to improve on the market access outcome for both goods and services and to promote TPP as a pathway to

future liberalisation in the Asia Pacific region. NZIBF also supports the concept of a permanent Secretariat for TPP ideally based in New Zealand.

8. As a leadership body NZIBF leaves to sectoral groups the task of identifying specific sectoral issues in TPP. This submission therefore comments on cross-sectoral or wider issues. On balance NZIBF concludes that ratifying the agreement would be consistent with wider trade and investment liberalisation efforts, presents net benefits to New Zealand and would be in the national interest.
9. NZIBF recommends to the Parliamentary Committee that it confirm its approval of the TPP Agreement.

### **About the NZ International Business Forum**

10. NZIBF provides a voice to articulate the needs and priorities of New Zealand's international business, in particular the importance of open markets, to the New Zealand Government and public stakeholders. Incorporated in May 2007<sup>5</sup>, NZIBF works with companies, business organizations and government agencies to implement key projects, including working to develop New Zealand's key international business relationships and conducting research and other activities relative to New Zealand's international competitiveness. NZIBF receives no direct government funding for its core operating budget, but from time to time may receive funding for jointly-funded projects. Funding is also provided in respect to the policy advice and support NZIBF provides to the New Zealand members of the APEC Business Advisory Council (ABAC).<sup>6</sup> The NZIBF Board (refer Annex A) brings together leaders from amongst New Zealand's largest internationally oriented companies and peak business organisations.
11. While this submission is made on behalf of the NZIBF membership a number of NZIBF members are likely to make their own submissions containing more detailed comments on specific issues relevant to their individual business interests.

### **General comments**

#### ***Economic importance of TPP***

12. TPP provides a vehicle for concluding free trade arrangements with eleven other parties which represent over 37% of global GDP, 812 million consumers, 40% of New Zealand's goods exports, 47% of services exports and over 70% of foreign direct

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<sup>5</sup> NZIBF is a successor organisation to the NZ Trade Liberalisation Network Inc which was established in 2001.

<sup>6</sup> A separate submission from ABAC New Zealand is being made to the Select Committee.

investment both outward and inward. TPP marks the conclusion of a new plurilateral framework for trade (in goods as well as services) and investment. TPP seeks to promote economic integration amongst the twelve parties at a time when the model for doing business in the Asia Pacific region is undergoing considerable evolution.

13. Numerous studies, including latterly by the New Zealand Institute of Economic Research (NZIER) on behalf of the New Zealand Pacific Economic Co-operation Council (NZPECC)<sup>7</sup>, have pointed to the *“dominant feature of modern commerce (as) the movement of semi-finished products seamlessly across many borders gaining steadily in value until final assembly and sale in any market”*. While the latter comment applies particularly to manufactured products, it also applies more generally to agricultural and food products as New Zealand producers and exporters seek to meet customers’ needs from global supply sources. New business models are further assisted by the provision of services either directly or indirectly in the form of services embedded in the supply of goods. Services trade is a valuable and growing component of overall trade flows.
14. This is the new reality of complex value chains and networks in which New Zealand businesses and their counterparts in the Asia Pacific region are operating today and which TPP aims to facilitate. Today more than ever before there is a need to improve market access, reduce the costs and increase the speed of doing business and create the sort of regulatory environment which leads to increased trade (in goods and services) and investment as a means of expanding sustainable, inclusive economic growth. NZIBF supports these goals and believes TPP provides a basis on which to improve the business environment in the Asia Pacific region. NZIBF agrees entirely with the National Interest Analysis (NIA) which finds that TPP is a *“platform to support the integration of New Zealand business into regional supply chains and would provide consistency and certainty to traders and investors in TPP markets”*.<sup>8</sup>
15. A number of domestic and international studies have sought to estimate the impact of TPP on trade and investment. Broadly speaking, although the majority of these studies see positive impacts on growth, others point to a lower growth impact and even possible job losses. Forecasting the impact of trade agreements is notoriously difficult. The differences in findings between these studies depend largely on the economic assumptions that underpin them. The NIA estimates TPP will give rise to a \$2.7 billion (in 2007 dollars) positive impact on GDP or additional growth of 1 percent per annum by 2030. NZIBF accepts these findings as conservative estimates, which have been

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<sup>7</sup> NZIER Report to NZPECC, September 2015 available at <http://nzpecc.org.nz>

<sup>8</sup> NIA, page 8

based on modelling by Professor Anna Strutt and colleagues.<sup>9</sup> At the same time NZIBF notes that in other recent FTAs (e.g. with China, ASEAN and Taiwan) the dynamic economic gains arising from those agreements have ultimately significantly exceeded the original modelling estimates.

