



12 MAR 2018

Andrew Riddell

fyi-request-7263-850dc11d@requests.fyi.org.nz

Dear Andrew Riddell,

Thank you for your email of 13 February 2018 in which you request the following under the Official Information Act 1982:

*"I am requesting all information (oral and written) and including copies of any communication, memoranda, talking points, or briefing notes provided to the Prime Minister by yourself or by your office, to support her statement, as reported on 8 November 2017, in relation to TPP11 (as it was on that date) that "There are clear benefits for our exporters in that agreement." Note this information request is about TPP11, not the CPTPP that it evolved into."*

Attached to this letter is a copy of Key Messages on CPTPP, which were provided to the Prime Minister's Office on 8 November 2017. Information is withheld under the following sections of the Act:

- 6(a): to avoid prejudicing the international relations of the New Zealand Government; and
- 9(2)(h): to maintain legal professional privilege.

Note that 'TPP11' was used to refer to negotiations between the eleven remaining parties to the TPP. As those negotiations have now concluded, the agreement now has a formal name, which is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The CPTPP retains all market access outcomes that had been agreed in TPP.

In order to find more information about the costs and benefits of CPTPP for New Zealand exporters, a full National Interest Analysis (NIA) on the CPTPP is publicly available at: [www.mfat.govt.nz/cptpp](http://www.mfat.govt.nz/cptpp).

Where the information has been withheld under section 9 of the Act, no public interest in releasing the information has been identified that would be sufficient to override the reasons for withholding it.

You have the right under section 28(3) of the Act to seek a review of this response by the Ombudsman.

Yours sincerely

A handwritten signature in blue ink, appearing to read "David Parker". The signature is stylized with a large initial 'D' and a long horizontal stroke.

Hon David Parker  
Minister for Trade and Export Growth

# TPP High-Level Key Messages: Summary

*This summary is subject to the final outcomes of the negotiations*  
**s6(a)**

## Summary

We are aiming to conclude an agreement that will:

- protect the *Treaty of Waitangi*;
- mitigate as far as possible risks around *ISDS* (carving out 80% of investors from using ISDS);
- protect New Zealand's *investment screening regime*;
- create new and *preferential market access* to support the viability of more than 620,000 trade-related New Zealand jobs;
- protect the *Pharmac model*;
- create new world-first disciplines for *trade and labour and trade and environment* standards;
- protect the ability to use *Government procurement* for economic development and preserve New Zealand's ability to maintain preferences that favour small and medium-sized enterprises (SMEs); and *consultations with civil society and Maori* will be undertaken prior to signature of the Agreement; and *Parliament will also examine* the Agreement; and
- joining a consensus to substantively conclude negotiations *does not commit New Zealand to bring the Agreement into force*.

## Protects the Treaty of Waitangi

- *Protects the unique status of the Treaty of Waitangi*: The revised agreement retains a specific provision preserving the pre-eminence of the Treaty of Waitangi in New Zealand. Nothing in this revised Agreement will prevent the Crown from meeting its obligations to Maori.

## Mitigates as far as possible the risks of Investor-State Dispute Settlement (ISDS)

- *Excludes 80% of current TPP11 investors (ie from Australia) from using ISDS and we will not be agreeing to ISDS in future agreements;*
- *Includes numerous robust safeguards to prevent the abuse of ISDS by corporations including:*
  - *Preserving the right to regulate for the protection of health, the environment, public morals, social or consumer protection;*
  - *NZ-specific exceptions for public health, water and other services;*
  - *Preserving a Government's right to implement legitimate public welfare measures and confirming that these are very unlikely to constitute indirect expropriation;*
  - *Allowing New Zealand the ability to rule out cases relating to tobacco control measures;*
  - *Preventing 'double-dipping' (ie an investor must waive the right to use the domestic system if they use ISDS);*
  - *Preventing punitive damages;*
  - *Preventing 'frivolous claims';*
  - *Retaining Government control over ISDS procedures;*
  - *TPP11 governments can issue interpretations that bind tribunals;*
  - *Limitations – 3.5 years – on the ability of an investor to take a claim;*
  - *Confirms that government decisions not to issue/renew subsidies or grants will not in and of itself lead to ISDS;*

- *New transparency requirements - public hearings and the ability for the public and experts to make submissions;*
- *Requires investors to initially enter consultations and negotiations to resolve the claim;*
- *Commits TPP11 parties to provide guidance on a Code of Conduct for ISDS arbitrators and to consider future any future appellate mechanism for ISDS claims.*

