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**TPP: Intellectual Property Chapter: Horizontal Issues/Overall Structure, General Provisions and Cooperation**

This paper sets out New Zealand's general views on the overall structure of an IP chapter under the TPP Agreement. It also comments on how this chapter might support the achievement of strong horizontal outcomes across the Agreement, and what the general provisions of the IP chapter might look like in light of this discussion. As a starting point New Zealand strongly supports the first theme that the IP Negotiating Group put to Chief Negotiators after Round Two that "Intellectual Property can play a role in incentivising innovation and creativity throughout the region to the benefit of both owners and users". In economic terms, knowledge and creative effort have special features and will be underprovided to society as a whole without the presence of IP rights.

*The Importance of the TRIPS Agreement*

New Zealand also strongly supports the third theme put to Chief Negotiators that the IP Chapter "can promote regulatory environments for IPR acquisition, protection and use that are consistent, transparent, stable and predictable". Our view is that the TRIPS agreement provides the framework for allowing this to occur. However, there is still a great deal of work to make the framework provided by TRIPS fully functional in the TPP region as a whole. We set out some thoughts below on how TPP might contribute to this in such key areas as operational coherence, enforcement and capacity/institution building in developing countries.

Given the importance of TRIPS, New Zealand can support a "TRIPS-aligned" structure for the IP Chapter under TPP, with broad headings the same or similar to those submitted to Chief Negotiators after Round 2.

*Difficulties with Going Beyond TRIPS*

A range of difficulties have emerged for TPP seeking to strengthen IP standards beyond those agreed to in TRIPS. Analysis of the costs and benefits of IP protection shows that there is a tendency towards overprotection of IP in all our societies, particularly in the areas of copyright and patents. The analysis also shows that the optimal rate of protection differs between countries and that it can differ across time as countries move through different stages of economic development.

The problems of overprotection are particularly acute for technology importing countries, including developing countries. The analysis shows that for these countries, IP rights that are too strong will detract from innovation rather than promote it. TRIPS, therefore, includes important flexibilities which are important for technology importing countries as they seek to use IP as a development tool. These flexibilities are designed to allow technology importing countries to make the same transitions that technology exporting countries made to become knowledge rich economies (i.e. technology exporting countries have in most cases evolved from being technology importing countries and these same countries pursued quite different IP policies in those circumstances.) FTAs and other agreements that seek to limit such flexibilities simply act against the interests of technology importing countries.

A further issue has arisen with rapid technological development, particularly in the digital environment. New technologies are allowing businesses to significantly increase their efficiency and lower transaction costs. The development of networks has become highly significant in many industries. Many innovations are occurring in a rapid and sequential manner either through the clustering of innovation or by one innovator moving to quickly build on the work of another.

In this environment, more people are arguing that overly strong IP rights can act as an inhibitor rather than as a promoter of innovation. Many of these claims are being made not just by users but by innovators themselves. This has led many innovative firms to develop business models that effectively by-pass IP regimes, whether these regimes involve giving away these rights, "inventing around" them or less stringent enforcement. For those seeking to uphold IP rights as traditionally conceived, new technologies have led to enforcement becoming a significant problem, particularly in the digital environment.

Finally, developments in IP regimes themselves have become an issue. In many countries, legislators, the courts and IP offices have sought to extend IP rights such as patents to new areas. They have also in many cases made these rights easier to obtain, leading in some cases to questions of whether such rights are diminishing in quality. The result in many cases has been a rapid increase in the number of IP rights granted without any evidence of a concomitant rise in innovative or creative activity. Rather what has occurred is a significant rise in disputed rights, litigation and backlogs raising the cost of IP rights for both users and innovators.

All the above factors are illustrated in the individual topic papers presented by New Zealand. Together they suggest that we should be cautious about moving beyond TRIPS standards under TPP. What is more, the issues that lie behind them are taking on a significant political dimension in many of our societies. Many IP users as well as some innovators have become mobilised to oppose the further strengthening of IP rights. These groups are acutely aware of what they see as "secret" negotiations to strengthen IP rights under FTAs and other international instruments. We will need to be ready to maintain an open dialogue with such groups.

#### *What IP Activities Should TPP Concentrate On?*

We fully endorse the theme that "Region—wide cooperation on intellectual property issues is important" as put to the Chief Negotiators by the IP Negotiating Group after Round Two. Rather than seeking to move IP standards beyond TRIPS, New Zealand's view is that TPP should seek to improve the operation of existing TRIPS standards within the TPP region. Cooperation can serve as a useful if not critical tool in meeting the standards agreed upon across TPP partners and ensuring full and timely implementation of the agreement by all parties.

As set out by New Zealand in the working group discussing cooperation at Round One, the following principles could be considered:

- Cooperation negotiated under trade agreements should directly support implementation of the agreement and assist parties to derive maximum economic benefit from it.
- Agreed areas of focus should aim to be as mutually beneficial as possible and complement existing economic partnerships and development assistance.
- Institutional arrangements should be flexible, fit for purpose, and not overly resource intensive or burdensome.