16. In sum NZIBF believes the strategic economic gains from TPP will be significant. Consequently any failure by New Zealand to ratify TPP would be significantly against the national interest as these potential gains would not be realised. Furthermore, if TPP were ratified by others and entered into effect without New Zealand participation, New Zealand's competitors in the region, including especially Australia and Chile, would benefit from preferential terms of access into important markets at New Zealand's cost. The most visible example of this is in the Japanese market for beef and dairy products. NZIBF therefore concurs with the finding of the NIA that *"if TPP goes ahead without New Zealand, New Zealand would be placed at a competitive disadvantage in the region, incurring a significant net cost to the economy"*.<sup>10</sup> NZIBF further agrees that such disadvantage would *"risk marginalisation and decline for New Zealand in the region"*.<sup>11</sup>

### ***TPP and sovereignty***

17. The ratification of any international treaty implies that New Zealand is prepared to limit its sovereignty in certain areas in exchange for the broader benefits that the treaty imparts. Even in so doing, international treaties generally make clear those areas where the Government retains policy flexibility and the continuing right to regulate (see the discussion on investment below). The Government also retains the right to leave the treaty under certain conditions.
18. Some critics of TPP have suggested that the agreement creates new obligations for New Zealand to seek the views of other trading partners and citizens of other trading partners when proceeding with new legislation or regulation. The criticism is that this gives foreign nationals unprecedented and inappropriate rights in relation to domestic policy and legislative processes.
19. NZIBF does not consider that TPP provides for any new obligations for consultation and transparency beyond what is already established practice in the World Trade Organisation (WTO) and existing FTAs. Furthermore such provisions are useful in

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

<sup>10</sup> NIA, page 23

<sup>11</sup> NIA, page 8

assisting New Zealand business interests in making submissions in relation to proposed legislation and regulation in other TPP member countries to mitigate any possible negative impact on our exports in those markets. Rather than being a problem in TPP, such provisions should be seen to be of considerable advantage to New Zealand.

20. Further commentary on this aspect of TPP and its relationship to current regulatory practice is provided in Annex B.

## **Specific outcomes**

### **Goods**

21. TPP provides for tariff reductions and/or elimination on a number of products of critical importance to New Zealand's goods exports. The scope of tariff elimination extends to 95.4% of New Zealand's current exports. These include dairy, meat, forestry, seafood, horticulture, wine, and manufactured products including medical technology and agricultural technology. The impact of these reductions is most significant in relation to the five markets with which New Zealand does not already enjoy free trade arrangements (Canada, Japan, Mexico, Peru and the United States). In the case of Malaysia and Viet Nam additional access has been secured over and above the level of the existing arrangements in wine and some dairy products.

22. Tariff elimination over varying timeframes in different markets is achieved for meat (except beef to Japan), horticulture including kiwifruit and apples, wine, forest products, most seafood products, textiles and manufactured goods. The NIA estimates the value of these tariff savings to be \$178 million once TPP is fully implemented.

23. In the case of beef to Japan, the tariff reduces from 38.5% currently to 9% over sixteen years.<sup>12</sup> This outcome, while less than complete elimination, will ensure that New Zealand exports receive comparable treatment to Australian exports, which are already subject to an FTA. The achievement of a level playing field between New Zealand and Australia in the Japanese beef market was a major objective for the New Zealand industry in the TPP negotiations.

24. In the case of dairy products, TPP represents a major reduction in the level of ambition which was heralded at the outset of the negotiations and suggested in the "broad outlines" of TPP released at the APEC Summit in Honolulu in 2011.<sup>13</sup> The dairy

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<sup>12</sup> It should be noted that safeguards apply to these exports if volumes exceed specified levels.

<sup>13</sup> The broad outlines are available at <https://ustr.gov/tpp/outlines-of-TPP>.

outcome is a source of disappointment for the dairy industry. NZIBF accepts that New Zealand negotiators did their best to secure a more comprehensive outcome, but that this was opposed by protectionist sectors in the United States, Japan and Canada. Unfortunately this has resulted in a “lop-sided” agreement in which dairy is one of the few sectors which does not benefit fully from liberalisation. That said, TPP contains a number of advantages for dairy in key markets which improves the current position. Tariff savings are estimated to be around \$96 million and new, albeit limited, access is gained to the United States, Japan, Canada and Mexico. Access to the Peruvian market remains inhibited by the operation of the Peru Price Band, which regrettably applies to New Zealand but not the United States. NZIBF believes that it should be a key objective of the Government through the TPP implementation and expansion process to eliminate continuing protectionism against dairy in TPP markets as soon as possible.