#### Protects New Zealand's Investment Screening Regime

- Protects the screening regime from ISDS, ie the revised Agreement excludes decisions taken under our screening regime from ISDS.
- Preserves the Government's policy space to screen overseas investment in the three existing areas: significant business assets, sensitive land and fishing quota.
- Retains the Government's ability to alter the screening criteria to make it more restrictive
- Negotiations this week may further narrow the scope of potential ISDS claims relating to investment contracts and approvals.
- 

#### **s9(2)(h)**

#### Creates New and Preferential Market Access

- Secures preferential market access for New Zealand exporters in key markets, thereby *supporting the viability of more than 620,000 trade-related New Zealand jobs* which depend on such access;
- *NZ goods exporters will benefit from NZ\$222 million* in tariff reductions per year once the agreement is fully implemented. NZ\$92 million of those savings will start on day one of the Agreement entering into force.
- *Levels the playing field for our exporters* in the important Japanese market where we are at a significant disadvantage.
  - *Beef:* NZ pays 38.5% tariff; Australia currently pays 27.5% (as will the EU-28); NZ beef exports already down nearly \$20 million in 1 year (frozen beef down 70%);
  - *Kiwifruit:* NZ pays 6.4% - Chile pays 0%; \$23m savings from day one of the revised Agreement
  - *Wine:* NZ pays 15%; Chile pays 4.3% now and will pay 0% by 2021; Australia pays 9.5% now and will pay 0% by 2021 (*Note that further detail on tariff savings is contained in Annex 2*)

#### Protects the Pharmac Model

- The unique New Zealand Pharmac model has been protected. In addition, changes that may be agreed this week will mean that Pharmac will not need to make administrative changes, thereby saving New Zealand up to \$4.5 million in up front costs and \$2.4 million in ongoing annual costs;
- Preserves existing approaches to biologics etc: Subject to confirmation this week in Viet Nam, TPP11 economies will not have to change current practices for market protection for biologic medicines - an important positive suspension for health interest groups.

#### Creates new and enforceable Labour and Environment Standards

- Establishes enforceable and world-first disciplines on trade and labour and trade and the environment across the TPP11 membership;

- Prohibits (with real trade enforcement disciplines) granting or maintaining subsidies that contribute to illegal, unreported or unregulated (IUU) fishing or that negatively affect stocks that are in an overfished condition. This is the first and only international agreement that includes a meaningful (and enforceable) way to deliver on this important SDG14 objective

**Preserves the ability to use Government Procurement**

- Preserves New Zealand's ability to maintain preferences that favour small and medium-sized enterprises (SMEs);
- Procurement by Kiwirail, some other SOEs, or by regional or local government is not disciplined by the Agreement.

**Consultations with civil society, Maori and the New Zealand Parliament**

- Joining the consensus **s6(a)** in Da Nang *does not commit New Zealand to signature or ratification of the Agreement at this stage*. Not to have done so would have effectively meant withdrawing from an Agreement, even before New Zealanders have seen the final outcome and fully debated its implications.
- The final text of the Agreement, together with a National Interest Analysis, will be scrutinised by the Foreign Affairs, Defence and Trade Select Committee. The legislative changes required to implement the Agreement will go through normal Parliamentary procedures.

*Please note that further detail on all of the above can be found in the attached Annexes.*

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# TPP High-Level Key Messages: Detailed

The key messages contained in this document are subject to the final outcomes of the negotiations s6(a)

## Overview

- We had significant concerns coming into these final stages of the negotiations for a revised TPP11 – which resumed within days of our taking office.
- The outcome – a revised Agreement – if concluded in Da Nang will allow us to:
  - **protect the Treaty of Waitangi;**
  - **preserve the Government's right to regulate** in the public interest;
  - **mitigate as far as possible the risks of ISDS** (including by carving out 80% of TPP11 investors from the use of the ISDS mechanism), while also making clear that we will not be agreeing to ISDS in future trade agreements;
  - **protect New Zealand's investment screening regime;**
  - **create new and preferential market access** to support the viability of more than 620,000 trade-related New Zealand jobs;
  - **protect the Pharmac model;**
  - **establish world-first treaty level outcomes** that are legally enforceable for trade and labour and trade and the environment;
  - **retain our ability to use Government Procurement** for economic development and preserve New Zealand's ability to maintain preferences that favour small and medium-sized enterprises (SMEs);
  - note that **joining a consensus for substantive conclusion does not imply we will automatically ratify the Agreement;** and
  - **consult extensively with civil society and Maori and ensure Parliament** has the ability to consider the revised Agreement and whether it is in the best interests of New Zealanders **before we agree to move to ratification.**

## Treaty of Waitangi

- The TPP11 includes a specific provision preserving the pre-eminence of the Treaty of Waitangi in New Zealand and nothing in this new Agreement will prevent the Crown from meeting its obligations to Maori.
- It provides flexibility for the Government to implement domestic policies in relation to Māori, including in fulfilment of the Crown's obligations under the Treaty, without being obliged to offer equivalent treatment to persons of other TPP11 countries.
- The Waitangi Tribunal (WAI 2522) has considered this provision, which appears across New Zealand's free trade agreements, and considered it provides a reasonable degree of protection.

