

# ***Analysis of the Leaked New Zealand Paper on the Trans-Pacific Partnership Agreement and Intellectual Property***

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Civil society groups have obtained a confidential paper<sup>1</sup> presented by New Zealand to the parties to the Trans-Pacific Partnership Agreement (TPPA) negotiations. The paper reflects New Zealand's views on the appropriate content for a possible intellectual property chapter in the agreement. The position New Zealand articulates still poses risks for access to medicines and other knowledge goods. But it also represents a significant improvement over the status quo advanced by the United States and European Union in free trade agreements over the last fifteen years.

The World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property (WTO's TRIPS) requires WTO member countries to comply with certain minimum standards of intellectual property protection. Historically, many free trade agreements (FTAs) involving developed countries have sought to raise this "floor," obligating countries to adopt stricter standards than those required by TRIPS. The resulting "TRIPS-plus" provisions limit countries' abilities to facilitate access to knowledge-intensive goods, from agricultural technologies to software to lifesaving medicines. These monopoly protections are a core feature of many U.S. FTAs.

New Zealand proposes an alternative "TRIPS-aligned" structure, focusing on operational coherence, enforcement and capacity building in developing countries. New Zealand recommends the TPPA "seek to improve the operation of existing TRIPS standards within the TPP region," and that the parties "should be cautious about moving beyond TRIPS standards under [the] TPP." For example, under New Zealand's proposal the TPPA would not contemplate data exclusivity provisions, which are required by many other U.S. FTAs and can create new or longer pharmaceutical drug monopolies.

New Zealand correctly notes that "there is a tendency towards overprotection of IP in all our societies, particularly in the areas of copyright and patents." This overprotection not only limits access and price-lowering competition, it can also "detract from innovation rather than promote it." For example, copyright can limit the ability of software designers to build upon existing programs, and patents can stunt the development of co-formulated medicines. Pointing to the "apparent lack of evidence of whether stronger intellectual property protection has increased innovation, particularly in developing countries," the

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<sup>1</sup> "TPP: Intellectual Property Chapter: Horizontal Issues/Overall Structure, General Provisions and Cooperation," paper submitted by New Zealand, marked as confidential, *available at*: <http://www.citizen.org/documents/NZleakedIPpaper-1.pdf>.

leaked paper suggests the TPPA focus on “high-quality rather than stronger IP rights,” including by combating poor-quality patents.

To some degree, New Zealand’s proposal could preserve TPPA member countries’ rights to pursue intellectual property policies and flexibilities consistent with their national economic and development strategies, their obligations to global trade rules, and the need to sustain both innovation and access in the regional and global economy.

But there are also dangers in each of New Zealand’s proposed focus areas, revealing the risks inherent in negotiating any intellectual property chapter in the TPPA. Unfortunately, seemingly innocuous new measures regarding IP enforcement, capacity building and operational coherence have consistently affected the substance of intellectual property rules, and increased their bias toward rights holders and models of economic monopoly. Any future proposals for intellectual property provisions in the TPPA should improve upon New Zealand’s starting position.

For example, New Zealand cites the Patent Cooperation Treaty (PCT) as an example of an initiative that can improve operational efficiency and provide greater consistency across state boundaries. But correspondingly, joining the PCT generally leads to more foreign patent applications and more product monopolies. Proposals at the Patent Cooperation Treaty would also limit countries’ ability to establish their own patentability criteria. If these proposals are accepted, the PCT would lock countries in to product monopolies based on patents of questionable merit that countries are otherwise free to deny under WTO rules. Apparently with the PCT in mind, New Zealand suggests “Ensuring ratification and accession to such international treaties by all TPP partners.” Unfortunately this proposal could undermine New Zealand’s parallel suggestion to work for “higher quality” rights.

Intellectual property enforcement initiatives such as the Anti-Counterfeiting Trade Agreement (ACTA) have generated considerable and well-deserved global controversy in recent years. Many of these measures exhibit extreme rights-holder bias, with very limited safeguards to protect legitimate competition. Egregious examples include the seizure of generic medicines in transit through Europe and the rise of titular anti-counterfeiting legislation in East Africa that effectively criminalizes the trade in generic medicines. Commonly overzealous and poorly conceived enforcement measures risk chilling legitimate competitive behavior. Any enforcement measures adopted in the TPPA would have to depart considerably from the global IP enforcement agenda that has emerged in recent years, or would be likely to undermine the culture of flexibility and context in intellectual property rules for which New Zealand otherwise articulates support.

Finally, many current capacity building initiatives are sponsored by technology-exporting countries and present a view of intellectual property biased toward rights holders. Worldwide trainings of judges and administrative officers run by the U.S. Patent and Trademark Office, among others, focus far more on exclusive rights than flexibilities, and shift the operational balance of the TRIPS Agreement away from the interests of

developing and technology-importing countries. Any capacity-building initiatives envisioned by the TPPA must help countries make use of their rights to defend public interests under IP rules. But this seems unlikely if technology exporters are to pay for the programs.

These shortcomings suggest the best result for many parties to the Trans-Pacific Partnership Agreement would be no intellectual property provisions at all. Nevertheless, New Zealand's proposal is a better starting point for regional IP negotiation than the U.S.-sponsored TRIPS-plus status quo. The leaked paper reflects growing awareness of the dangers of TRIPS-plus measures and rigid exclusive rights in many countries, making explicit reference to controversies within New Zealand over the content and secrecy of such negotiations.

We congratulate New Zealand for introducing an alternative vision. New Zealand's call for an open dialogue should include releasing TPPA draft text, so the public can meaningfully contribute. Parties to the TPPA should take a cue from New Zealand and affirmatively introduce their own independent visions for trade and the knowledge economy early in the TPPA negotiations, so the matter is not settled by rote and a twentieth-century template introduced by the United States.

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