25. NZIBF notes that these market access outcomes are accompanied by a range of other measures, which will materially benefit exporters. These include flexible rules of origin (ROO), customs commitments and rules on the operation of tariff rate quotas. These outcomes all help reduce compliance costs, streamline export processes and enhance the ability of New Zealand exporters, especially SMEs, to participate in regional value chains. SMEs benefit not only from provisions in TPP which aim specifically to promote the agreement to them but by provisions which lower the costs of doing business.
26. TPP further includes measures to address non tariff barriers (NTBs), which exporters regularly report are often more problematic than tariffs. Non tariff measures (NTMs) which may be introduced for a variety of legitimate policy reasons may become NTBs when they unnecessarily restrict trade. In so doing they can act as disguised barriers to trade, and have the potential to limit exports, erode margins, add costs and inhibit participation in global value chains. NZIBF welcomes the range of provisions in the TPP aimed at minimising and/or mitigating NTBs, which are contained in chapters on Sanitary and Phyto-sanitary Measures (SPS), Technical Barriers to Trade (TBT), Regulatory Coherence and Customs Administration and Trade Facilitation. These provisions emphasise the need for NTMs to be predictable, consistent, transparent, based in sound science or closely linked to international norms (as appropriate), and no more trade-restrictive than necessary. While the TPP measures on SPS and TBT replicate existing WTO disciplines (and therefore do not amount to significant change in New Zealand practice), they provide for improved implementation by other TPP economies, which will assist exporters. For the wine and medical devices industry specific annexes address regulatory practices in those sectors, which again are materially beneficial.

## **Services**

27. NZIBF welcomes the liberalisation of services trade contained in TPP especially given the growing importance of services in the New Zealand export economy (around a quarter of total exports). Five out of ten of New Zealand's top markets for services exports are TPP members (Australia, US, Japan, Singapore and Canada).
28. Liberalisation of trade in services helps to foster deeper regional economic integration. NZIBF recognises the value of new commitments (in some cases going beyond existing FTAs and current WTO commitments) relating to professional services (such as engineering, legal and architectural services); business services such as management consultancy; private education including language teaching; agriculture services; environmental services and transportation, warehousing, distribution and retail services. The gains in TPP include more open markets for cross border trade in services, better provisions relating to investment in services operations in TPP member economies and improvements in visa arrangements for services exporters visiting other markets. Some of these gains are relatively modest but represent a first step in opening previously closed markets to competition. NZIBF hopes these outcomes can be improved as TPP expands and matures.
29. NZIBF is disappointed that the United States made no commitments on business visas in the context of TPP. The ability to secure temporary entry visas particularly for setting up new business operations in the United States remains a continuing problem for New Zealand businesses and needs to be addressed with vigour by the Government in association with business.

## **Investment**

30. NZIBF supports TPP's provisions on investment, which provide appropriate protection and encouragement of investment between TPP members.
31. NZIBF notes that under TPP there is no change to the Overseas Investment Act (OIA) 2005, except that New Zealand will increase the threshold above which a non-government investor from a TPP party must obtain prior approval from \$100 million to \$200 million. NZIBF welcomes the increase in threshold level given the importance of attracting foreign direct investment to New Zealand. Beyond this there is no change to the foreign investment regime for sensitive land (including farm land over 5ha) or fishing quotas.
32. As it has in China, ASEAN and Korean FTAs New Zealand has agreed to investor-state dispute settlement (ISDS). NZIBF supports these provisions which apply only to the

investment chapter. Generally in NZIBF's view TPP like earlier FTAs contains high standard provisions which will ensure the Government's continuing right to regulate in the public interest in the areas of public health, the environment, education and other core government services, while providing protection for investors of minimum standards of treatment and against unjustified expropriation of assets. NZIBF concurs with the Government's view that the chance of a successful challenge to New Zealand under ISDS remains very unlikely, provided of course the Government continues to deal fairly with foreign investors.