## Investor State Dispute Settlement (ISDS)

- Investor state dispute settlement is a major concern for this government and we will not be agreeing to ISDS in the future.
- In the case of the revised TPP11 we continue to seek its removal. This Government only took over with barely a fortnight of negotiations left. Over the past week, all other TPP partners have not been prepared to agree to remove New Zealand from ISDS altogether. Negotiators have been instructed to persist on this.

- We are also seeking to mitigate as far as possible the risks we see in ISDS by making several changes to the new Agreement. These include a reciprocal carve-out of ISDS with Australia and a range of changes to the agreement itself.
- Most importantly, we will retain our long-standing practice to exclude ISDS altogether between Australia and New Zealand. This means that 80% of foreign direct investment into NZ from TPP11 parties will be excluded from ISDS – in other words investors that provide 80% of investment into New Zealand will not be able to use the TPP11 arbitration mechanism to sue the New Zealand Government.
- In addition, Negotiators have been instructed by this Government to pursue the following in the remaining days of the current negotiations in Da Nang:

1. *Exclusion of prior consent*

- We are seeking treaty-status reciprocal side letters to exclude prior consent to ISDS with all parties. This has proven impossible to achieve to date – with the important exception of Australia, but New Zealand's position is clear. We are also interested to work closely with TPP partners to review ISDS in TPP11 and also to change ISDS in the future. We have made this clear in the negotiations

2. *Narrowed claims*

We are actively working to narrow the scope of claims that may be brought under TPP11's ISDS mechanism to align with existing FTAs, such as China-NZ FTA.

**s6(a)**

3. *Strong safeguards on the right to regulate*

- We have retained the important safeguards agreed as part of the original TPP:
  - *Governments retain control over the ISDS procedure:*
    1. TPP11 governments can issue interpretations that bind tribunals.
    2. NZ can (and will) rule out cases relating to tobacco control measures.
  - *Governments have clear obligations with exceptions to limit the scope of the chapter and therefore limit ISDS:*
    1. NZ-specific exceptions in important policy areas such as the screening regime, health and other public services and water.
    2. Provisions that confirm government action to implement legitimate public welfare measures is very unlikely to constitute indirect expropriation.
    3. Confirmation that government action that is inconsistent with an investor's obligations will not in and of itself lead to ISDS.
    4. Confirmation that government decisions not to issue/renew subsidies or grants will not in and of itself lead to ISDS.
  - *Safeguards limit the costs of potential proceedings:*
    1. Procedures for throwing out frivolous claims or claims manifestly without legal merit.
    2. Limits to the monetary awards a tribunal may grant and no punitive damages.
    3. 3.5 year limitation period for claims to be taken.
    4. Requirements for investors to waive their right to bring other proceedings, such as before domestic courts.
  - *Procedures and rules that ensure ethical and responsible tribunals make robust decisions:*
    1. Transparency requirements for public hearings and the ability for the public and experts to make submissions.

2. Requirement for investors to initially enter consultations and negotiations to resolve the claim.
3. TPP11 parties commit to adopt a Code of Conduct for ISDS arbitrators and to consider future any future appellate mechanism for ISDS claims.

#### Investment screening

- The revised TPP11 also preserves our policy space to screen overseas investment in the three existing areas of significant business assets, sensitive land and fishing quota.
- The revised TPP11 will not prevent the Government from altering the screening criteria in the investment regime to make it more or less restrictive, which is something the government is looking at as a priority.
- The revised TPP11 Protects the screening regime from ISDS, ie the revised Agreement excludes decisions taken under our screening regime from ISDS in a country-specific Annex.