Cooperation amongst TPP member countries could concentrate on three key areas:

- Improving operational efficiency in the IP areas – Working through existing international processes, there is still a great deal that could be done to ensure that IP rights are granted on a consistent basis across TPP countries. There is a great deal of duplication of effort across TPP members in the granting of IP rights, particularly patents and trademarks. While international mechanisms are in place to streamline these efforts (e.g. the Patent Cooperation Treaty and the Madrid Protocol), TPP member countries should seek to help each participate in such processes. Furthermore, we should seek to ensure that such coordination efforts promote high quality rights (around such concepts as "inventive step" for patents) to ensure that IP rights in the region maximise their contribution to innovation;
- Cooperation on enforcement - Such efforts could help address the significant issues with infringement of IP rights that are evident in all our economies. FTAs in the region have

already added usefully to IP enforcement cooperation both at and behind the border. TPP should look to both consolidate and take forward efforts in this area;

- Cooperation on capacity/institution building in the region - All countries in the region face challenges in establishing and maintaining adequate IP institutions and these challenges are particularly severe for developing countries. Again significant progress has already been made in the region under existing FTAs. TPP should look to both consolidate and take forward these efforts.

#### *How Will These Activities Contribute to Horizontal Outcomes?*

Concentrating our efforts in these areas would entail the IP chapter contributing to the development of horizontal outcomes as follows:

- Regulatory coordination — this will occur through improved operational coordination based on consistent and "high quality" (rather than "stronger") IP rights;
- Competitiveness — operational coordination has the potential to significantly lower compliance costs for business by reducing the number and complexity of processes required to obtain IP rights in different countries and through a concomitant reduction in the fees and costs of doing so. Improved IP enforcement across the region will also contribute to the competitiveness of business in the region;
- Development — Improved IP capacity and institutions should promote development by increasing the contribution that IP rights can make to innovation in developing countries, particularly if rights are correctly aligned to the interests of these countries. Improved capacity should also assist developing countries to increasingly tailor IP policies and systems to suit their own national circumstances;
- Small and Medium Enterprises - Improved operational coordination and enforcement should contribute to lower costs and a more secure environment for SMEs operating in the region;
- A Living Agreement - Given that the proposed cooperative activities listed above will need to occur over time and involve structures and processes for their achievement, it will be important to develop these in the context of creating a living agreement so that improvements can be sought and achieved as we go along.

#### *General provisions: TRIPS and other multilateral IP agreements*

The TPP region consists of countries differing in size, incomes, levels of development and economic structure. We believe that to achieve the longer-term regional goals the standards agreed upon for the TPP will need to take account of those differing levels of development and needs. While harmonisation of aspects of our respective IP regimes is desirable in this context, a one-size-fits-all model appears problematic.

As noted above, New Zealand considers that TRIPS provides a valuable and appropriate framework to achieve the horizontal outcomes, including the development of a platform for a future region-wide FTA. Our analysis also suggests that we should be cautious about moving beyond TRIPS standards, given the differing levels of economic development and the apparent lack of evidence of whether stronger intellectual property protection has increased innovation, particularly in developing countries.

For New Zealand, therefore, the key question to consider is how to make the existing TRIPS framework fully functional in the 21<sup>st</sup> century in the TPP region, so that TPP can be made to work for countries with differing economic structures.

The general provisions should be considered in light of the discussion above, in particular the question of whether TPP parties should be expected to ratify or accede to certain multilateral IP treaties.

Traditionally, international intellectual property treaties have been based on two basic rules: the provision of substantive minima obligations and national treatment (see for example the Paris and

Berne Conventions). The substantive minima have been periodically amended, mostly to require greater or different levels of protection. While traditionally, recognising the principles of self-determination and diversity, a large part of law making would be left to national laws, stronger levels of international IP protection coupled with a larger coverage of issues is increasingly limiting the capacity of states to determine the optimal level and form of intellectual property protection, hence limiting room for cultural and economic difference and maximisation of social utility.

These developments are underpinned by an increasing pressure from rights holders to internationalise a larger array of issues and find international solutions to issues that have only had limited consideration at the national level. This is particularly true for the area of copyright, where rights holders have been seeking the adoption of more intrusive international rules with respect to a range of copyright issues at an early stage of norm development.

While there may be good arguments for an early and more rapid development of international solutions, such approach bears the risk of being premature, lacking evidence at the national level that would suggest a desirable international norm.

The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty are examples of such approach. Both treaties attempt to deal with the challenges of enforcing intellectual property rights in the digital environment through legislating on technological measures and rights management. However, by providing stricter digital enforcement measures that are based on traditional concepts of copyright protection, the treaties have limited ability to recognise the reality of emerging new business models and new ways of consuming creative works via the internet.

Developments in the digital content market on the other hand indicate that businesses increasingly recognise that it is not in their interest to enforce copyright through DRM but to focus on monetising current internet user behaviour rather than trying to restrict it. This suggests that neither the WCT nor the WPPT reflect the complexity of creative investment in an online environment and their scope to act as a promoter of innovation remains questionable.

It is New Zealand's view that TPP parties should only agree to ratify or accede to treaties that clearly support the longer term goals for the TPP region. Given the considerable level of uncertainty regarding the benefits of the WIPO Internet Treaties for the TPP region, New Zealand considers that TPP countries should retain their flexibility to legislate on technological measures.

Yet we believe that there are international treaties that could support achieving the horizontal outcomes, particularly treaties promoting operational efficiency. Ensuring ratification and accession to such international treaties by all TPP partners could for example facilitate the harmonisation and streamlining of processes and procedures in relation to rights acquisition, maintenance and enforcement and in this way improve operational efficiency in the TPP region.

Equally important to the question of acceding to international treaties is the issue of their effective implementation. New Zealand considers that improving operational efficiency could be a key area for cooperation, as noted above.