33. NZIBF notes the Government's intention to exercise the right to restrict the applicability of ISDS to tobacco and recommends this not become an unhelpful precedent for other areas. NZIBF also notes that ISDS will not apply to investments to or from Australia. While the likelihood of trans Tasman actions may be even more unlikely than in respect of others, NZIBF would have preferred there to be uniform application of ISDS between all trading partners.

34. NZIBF welcomes the provision which ensures that government actions to accord more favourable treatment to Maori under the Treaty of Waitangi are fully upheld and safeguarded.<sup>14</sup>

35. NZIBF is aware that some have criticised TPP because it removes the ability of a future government, if it wished, to apply a ban on sales of residential land to non-residents. NZIBF accepts that such a ban would be problematic given that the flexibility has not been retained to amend categories (as opposed to criteria) of investment under the OIA<sup>15</sup>. NZIBF has no comment to make at this time on the desirability of such a ban but observes that other measures (e.g. in the taxation area) are available to a future government if it wished to implement restrictions on residential land sales (provided it were done on a non-discriminatory basis). Other avenues for effecting such an outcome may also be open to a future government in close consultation with trading partners.

36. Further commentary on TPP's investment provisions, their relationship to established practice and the operations of ISDS is provided at Annex C.

### ***Intellectual property***

37. Intellectual property was one of the most difficult areas of the negotiation. NZIBF notes that very little change to existing policies in the area of intellectual property is required

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<sup>14</sup> TPP, Art 29.6

<sup>15</sup> TPP- Annex II – New Zealand - 7

by TPP. No change to New Zealand's current laws, regulations or practice is required in respect of parallel imports, patents for software, patent terms for pharmaceuticals (except in so far as there are delays in the approval process), data protection terms for biologics or internet services providers' liability for copyright infringement.

38. In the area of medicines' purchasing only limited procedural and transparency changes are required in respect of Pharmac. ISDS does not apply to decisions by Pharmac. For these reasons and given the lack of changes to patents and data protection above, NZIBF finds it difficult to believe therefore that, as is sometimes claimed, TPP may lead to an increase in the cost of medicine.
39. In one major area – copyright – some changes will be required. NZIBF notes that copyright exists to protect and promote creativity. Copyright is a property right, lasting for a limited period of time, which is given to creators of literary, dramatic, musical and artistic works, sound recordings and films automatically upon their creation. Copyright is “infringed” by any unauthorised use, which is made of those works. This means no one, other than the copyright owner, can make copies, distribute or communicate their work.
40. Under TPP the copyright term is to be raised from 50 years to 70 years after the death of the author (or in the case of movies and the like, after first release). This will require an amendment to the Copyright Act (1994).
41. There is an active debate amongst economists as to whether extended copyright terms result in more creativity. Nearly all OCED members (including Australia and all EU countries, but not currently New Zealand, Canada or Japan) apply a 70 year term.
42. The NIA suggests over the very long term a cost of an additional \$55 million to the economy as a whole, but NZIBF is aware that this figure is disputed by industry as being too high. NZIBF also believes the figure needs to be seen in context as vastly less than the \$2.7 billion the Government expects to be secured from TPP. To put the cost into perspective the cost is about the same as New Zealand's savings on cheese tariffs to Japan.
43. While the NIA tends to present copyright extension as a “cost” to the economy, doing so will mean that the copyright term will be uniform across all twelve TPP economies (including between New Zealand and Australia): this could be of use to the New Zealand creative sector seeking to sell offshore and operating in multiple jurisdictions. Simplifying the regulatory framework should result in lower costs and better protections for New Zealand exporters of creative content.