### s9(2)(h)

#### Market access

- Although substantive conclusion of negotiations has not yet been reached, so far this has been achieved while still retaining all of TPP's market access outcomes among the 11 economies.
- The ten other economies in the TPP11 have a combined 480 million population that consume nearly a third (31 per cent) of New Zealand's overall exports including NZ\$15 billion of goods and NZ\$7 billion of services.
- The TPP11 will provide New Zealand exporters with preferential access for the first time into Japan, the world's third-largest economy, as well as Canada, and Mexico, both in the world's top 15 economies, and Peru.
- Crucially, it will level the playing field for our exporters in the important Japanese market by comparison to partners with existing FTAs in this valuable market, such as Australia and Chile, and soon with the 28-members of the EU which recently concluded an FTA with Japan also. For example:
  - Beef: NZ pays 38.5% tariff; Australia pays 27.5% (as will the EU-28); NZ beef exports down nearly \$20 million in 1 year;
  - Kiwifruit: NZ pays 6.4% - Chile pays 0%
  - Wine: NZ pays 15%; Chile pays 4.3% now and will pay 0% by 2021; Australia pays 9.5% now and will pay 0% by 2021
- Overall our goods exporters will benefit from NZ\$222 million in tariff reductions per year once the agreement is fully implemented. NZ\$92 million of those savings will start as soon as the Agreement enters into force. By way of comparison, the annual tariff reductions from New Zealand's free trade agreement with China were initially estimated at NZ\$115 million a year, although since then trade growth has seen New Zealand's annual exports to China quadruple. Further details on tariff savings are contained in Annex 2.

#### Pharmac

- The revised TPP11 does not change the Pharmac model or its ability to negotiate the best price for medicines for New Zealanders.
- In addition, agreement in principle (but negotiations continue) has been reached to no longer require Pharmac to make administrative changes that would primarily benefit the



pharmaceutical industry. If this is sustained in the negotiations this week, this is an important positive development. Implementation of these changes were expected to cost New Zealand an initial NZ\$4.5 million and NZ\$2.2 million per year thereafter.

- We also believe we are close to agreeing that TPP11 economies can retain current practices for market protection for biologic medicines, through data exclusivity and other measures. This is another important positive revision of the revised Agreement.

#### Labour and Environment

- The labour and environment outcomes in the TPP11 are the most comprehensive New Zealand has achieved in a free trade agreement with trade and labour and trade and environment standards linked together and made legally enforceable – through trade disciplines, fines and sanctions - for the first time.
- The Agreement is also a world-first for including a prohibition on granting or maintaining subsidies that contribute to illegal, unreported or unregulated (IUU) fishing or that negatively affect stocks that are in an overfished condition. This is a meaningful contribution to achieving Sustainable Development Goal 14 (on fish subsidies and addressing collapsing fishing stocks before 2020)
- Overall, these will raise labour and environmental standards in the region, reduce the impact of unfair practices, and promote sustainable development.

#### Government Procurement

- The Agreement will provide greater opportunities for New Zealand suppliers to bid for contracts in TPP11 markets - particularly those in Malaysia, Mexico, Peru and Viet Nam.
- At the same time, this Agreement expressly reserves the right of governments to take actions to maintain preferences that favour small and medium-sized enterprises (SMEs).
- For those central government agencies covered by the Agreement, procurement has to be above the level of NZ\$260,000 (for goods and services) or NZ\$10 million (for construction) to come under the agreement and certain other procurement activities (for procurement of public health, education and welfare services and for research and development services) are also excluded.
- Procurement by Kiwirail, some other SOEs, or by regional or local government is not disciplined by the Agreement.

#### Domestic steps

#### s6(a)

- Joining the consensus in Da Nang does not commit New Zealand to signature or ratification of the Agreement at this stage. But to not do so would have effectively meant withdrawing from an Agreement, even before New Zealanders have seen the final outcome and fully debated its implications.
- As with all New Zealand FTAs, TPP11 would go through the Parliamentary treaty examination process and only be ratified by the Government if it is deemed to be in New Zealand's best interests.
- The final text of the Agreement, together with a National Interest Analysis, will be scrutinised by the Foreign Affairs, Defence and Trade Select Committee. After that, the legislative changes required to implement the Agreement will go through normal Parliamentary procedures. There is flexibility to do this by amending the existing TPP implementing legislation.

- The Agreement itself cannot be modified unilaterally by New Zealand, but there is some flexibility in the way various measures can be implemented through domestic legislation and regulation.

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## Annex 2: Estimated Tariff Reductions by Sector under [TPP11] Economies

Sector	Annual NZ exports to [TPP11] economies (2012-14 average)	Estimated duties paid to [TPP11] economies per year	Estimated tariff reductions per year once fully implemented
Dairy	\$1,273 million	\$117 million	\$86 million
Meat	\$554 million	\$82 million	\$65 million
Horticulture	\$557 million	\$33 million	All duties saved
Other Agriculture	\$186 million	\$18 million	\$10 million
Forestry	\$594 million	\$11 million	All duties saved
Fisheries	\$206 million	\$9 million	All duties saved
Wine	\$112 million	\$4 million	All duties saved
Industrials	\$1,116 million	\$3 million	All duties saved
Textiles	\$44 million	\$1 million	All duties saved
<b>Total</b>	<b>\$4,642 million</b>	<b>\$278 million</b>	<b>\$222 million</b>

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