44. It should be noted also that New Zealand legislation already establishes the right of “fair dealing” with copyright materials. This provides for limited exceptions to copyright in some narrow areas (such as copying for the purposes of criticism, review, news reporting and private research). TPP does not go as far as introducing the US practice of “fair use” but the TPP parties have undertaken to achieve balance in their copyright and related systems including by allowing exceptions and limitations to the rights of copyright owners. NZIBF welcomes this policy flexibility.
45. Many of these sorts of exceptions and limitations are likely to be already in place in New Zealand. For example TPP specifically refers to the facilitating access to copyright works by people who are blind. NZIBF notes that contrary to general expectations before TPP was concluded, TPP will not make things any more restrictive for blind people. Nor, as noted above, will TPP result in any changes to obligations on the part of internet services providers in relation to downloading of copyright material – the text makes clear that the obligations follow the practices adopted in New Zealand in 2008.
46. In one area - the circumvention of technological protection measures (TPMs) – e.g., digital locks that protect copyright works such as video games - TPP will require New Zealand to establish a criminal offence for those who deliberately set out to circumvent such measures: until now New Zealand law has only targeted devices or software which permit such circumvention. TPP will not require a change to existing law where circumvention is permitted for non-infringing uses (such as for research or after copyright has expired) and will not put an end to circumventing video zoning which is currently permitted under New Zealand legislation. NZIBF notes the Ministry of Business Innovation and Employment is currently consulting on the implementation of these commitments.<sup>16</sup>
47. On balance therefore NZIBF believes that TPP’s intellectual property provisions, while a complex set of legal commitments, will not result in major change to current practice except in relation to copyright term and TPMs. Furthermore NZIBF expects the impact of TPP’s copyright provisions to be limited. As with much of TPP they will mean that New Zealand’s practices and those in other TPP economies are brought more into alignment and closer to international norms.

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<sup>16</sup> <http://www.mbie.govt.nz/info-services/business/intellectual-property/tpp-intellectual-property-chapter/implementation-consultation>

### ***Next generation trade and business issues***

48. NZIBF notes that TPP contains a number of provisions which seek to make it a “next generation” or “21<sup>st</sup> century” agreement. These include provisions relating to trade facilitation, competition, state owned enterprises (SOEs), small and medium sized enterprises (SMEs), the digital economy (including in relation to data flows), e-commerce and regulatory coherence. NZIBF welcomes these provisions which for the larger part represent best practice in the Asia Pacific region and which are already practiced in New Zealand. NZIBF notes that SOEs in New Zealand already operate along the lines required by TPP.

### ***Environment and labour provisions***

49. NZIBF welcomes TPP’s chapters on environment and labour which are subject to dispute settlement. These provisions should ensure that TPP is complementary to global efforts to raise environmental and labour standards. The adoption of these provisions poses little if any complication for New Zealand but will be of significant assistance to TPP’s developing members to improve performance in these areas.

50. NZIBF particularly welcomes the provisions related to the elimination of fishing subsidies and also the market access improvements for environmental goods and services which build on APEC and WTO initiatives.

### ***A living agreement***

51. NZIBF welcomes provisions in TPP which seek to make it a “living agreement”. These are important as business models in the region continue to change and evolve. NZIBF notes also that a number of economies have expressed interest in joining TPP at a later date<sup>17</sup>. These include Korea, the Philippines, Thailand and Indonesia. As future accessions occur this provides an opportunity to improve the current market access and other outcomes in the future. The prospect of new accessions increases the attractiveness of TPP as a pathway and template for broader liberalisation in the Asia Pacific region leading ultimately to a future Free Trade Area of the Asia Pacific (FTAAP), as championed by ABAC.

52. NZIBF believes that TPP’s functioning and broader vocation would be assisted by the establishment of a permanent Secretariat to advise the TPP Commission as the governance body for the Agreement<sup>18</sup> and, since New Zealand already acts as

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<sup>17</sup> An accessions process is provided for in TPP Art 30.4.

<sup>18</sup> TPP Art 27

Depository for the Agreement, recommends that the Government pursue the opportunity of hosting such a Secretariat in New Zealand.

### **Recommendations to the Foreign Affairs, Defence and Trade Committee**

53. NZIBF recommends that the Committee:

- a. **note** the NZIBF's support for the ratification and implementation of the TPP Agreement based on the agreement's importance for regional economic integration, trade and investment growth and its overall positive contribution to the economy
- b. **approve** NZIBF's request to be heard in support of this submission.

#### For further information

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**NZ International Business Forum**  
**March 2016**

## Annex A

### Board members of the NZ International Business Forum

#### Directors

Malcolm Bailey, Director, Fonterra Co-operative Group (Chair)  
Michael Barnett, Chief Executive, Auckland Regional Chamber of Commerce and Industry  
(*representing the New Zealand Chambers of Commerce*)  
Peter Clark, Chief Executive, PF Olsen Ltd  
Paul Gestro, Head of Asia, BNZ  
Sir Graeme Harrison, Chairman, ANZCO Foods Ltd  
Kirk Hope, Chief Executive, Business NZ  
Peter McBride, Chairman, Zespri International Ltd  
James Parsons, Chairman, Beef + Lamb New Zealand  
Steve Yung, Chief Executive, Sealord Group Ltd

#### Alternate Directors

Catherine Beard, Executive Director, Export NZ/Manufacturing NZ  
Scott Champion, Chief Executive, Beef + Lamb New Zealand  
Simon Limmer, General Manager, Grower and Government Relations, Zespri  
Philip Turner, Director, Global Stakeholder Affairs, Fonterra Co-operative Group Ltd

#### Executive team

Stephen Jacobi, Jacobi Consulting Ltd (*Executive Director*)  
Fiona Cooper Clarke, Cooper Clarke Consulting Ltd (*Associate Director*)  
Stephanie Honey, Stephanie Honey Consulting (*Associate Director*)

#### Associate members

NZIBF's membership also comprises a range of associate members who are listed on our website – [www.tradeworks.org.nz](http://www.tradeworks.org.nz)

## Annex B

### Further comment on transparency and consultation

1. This section provides further commentary on the provisions for transparency and consultation in TPP and their comparison with existing FTAs.
2. The general requirement for transparency and consultations between trade partners are set out in Articles X and XXII of the General Agreement on Tariffs and Trade (GATT). These provisions form part of the WTO's commitments on transparency which have been replicated and expanded in various regional trade agreements. Generally the trend is for these provisions to become wider and more sophisticated as new agreements are concluded. Similar commitments also form part of the mechanisms to promote domestic transparency which have been adopted by the OECD in an effort to improve the quality of domestic regulation and to avoid unnecessary obstacles to trade.
3. In the case of the NZ China FTA, Chapter 13 (Transparency), Article 168.2 (Publication) requires NZ and China *"(to) provide, where appropriate interested persons of the other Party and the other Party with a reasonable opportunity to comment on such proposed measures"* (such measures being "laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this Agreement")<sup>19</sup>.
4. Similarly in the case of TPP, Chapter 26 (Transparency and Anti-Corruption), Section B (Transparency), Article 26.2 (Publication), we find very similar language: *"(to) provide interested persons and other Parties with a reasonable opportunity to comment on these proposed measures"*<sup>20</sup>.
5. It can be seen therefore that TPP builds on existing WTO and existing FTA provisions and extends them to TPP members. The requirements are already part of what is generally considered best practice when making regulations or crafting legislation.
6. Lastly it can be observed that consultation provisions also apply in Chapter 20 on the Environment which in Article 20.9 provides for public submissions. These provisions are designed to encourage TPP members to consult actively with stakeholders in developing environmental laws and regulations. Such requirements already form part of New Zealand practice and can further assist sustainable development in other TPP members.

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<sup>19</sup> NZ China FTA Art 168

<sup>20</sup> TPP Art 26.2

## Annex C

### Further commentary on investment

1. This section provides further commentary on the investment provisions in TPP. It focuses particularly on how the New Zealand Government has sought to balance investor protections with the Government's continuing right to regulate notably through the inclusion of safeguards within the investment chapter itself. Comparisons are also drawn with other contemporary FTAs.<sup>21</sup>

#### ***New Zealand's investment interests in context***

2. New Zealand's economy is unusual by OECD standards. Although a wealthy, first-world country, New Zealand remains a net capital importer highly reliant on overseas funding, whether through debt or foreign direct investment. To this extent, as a matter of signalling intent and safeguarding New Zealand's regulatory environment, it is in New Zealand's interest to extend strong protections to foreign investors including in the form of investor state dispute settlement (ISDS). This is also helpful to attract much needed capital for economic development.
3. New Zealand has at present relatively few substantial outbound investors which are in a position to take advantage of the reciprocal protections extended to New Zealand investors in respect of New Zealand investments overseas. It is important however that forward-looking FTAs prepare for the future, particularly as New Zealand enterprises deepen their involvement in global value chains and networks and seek to locate themselves closer to consumers in overseas markets.
4. At the same time it is important to analyse how New Zealand can protect itself from fiscal risk caused by acceding to the new avenues of liability that ISDS creates. That requires assessing the fundamental balance struck between investor protection and the right to regulate.

#### ***Comparing TPP and earlier FTAs***

5. TPP like earlier FTAs contain the same four main substantive rights, relating to:
  - a. national treatment (NT)
  - b. most favoured nation (MFN)
  - c. minimum standard of treatment (MST); and
  - d. freedom from expropriation.

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<sup>21</sup> This material has been informed by advice received from Daniel Kalderimis at Chapman Tripp Wellington.

6. The same is true for the other (arguably less significant) investor protection rights, relating respectively to treatment in the case of armed conflict or civil strife, monetary transfers, performance requirements, and the composition of senior management and boards of directors. The agreements include similar procedural provisions, including the scope and procedures for the ISDS mechanism.
7. In very general terms we judge these more general TPP provisions to continue past practice and to present few if any substantial difficulties or risks for New Zealand, bearing in mind that what is at issue here is not so much policy change as discriminatory or egregious behaviour on the part of the Government towards foreign investors from TPP members.

### ***Exceptions and non conforming measures***

8. The TPP's WTO-style general exceptions do not apply to the investment chapter.<sup>22</sup> This is consistent with US FTA practice, but is a change from established New Zealand practice. Some may argue that this change removes the general exceptions 'safety net', which has otherwise applied in all of New Zealand's more recent FTA investment chapters, including most recently the NZ-Korea FTA.<sup>23</sup>
9. The TPP does, however, include specific exceptions that apply to the investment chapter and restricts the operation of ISDS. These relate to tobacco control measures,<sup>24</sup> and to measures taken to accord more favourable treatment to Māori, including in fulfilment of the Government's obligations under the Treaty of Waitangi.<sup>25</sup>
10. Overall, the TPP attempts to strike a balance between investment protection and host-state rights to regulate *within*, rather than outside of, the substantive investor protection provisions. Public interest considerations are accordingly built into the TPP's substantive investor rights. For example:
  - a. the text recognises that whether investors are in "*like circumstances*" for the purposes of National Treatment or Most-Favoured-Nation Treatment (*MFN*) depends upon the

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<sup>22</sup> TPP Art 29.1.

<sup>23</sup> NZ-Korea FTA Art 20.1.

<sup>24</sup> Parties may elect to deny the benefits of ISDS to claims challenging tobacco control measures: TPP Art 29.5.

<sup>25</sup> TPP Art 29.6 states that nothing in the TPP precludes the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by the TPP, including in fulfilment of its obligations under the Treaty of Waitangi, provided such measures are not used as a means of arbitrary or unjustified discrimination or as disguised restrictions on trade. Interpretation of the Treaty of Waitangi, including the nature of rights and obligations arising under it, are not subject to the dispute settlement provisions of the TPP.

totality of the circumstances, including whether the relevant treatment distinguishes between investors on the basis of legitimate public welfare objectives;<sup>26</sup>

- b. the Minimum Standard of Treatment (MST) is narrowly defined by reference to customary international law principles.<sup>27</sup> For greater clarity TPP provides no free standing right to fair and equitable treatment, and subjective expectations (such as in relation to future profits or regulatory landscape) are expressly discounted as amounting to a breach of the MST.<sup>28</sup> Expressly coupling the MST to customary international law is intended to limit the scope of investor protection to preserve host state regulatory autonomy; and
- c. the Expropriation Annex provides that indirect expropriation must have an effect equivalent to direct expropriation, and states that non-discriminatory regulatory action to protect legitimate public welfare objectives (such as public health, safety and the environment) do not constitute indirect expropriation “*except in rare circumstances*”.<sup>29</sup>
- d. New Zealand’s non-conforming measures Annexes also preserve domestic policy space, including with respect to the provision of social services,<sup>30</sup> resource management and protected areas,<sup>31</sup> animal welfare and the protection of plant, animal and human life and health,<sup>32</sup> research and development,<sup>33</sup> fisheries,<sup>34</sup> tobacco,<sup>35</sup> and the OIA.<sup>36</sup>

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<sup>26</sup> TPP Art 9.4 (National Treatment), Art 9.5 (MFN) and interpretive note on “*like circumstances*”. This limitation on “*like circumstances*” does not appear in the NT or MFN provisions of the NZ-Korea or NZ-China FTAs. It thus provides a new and additional layer of protection.

<sup>27</sup> TPP Art 9.6, Annex 9-A. The NZ-Korea FTA similarly restricts MST in accordance with customary international law at Art 10.7. Both the NZ-Korea FTA and the TPP can be contrasted with the stand-alone fair and equitable treatment and full protection and security rights that were included in the NZ-China FTA, which are not expressly restricted by customary international law.

<sup>28</sup> TPP Art 9.6(4), which states that “*the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article*”. This can be contrasted with, for example, Annex 9B(3)(a)(ii) where the extent to which government action interferes with “*distinct, reasonable investment-backed expectations*” is a factor relevant to determining whether indirect expropriation has occurred.

<sup>29</sup> TPP Art 9.8, Annex 9-B. Under the NZ-Korea FTA Annex 10-B, non-discriminatory regulatory actions that are designed to protect legitimate public welfare objectives do *not* constitute indirect expropriation; there is no “*in rare circumstances*” exception. The NZ-China FTA Annex 13 contains the “*in rare circumstances*” exception, but only where the indirect expropriation is discriminatory in its effect or in breach of a state’s prior binding written commitment to an investor.

<sup>30</sup> TPP Annex II – New Zealand – 1–2.

<sup>31</sup> TPP Annex II – New Zealand – 11.

<sup>32</sup> TPP Annex II – New Zealand – 12.

<sup>33</sup> TPP Annex II – New Zealand – 16.

<sup>34</sup> TPP Annex II – New Zealand – 18.

<sup>35</sup> TPP Annex II – New Zealand – 30.

<sup>36</sup> See also TPP Annex 9-H, which states decisions under New Zealand’s Overseas Investment Act 2005 to grant or decline consent are not subject to dispute settlement under the TPP.

11. Finally, the investment chapter includes a provision stating that nothing in the chapter shall be construed to prevent a Party from taking measures it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives, to the extent those measures are “*otherwise consistent with this chapter*”.<sup>37</sup> We accept however that this language is circular and its impact hortatory.

### ***Limitations on the operation of investor state dispute settlement***

12. As with the NZ-Korea FTA, but in contrast to New Zealand’s earlier FTA practice, the TPP’s investment chapter seeks proactively to address broader public critiques of ISDS, including its perceived lack of transparency, efficiency, fairness and consistency. For instance:

- a. Transparency: TPP ISDS proceedings are intended to be open and transparent; they must be heard in public, and pleadings, decisions and awards of the tribunal must be available publicly.<sup>38</sup> The transparency of arbitral proceedings are subject to a limited exception for “protected information”,<sup>39</sup> which must be clearly designated by the parties to the dispute. This is similar to provisions in the NZ-Korea FTA, but is more advanced than the processes provided for in the NZ-China FTA.<sup>40</sup>
- b. Efficiency: tribunals have an expedited process to deal with preliminary questions regarding whether the claim is one that can properly be brought or whether a claim is manifestly without legal merit.<sup>41</sup>
- c. Fairness: a tribunal may accept and consider amicus curiae submissions regarding a matter of fact or law within the scope of the dispute from non-parties who have a significant interest in the arbitral proceedings.<sup>42</sup>
- d. Consistency: in defending arbitral proceedings on the grounds that the measure is within the scope of a non-conforming measure set out in Annex I or Annex II (discussed

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<sup>37</sup> TPP Art 9.16.

<sup>38</sup> TPP Art 9.24. The provision for “*transparent*” arbitral proceedings also appears in the NZ-Korea FTA at Art 10.27; by contrast, the NZ-China FTA leaves it for the state party “*as it considers appropriate*” to ensure the public availability of tribunal documents (at Art 157).

<sup>39</sup> “*Protected information*” is defined in Art 9 to mean confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law, including classified government information.

<sup>40</sup> The provision for “*transparent*” arbitral proceedings also appears in the NZ-Korea FTA at Art 10.27; by contrast, the NZ-China FTA leaves it for the state party “*as it considers appropriate*” to ensure the public availability of tribunal documents (at Art 157).

<sup>41</sup> TPP Art 9.23.4; the same expedited process is available in the NZ-Korea FTA, Art 10.26, and the NZ-China FTA, Art 154. A similar process is available for ICSID (but not, say, UNCITRAL) claims by virtue of Article 41(5) of the ICSID Arbitration Rules.

<sup>42</sup> TPP Art 9.23.3; see also NZ-Korea FTA Art 10.26. This does not appear in the NZ-China FTA.

below), the respondent State can request an interpretation of the issue by the TPP Commission.<sup>43</sup> The Commission's interpretation will then bind the tribunal.<sup>44</sup>

### ***Conclusions***

13. While TPP presents a number of evolutions over past practice the agreement continues to provide a high standard of protection for investors while building in effective provisions to protect the right of the New Zealand Government to regulate in the public interest. In the case of limitations applied to the operations of ISDS this exceeds past practice and improves on previous outcomes.

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<sup>43</sup> The Trans-Pacific Partnership Commission is established under Art 27.1.

<sup>44</sup> TPP Art 9.26.